No.

In the Supreme Court of the United States

D.L. MARKHAM DDS, MSD, INCORPORATED 401(K) PLAN;
D.L. MARKHAM DDS, MSD, INCORPORATED,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY;
VALIC FINANCIAL ADVISERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What transactions between an ERISA plan and a service provider are prohibited by 29 U.S.C. § 1106(a)(1)(C) unless exempt under 29 U.S.C. § 1108(b)(2)?

2. Does a district court abuse its discretion when, for reasons other than futility, it denies plaintiffs an opportunity to amend their first complaint after granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)?

PARTIES TO THE PROCEEDING

Petitioner D.L. Markham DDS, MSD, Inc. 401(k) Plan is an ERISA plan that provides retirement benefits to the employees of Petitioner D.L. Markham DDS, MSD, Inc., a dental practice. Petitioners are the plaintiffs in the district court.

Respondents The Variable Annuity Life Insurance Company and VALIC Financial Advisers, Inc. provide administrative and investment management services to ERISA plans. Respondents are the defendants in the district court.

Unless otherwise noted, Petitioners are referred to collectively as "the Markhams" and Respondents are referred to collectively as "VALIC."

STATEMENT PURSUANT TO RULE 29.6

According to a November 3, 2023 Form 10-Q filing with the Securities and Exchange Commission, VALIC and VALIC Financial Advisers are subsidiaries of Corebridge Financial, Inc., a publicly traded company.

According to Respondents, as of April 19, 2023, American International Group, Inc. ("AIG"), a publicly traded company, owned more than 10% of the stock of Respondent VALIC, which in turn owns Respondent VALIC Financial Advisers.

RULE 14.1(B)(III) STATEMENT

The following proceedings are the subject of this petition.

Markham et al. v. The Variable Annuity Life Insurance Company, et al., 88 F.4th 602 (5th Cir. 2023) (opinion and judgment affirming district court's ruling granting VALIC's motion to dismiss without leave to amend).

Markham et al. v. The Variable Annuity Life Insurance Company et al., 2022 WL 5213229 (S.D. Tx, Oct. 5, 2022) (order and judgment granting VALIC's motion to dismiss without leave to amend).

Markham et al. v. The Variable Annuity Life Insurance Company et al., 2022 WL 891290 (E.D. Cal., March 25, 2022) (order granting VALIC's motion to transfer venue and denying VALIC's motion to dismiss as moot).

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PETITION FOR A WRIT OF CERTIORARI

The Markhams respectfully petition the Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

This case is an ideal vehicle for resolving multiple circuit splits and providing much needed clarity on important and often dispositive issues of law arising from service relationships between ERISA plans and their providers.

STATEMENT OF JURISDICTION

On December 14, 2023, the Fifth Circuit issued an opinion and entered a judgment affirming the decision of the district court. Pet. App. 1. The Court has jurisdiction to review this judgment through 28 U.S.C. § 1254(a). The petition is timely because it is filed within ninety days of December 14, 2023. Sup. Ct. R. 13.1.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act ("ERISA") is codified at 29 U.S.C. Ch. 18 and 26 U.S.C. Subch. D. The Department of Labor ("DOL") regulations are set forth at 29 C.F.R Ch. XXV. The DOL supplemental information can be found at 77 Fed.Reg. 5632 (Feb. 3, 2012). Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings.

Relevant provisions of ERISA and the DOL regulations and information are set forth below and reproduced in greater detail in Appendix E. Rule 15(a)(2) is also set forth below.

Statutory Provisions

Section 1002(14)(B) of Title 29 of the U.S. Code states:

§ 1002. Definitions

For purposes of this subchapter:

. . .

(14) The term "party in interest means, as to an employee plan –

. . .

(B) a person providing services to such plan.

Pet. App. 76-77.

Section 1106(a)(1)(C) of Title 29 states:

§ 1106. Prohibited Transactions.

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title.

(1) 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—

. . .

(C) furnishing of goods, services, or facilities between the plan and a party in interest.

Pet. App. 78-80.

Section 1108(b)(2) of Title 29 states:

§ 1108. Exemptions from prohibited transactions.

. . .

(b) Enumeration of transactions exempted from section 1106 prohibitions.

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions.

(2)(A) Contracting 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.

(B)(i) No contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such contract or arrangement, is reasonable within the meaning of this paragraph unless the requirements of this clause are met.

(ii)(I) For purposes of this paragraph:

(aa) the term "covered plan" means a group health plan as defined [in] section 1191(b)(a) of this title.

Pet. App. 80-129.

Regulatory Provisions

Section 2550.408b-2 of Title 29 of the Code of Federal Regulations states:

> § 2550.408b-2 General statutory exemptions for services or office space.
>
> . . .
>
> (c) Reasonable contract or arrangement—
>
> (1) Pension plan disclosure.
>
> (i) General. No contract or arrangement for services between a covered plan and a covered service provider, nor any extension or renewal, is reasonable within the meaning of section 408(b)(2) of the Act and paragraph (a)(2) of this section unless the requirements of this paragraph (c)(1) are satisfied.
>
> (2) Welfare plan disclosure. [Reserved]
>
> (3) Termination of contract or arrangement. No contract or arrangement is reasonable within the meaning of section 408(b)(2) of the Act and paragraph (a)(2) of this section if it does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous. . . . A provision in a contract or other arrangement which reasonably compensates the service provider or lessor for loss upon early termination of the contract, arrangement, or lease is not a penalty. For example, a minimal fee in a service contract

> which is charged to allow recoupment of reasonable start-up costs is not a penalty. . . . Such a provision does not reasonably compensate for loss if it provides for payment in excess of actual loss or if it fails to require mitigation of damages.

Pet. App. 146, 148, 167-168.

Volume 77 of the Federal Register, beginning on page 5632, dated Friday, February 3, 2012, states:

> Reasonable Contract or Arrangement Under 408(b)(2) – Fee Disclosure
>
> . . . .
>
> B. Overview of Final Regulation and Public Comments
>
> . . . .
>
> The furnishing of goods, services, or facilities between a plan and a party in interest to the plan generally is prohibited under section 406(a)(1)(C) of ERISA. As a result, a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a "party in interest" to the plan. However, section 408(b)(2) of ERISA exempts certain arrangements between plans and service providers that otherwise would be prohibited transactions under section 406 of ERISA. Specifically, section 408(b)(2) provides relief from ERISA's prohibited transaction rules for service contracts or arrangements between a plan and a party in interest if the

> contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan, and no more than reasonable compensation is paid for the services. Regulations issued by the Department clarify each of these conditions to the exemption.

Pet. App. 132.

Federal Rules

Federal Rule of Civil Procedure 15 states:

> Rule 15. Amended and Supplemental Pleadings.
>
> (a) Amendments Before Trial.
>
> . . . .
>
> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE

1. For present purposes, this much is presumed true.

David and Luminita Markham own a dental practice in Auburn, California. In 2017, the practice established a 401(k) plan for its employees. Once established, the Markham plan designated the Markham dental practice as its named fiduciary. (2021.01.04 Complaint ¶ 5).

In May 2018, the Markhams entered into a service provider agreement ("SPA") with VALIC, a life insurance company that services ERISA plans. Under the SPA, VALIC would maintain and administer the Markham plan on the VALIC platform. (Complaint ¶ 5; Respondents' 2022.04.22 Levy Decl., Ex. B).

The Markhams then entered into a second and distinct agreement with VALIC: a Portfolio Director Group Fixed and Variable Deferred Annuity Contract. ("P.D. Contract"). The P.D. Contract permits plan participants to invest their retirement savings (labeled "purchase payments") in investment funds (labeled "variable investment options") in a manner similar to how 401(k) plan assets are typically invested in collective investment funds. VALIC charges participants a daily percentage fee of their investment fund savings for managing the separate account that contains these investments. (Complaint ¶ 10; Respondents' 2022.04.22 Levy Decl., Ex. A).

The P.D. Contract also has what VALIC terms a "cash surrender or withdrawal charge" of 5% imposed on contributions made during the five-year period pre-

ceding the date of the withdrawal. The Contract reserves to VALIC the discretion to determine the charge amount, which can range from zero to five percent based upon unspecified "conditions and limitations" set by VALIC. (Complaint ¶ 10; 2022.04.22 Levy Decl., Ex. A).

The Plan transferred its assets to the VALIC platform and VALIC began collecting daily fees. About 18 months later, the Markhams determined that these fees were too high given the investment returns and service quality. They advised VALIC of their intent to terminate the relationship and transfer the Plan's assets to a new provider. (Complaint ¶ 12).

VALIC opposed the transfer. For the next eight months, it would retain possession and control of the Plan's assets and continue its daily fee collection. (Complaint ¶ 14).

In April 2020, VALIC informed the Markhams that the P.D. Contract permitted it to impose the 5% surrender charge against all of the Plan's assets if the Plan withdrew them. In June, the Markhams responded that this charge was an unlawful termination penalty. They explained that an early termination fee that provides for payment in excess of reasonable start-up costs is unreasonable and thus prohibited by ERISA. 29 C.F.R. § 2550.408b-2(C)(3). Such a fee tends to lock a plan "into an arrangement that has become disadvantageous." *Id.* (Complaint ¶ 14).

More plainly, the surrender charge provision -- which conditions VALIC's "surrender" of the Plan's assets on a payment to VALIC – is akin to a ransom

clause. A plan must ransom its assets with a percentage payment to VALIC in order to secure their release. This is particularly so because the percentage payment bears no relationship to VALIC's costs in taking possession of the assets and setting up the relationship.

The Markhams asked VALIC to waive the charge as permitted by the P.D. Contract. Its executive committee deliberated for six weeks about whether to do so. On August 7, 2020, VALIC informed the Markhams that it would impose the charge. (Complaint ¶ 14).

On August 19, 2020, at the Markhams' insistence, VALIC released the plan's assets to the new provider. As a condition of doing so, it kept for itself 4.5% of the plan's assets, or $20,703. (Complaint ¶¶ 14-15).

2. On January 4, 2021, Petitioners (the Markham practice and plan) filed their original and only complaint in the United States District Court for the Eastern District of California. Because the class action complaint asserted ERISA claims, the district court had subject matter jurisdiction. 29 U.S.C. § 1132(e); 28 U.S.C. § 1291.

The Markhams' first cause of action alleged VALIC knowingly participated in a prohibited transaction in violation of ERISA. They alleged their transactions with VALIC were prohibited by 29 U.S.C. § 1106(a) because the exemption for reasonable contracts or arrangements established in 29 U.S.C. § 1108 did not apply. Rather, the surrender charge was an unreasonable termination penalty. 29 C.F.R. § 2550.408b-2(C)(3). (Complaint ¶¶ 27-29).

3. The Respondents filed, and the Markhams opposed, motions to dismiss the complaint and a motion to transfer venue to the Southern District of Texas. The Markhams' oppositions argued for leave to amend their complaint in the event Respondents' motions to dismiss were granted. For example, the Markhams' opposition to VALIC's motion to dismiss has an argument section entitled: "To the Extent It Is Not Alleged, Plaintiffs Can Amend to State a Claim for Knowing Participation in a Fiduciary Breach." (Petitioners' 2021.04.01 Opposition p. 11).

Due to a long-standing judicial emergency (Pet. App. 72-73), nearly a year passed before the Eastern District of California resolved Respondents' motions. On March 24, 2022, it granted the motion to transfer venue and denied the motions to dismiss as moot. Pet. App. 75.

4. Ten days later, the United States District Court for the Southern District of Texas set a briefing schedule for Respondents' renewed motions to dismiss. (2022.04.04 Order).

The Markhams again opposed VALIC's motions and alternatively requested leave to amend. (Petitioners' 2022.05.23 Opposition). In doing so, they explained that, if necessary, they "can and would allege" additional facts and legal theories in support of their case. These included:

(a) VALIC refused to transfer the Plan's assets to a new provider unless the Markhams first entered into a transition agreement that included a release of certain claims against VALIC. The Markhams had no choice but to

sign this agreement in order to finally end the disadvantageous relationship.

(b) If the district court determined VALIC was not a party in interest, the Markhams could amend their complaint to expressly allege a claim based on VALIC's knowing participation in a fiduciary breach.

(*Id.* at 4, 7, 8, 24).

The Markhams explained further:

> While Plaintiffs cannot know how they might amend their complaint until they know the manner in which it might be deficient, Plaintiffs can foresee numerous ways in which any deficiencies could be addressed.
>
> For these reasons and others, Plaintiffs seek a chance to amend in the event VALIC's motion is in any way successful. . . .

(*Id.* at 24).

In reply, VALIC argued – for the first time - that leave to amend should be denied because of the Markhams' undue delay in seeking such leave. (Respondents' 2022.06.06 Reply pp. 10-14).

5. On October 5, 2022, the district court granted VALIC's motion without a hearing, denied the Markhams leave to amend, and entered judgment. Pet. App. 19-50.

As relevant here, the district court found that VALIC was not a "party in interest" when it entered into its contracts with the Markhams because the parties had no pre-existing relationship. Pet. App. 35-43.

Thus, it made no difference if the contracts were reasonable and thus exempt under 29 U.S.C. § 1108, or unreasonable and thus prohibited by 29 U.S.C. § 1106.

The district court also addressed the meaning of the term "transaction" under 29 U.S.C. § 1106. It found that VALIC was likely a party in interest when it imposed the surrender charge in the course of transferring the assets, but this was not a transaction within the meaning of 29 U.S.C. § 1106 because it involved the collection of a predetermined fee. Pet. App. 43-45.

In its ruling, the district court acknowledged other courts have reached contrary conclusions and the Fifth Circuit had not addressed the question. Pet. App. 41-45. Still, it denied the Markhams leave to amend because they did not seek leave before VALIC renewed their motion to dismiss in the Southern District of Texas. It reasoned that the Markhams were aware of the Complaint's issues based on VALIC's motion to dismiss in the Eastern District of California and did not seek leave to amend their complaint there. The district court also found that the Markhams failed to show how they would amend their complaint to address the deficiencies identified in the district court's opinion. Pet. App. 46-47.

6. The Markhams appealed. The Department of Labor filed an amicus brief in support. The Chamber of Commerce and the American Council of Life Insurers filed briefs supporting VALIC. The United States Court of Appeals for the Fifth Circuit had jurisdiction under 29 U.S.C. § 1291.

7. The Fifth Circuit affirmed the district court. With the apparent exception of covered providers to group health plans that do not comply with the disclosure requirements of § 1108(2)(B), it held that § 1106 only applies to plan insiders, i.e., providers that have a pre-existing relationship to a plan. In support of this interpretation, it reasoned that the party in interest definition for service providers uses the present participle "providing," and a present participle expresses current action. Pet. App. 8-14.

The Fifth Circuit further held that service payments made pursuant to a service contract are not transactions under § 1106. Rather, the term transaction "refers to the establishment of rights and obligations between the parties – not the payment of funds pursuant to an existing agreement." It also concluded that, while a contract breach may constitute a transaction under § 1106, contract compliance does not. Pet. App. 14-16.

Finally, the Fifth Circuit seemed of two minds with respect to the district court's denial of Petitioners' request for leave to amend. Footnote four suggests the Markhams could still pursue a claim against VALIC as a nonfiduciary, consistent with *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 (2000).[1] Pet. App. 8. At the same time, the opinion affirms the district court's denial of the Markhams' request for leave to amend, which renders this option unavailable.

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[1] The footnote can also be read to suggest that, at some point, the Fifth Circuit considered adopting the expansive view of 29 U.S.C. § 1106.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Are Splintered On What Service Transactions Between Plans And Providers Are Prohibited By Section 1106 Unless Exempt Under Section 1108.

Background

A service contract or arrangement is a relationship that is typically paid and performed over time. The DOL believes that ERISA prohibits all unreasonable service relationships and permits reasonable ones. Reasonable Contract or Arrangement Under 408(b)(2) – Fee Disclosure, 77 F.R. 5632 (Feb. 3, 2012). Pet. App. 131-132. Based on this conclusion, the DOL promulgated a rule in 2012 stating that initial service contracts, renewals, and extensions are unreasonable, and thus prohibited by § 1106, unless the providers first make certain disclosures. 29 C.F.R. § 2550.408b-2(c)(1)(i), (v)(A), and (viii)(E). Pet. App. 146-167. The DOL reserved action on a similar rule for employee welfare plans, explaining its intent to address disclosures to welfare plans at a later date. 77 F.R. 5632, 5649. Pet. App. 145-146. It did not follow through.

In 2021, Congress filled the void for welfare plans left by the DOL. Using substantially the same language as the DOL rule for pension plans, Congress amended § 1108(b)(2) to state that initial service contracts, renewals, and extensions between service providers and group health plans are unreasonable and thus prohibited by § 1106 absent disclosures specific to group health plans. 29 U.S.C. §§ 1108(b)(2)(B)(i), (ii)(I)(ee), (v)(I). Pet. App. 80-128.

Broadly speaking, the lower courts take either an expansive or narrow view of when and whether a transaction with a service provider is prohibited by 29 U.S.C. § 1106.

The Expansive View

The Second, Eighth, and Ninth Circuits take an expansive view.

In *Bugielski v. AT&T Services, Inc.*, 76 F.4th 894, 901-906 (9th Cir. 2023), the Ninth Circuit cited with approval the DOL's interpretation and concluded that § 1106 applies to arm's length service transactions. *Id.* at 901. Explaining that "a reviewing court's task is to apply the text of the statute, not improve upon it," *Id.* at 906 (citing *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-509 (2014)), it rejected as atextual the narrow view. Because § 1108 already exempts those transactions that are reasonable and necessary to keep a plan running smoothly, the Ninth Circuit declined "to read additional limitations, requirements, or exceptions into the statutory text." *Id.* at 901. The Eighth Circuit is of a similar mind. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601 (8th Cir. 2009) (construing § 1106 to render virtually any business between a plan and service provider prohibited unless reasonable under § 1108).

The Second Circuit shares the expansive view, but with an important variation. In *Cunningham v. Cornell University*, 86 F.4th 961 (2d Cir. 2023), a plan contracted with two record-keeping providers that were paid fees over time. *Id.* at 970. The plaintiffs alleged these fee payments were prohibited by § 1106. The Second Circuit surveyed the law and concluded that

the Eighth and Ninth Circuits' interpretation of ERISA was closer to correct, except that § 1106 should be read as incorporating the § 1108 exemptions at the pleadings stage. Thus, a plaintiff must plausibly allege in its complaint that the providers' fees are unreasonable, and thus not exempt under § 1108, in order to state a prohibited transaction claim under § 1106. *Id.* at 975.

The United States District Court for the Northern District of Georgia (in the 11th Circuit) also embraces the expansive view. *Fleming v. Rollins, Inc.*, 655 F.Supp.3d 1243, 1260 (N.D. Ga. 2023); *Comerica Bank for DALRC Retiree Benefit Tr. v. Voluntary Emp. Benefits Assocs., Inc.*, 2012 WL 12948705 *18, n.27 (N.D. Ga., Jan 11, 2012) (listing cases and stating "the statutory language does not say that the contract that causes the service provider to be a party in interest must be different than the prohibited transaction").

The expansive view cites and relies upon, not just the statute and regulations, but this Court's precedent and ERISA's purpose. Specifically, ERISA's plain and unambiguous language must be enforced according to its terms. *Bugielski*, *supra* at 904 (citing *Intel Corp. Inv. Pol'y Comm. v. Sulyma,* 589 U.S. ___, 140 S.Ct. 768, 776 (2020)). Section 1106(a)(1) "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.'" *Braden*, *supra*, at 600 (citing *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42 (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). And "[e]xpenses, such as management or administrative fees, can sometimes

significantly reduce the value of an account in a defined-contribution plan." *Bugielski* at 905 (citing *Tibble v. Edison,* 575 U.S. 523, 525 (2015)).

The expansive view finds further support in (and otherwise distinguishes) *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996). *Lockheed* involved the payment of employee benefits that were not potentially harmful to the plan. Service transactions, by contrast, are potentially harmful. *Bugielski, supra*, at 905. The expansive view maintains that dicta in *Lockheed* about "plan insiders" does not exclude arm's length service transactions from the scope of § 1106 because: (1) "there is a fundamental difference between paying increased pension benefits to employees and authorizing transactions that generate millions of dollars for a party in interest;" and (2) the direct terms of § 1106(a)(1)(C) prohibit service transactions unless exempted by § 1108. *Bugielski*, *supra*, at 905.

The Narrow View

The Third, Fourth, Seventh, Tenth (and now Fifth) Circuits each take a narrow view, but for different reasons.

The Tenth Circuit rejects the DOL's expansive interpretation of § 1106 – at least with respect to initial contracts – as circular: "the initial agreement with a service provider would simultaneously transform that provider into a party in interest and make the same transaction prohibited under § 1106." *Ramos v. Banner Health,* 1 F.4th 769, 787 (10th Cir. 2021). Accordingly, it holds that § 1106 only applies to transactions where there is "some pre-existing relationship" or that are "less than an arm's length deal." *Id.* at 787-88.

Ramos also assumes, without deciding, that the only relevant transaction is the execution of the initial agreement, though the agreement results in a relationship where the plan pays the provider for furnishing services on a "pay as you go" basis.

By contrast, the Third, Fourth, and Seventh Circuits all agree that, while a service provider may not be a party in interest when it executes the initial contract, it is when paid fees for services pursuant to the contract. *Albert v. Oshkosh Corporation,* 47 F.4th 570, 584-86 (7th Cir. 2022); *Peters v. Aetna*, 2 F.4th 199, 229 (4th Cir. 2021); *Sweda v. University of Pennsylvania*, 923 F.3d 320, 338-340 (3d Cir. 2019). These circuits also acknowledge that, "under a literal reading of § 1002(14)(B) and 1106(a)(1)(C), ERISA would prohibit payments by a plan to an entity providing services for the plan." *Albert, supra,* at 584; *Peters, supra,* at 240; *Sweda, supra,* at 339-340.

They reject this literal reading. *E.g., Sweda, supra*, at 336. The Seventh Circuit instead holds that § 1106 does not apply at all to routine, arm's length, service transactions. *Albert, supra*, at 585. The Third and Fourth Circuits hold that, for a transaction to be prohibited under § 1106, there must be something more involved, such as an intent to benefit the party in interest, self-dealing, or disloyal conduct. *Peters*, *supra,* at 229, 240; *Sweda, supra,* at 340.

Finally, there is the Fifth Circuit's opinion here.

The Fifth Circuit -- unlike the Second, Third, Fourth, and Seventh Circuits -- holds that service payments made pursuant to a contract are not transac-

tions at all. Pet. App. 14-16. Thus, so long as a provider operates under an initial service contract, no matter its terms and no matter how long, it is not a party in interest under § 1106 (with the apparent exception of certain group health plan providers).

The United States District Court for the District of Columbia also embraces a variation of the narrow view. *Sellers v. Anthem Life Ins. Co.*, 316 F.Supp.3d 25, 34-39 (D.D.C. 2018) (Section 1106 does not apply to initial or renewed service transactions entered into at arm's length).

The narrow view (like the expansive view) also cites and relies upon this Court's precedent and its view of ERISA's purpose. The narrow view reads *Harris Trust* and *Lockheed* as limiting the application of § 1106 to "plan insiders," Pet. App. 9-10; *Ramos*, *supra*, at 787-788. Thus, Congress did not intend to prohibit any service transactions entered into at arm's length (whether initial or renewed), even if they are unreasonable. *E.g., Sweda*, *supra*, at 337; *Sellers*, *supra*, 316 F.Supp. at 38-39.

II. ERISA's Text and Purpose Demonstrate That All Service Relationships Between Plans and Providers Are Prohibited By Section 1106 Unless Exempt Under Section 1108.

Section 1106(a) states that, except as provided in section 1108, a fiduciary shall not knowingly cause a plan to engage in a transaction that constitutes a "furnishing of goods, services, or facilities between the plan and a 'party in interest.'" 29 U.S.C. § 1106(a)(1)(C). Or, when the definition is substituted

for the term "party in interest," a transaction that constitutes a "furnishing of goods, services, or facilities between *the plan* and *a person providing services to such plan*." 29 U.S.C. § 1002(B)(14).

The best reading of this language is that it describes each party's role in the transaction. The plan is on one side of the transaction and the person providing services is on the other side.

It is commonplace to identify contracting parties by referencing their contractual roles. Contracts between a promisor/promisee, lessor/lessee, employer/employee, etc., generally identify the parties' roles in the same contract that creates them. These contracts (like all contracts) are also subject to regulation. This is what § 1106(a)(1)(C) also does. It is not circular or absurd. It is ordinary. A trust agreement between a plan and "a person acting as the trustee to such plan" does not require the trustee to exist before the trust does.

The use of the present participle in §§ 1106(a)(1)(C) and 1002(B)(14) does not alter this analysis. The Dictionary Act commands that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. The context here does not require restricting the present participle to the present tense in construing ERISA.

Instead, the use of the present participle connotes current *and continuing* action. Cambridge University Press. "Present Participle." *Cambridge Dictionary*

Accessed March 11, 2024 at https://dictionary.cambridge.org/dictionary/english/present-participle. Section 1106(a)(1)(C) does not speak of a transaction *to* furnish services. It speaks of a transaction that *constitutes* a *furnishing* of services, meaning the transaction itself is one that continues over time. In other words, the "transaction" referred to in § 1106 is the entirety of the "service relationship." *See* Reasonable Contract or Arrangement, *supra*, 77 F.R. 5632-01. Pet. App. 132. Because a service provider is, at a minimum, a party in interest during the *continuing* part of the transaction, even an initial transaction with a service provider is prohibited by § 1106 unless permitted by § 1108.

The exemptions identified in § 1108 confirm this reading. No one – not a fiduciary, attorney, employer, union or service provider -- can be a party to a plan that does not exist. Yet § 1108(b)(2) exempts from § 1106 reasonable contracts and arrangements with a party in interest necessary for *the establishment* of the plan. 29 U.S.C. § 1108(b)(2)(A). Temporally, a contract to establish a plan is so initial that it is not even, technically speaking, with a plan. Yet § 1106 and 1108 treat such contracts as prohibited unless reasonable.

Also, section 1108(b)(2) now conditions exemptions under § 1108 on disclosure requirements for group health plan providers that expressly apply to initial contracts. 29 U.S.C. § 1108(b)(2)(B)(i). This provision only makes sense if initial contracts with these providers are otherwise prohibited by § 1106. If Congress considered initial contracts outside the scope of § 1106, it would not have amended § 1108 – the ex-

emptions to § 1106 – to mandate disclosure requirements for initial contracts with group health plan providers.

This textual reading makes logical and grammatical sense. It also furthers ERISA's primary purpose: The protection of employee retirement savings. Congress intended for ERISA to supplant the amorphous arm's length standard for service transactions with the categorical prohibitions and exemptions set forth in §§ 1106 and 1108. *See C.I.R. v. Keystone Consol. Industries Inc.*, 508 U.S. 152, 160 (1993) (citing S. Rep. 93-393, 1974 U.S.C.C.A.N. 4889, 1973 WL 12551 (Leg.Hist.) at *4917); Pet. App. 177 (explaining why Congress chose to replace the arm's length standard with categorical rules). The narrow view dramatically departs from ERISA's text and purpose.

By granting certiorari, this Court can bring much needed uniformity to the law and confirm that § 1106 applies categorically to service transactions that are not exempted by § 1108.

III. The Fifth Circuit's Opinion Below Is Particularly Problematic And Should Be Reversed

It is axiomatic that "a word or phrase is presumed to bear the same meaning throughout the text." Scalia, A. & Garner, B. A. *Reading Law: The Interpretation of Legal Texts* (Thomas/West 2012); *See also Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980). The Fifth Circuit opinion violates this axiom.

First, the opinion assigns different meanings to the same party in interest definition. It holds that a person providing services to a plan is *not* a party in interest unless it has a pre-existing relationship with

the plan except it *is* a party in interest if it is a covered service provider that fails to comply with its obligations under 29 U.S.C. § 1108(b)(2)(B).

Second, the opinion assigns two different meanings to the term "transaction" in section 1106(a)(1). It first states that the term is properly limited to the contract or arrangement that establishes the "rights and obligations between the parties." Pet. App. 14. It then states that conduct contrary to those rights and obligations – a contract breach – is also a transaction. Pet. App. 16.

Finally, and contrary to the other circuits that have directly addressed the issue, the Fifth Circuit draws a bright line distinction between initial and subsequent service transactions. It holds that no part of an initial service transaction, neither entering into the contract nor its continuation, is prohibited by § 1106. It logically follows that, at least in the Fifth Circuit, pension plan providers need not provide the disclosures required by 29 C.F.R. § 2550.408b-2 prior to entering into an initial contract.

The Fifth Circuit's clear demarcation creates other issues as well. It means that initial service transactions – the ones most likely to involve inexperienced or careless fiduciaries -- can be unreasonable, long-term, disadvantageous, and otherwise contrary to ERISA's purpose. Renewal transactions, however, are subject to § 1106 and § 1108.

Courts on both sides of the expansive/narrow divide agree that treating service relationships arising from initial contracts so differently than subsequent ones is problematic. Doing so will "encourage service

providers to lock ERISA plans into long term-contracts." *Sellers, supra*, at 316 F.Supp.3d at 38-39. Yet Congress "was specifically concerned with the danger that a plan would become locked into a long-term, disadvantageous service contract . . . . The danger of long-term contracts is only addressed if every service contract is required to be reasonable, rather than just successive contracts." *Comerica Bank, supra,* 2012 WL 12948705 at n.27; H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, 1974 WL 1542 (Leg. Hist); Pet. App. 175-176.

IV. The Failure to Grant Leave to Amend Warrants Consideration for Summary Reversal

Supreme Court Rule 10(a) states this Court may grant a writ of certiorari when a Court of Appeal "has so far departed from the accepted and usual course of conduct, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power."

In addition to generating an unnecessary circuit split, the Fifth Circuit's affirmance of the district court's denial of leave to amend is such a departure. Petitioners respectfully request that the Court grant the petition as to this question and either summarily reverse under Supreme Court Rule 16.1, *e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505, 510 (2001), or order plenary briefing and argument.

"'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a decision on the merits.'" *Foman v. Davis*, 371 U.S.

178, 181-182 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Id.*

The Seventh Circuit holds that a plaintiff faced with a Rule 12(b)(6) motion and who has good reason to think the complaint is sufficient may stand by its complaint without losing the well-established liberal standard for amendment with leave of court under F.R.C.P. 15(a)(2). *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana*, 786 F.3d 510, 523 (7th Cir. 2015). This is especially so where the law is uncertain. *Id.* at 520. Thus, "giving leave to amend freely is especially advisable when such permission is sought after dismissal of the first complaint. Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district should grant leave to amend after granting a motion to dismiss.'" *Id.* at 519.

The denial of leave to amend by the district court and Fifth Circuit directly conflicts with this Court's precedent and the Seventh Circuit standard. As the decisions below amply demonstrate, the arguments presented in VALIC's motion to dismiss involved uncertain and unsettled issues of law. The Markhams

were entitled to stand by their complaint and determine how the complaint might best be amended – assuming amendment was needed at all – after the district court ruled.

The Markhams' proposed amendments were not futile. It is well-established, as footnote 4 of the Fifth Circuit's opinion seems to acknowledge, that the complaint allegations support an alternative theory of recovery: Knowing participation in a fiduciary breach. *E.g., Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000) (explaining that ERISA Section 502(a)(3) does not limit the universe of possible defendants for such a claim). Plaintiffs also proposed an amendment alleging that imposition of the surrender charge was a separate transaction because, as a condition of releasing the plan's assets, VALIC required the Markhams to sign a transition agreement not referenced in the initial contracts. This would seem to constitute a separate transaction with a party in interest even under the Fifth Circuit's view.

There is no evidence the Markhams acted in bad faith or with a dilatory motive in seeking a ruling on Respondents' motions. There is no evidence of prejudice. To the extent there was undue delay, it arose from a judicial emergency over which the Markhams had no control. The district court denied the Markhams' leave to amend because the Eastern District of California had Respondents' motions to dismiss under submission for nearly year before denying them and granting the motion to transfer.

It is unjust, and inconsistent with F.R.C.P. 15 and this Court's precedents, to refuse a party even one opportunity to amend its complaint after granting a

12(b)(6) motion because of the delay occasioned by a judicial emergency.

CONCLUSION

Petitioners ask that the Court grant their petition for a writ of certiorari.

Respectfully submitted.

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