No. 25-826

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL HUTCHINS, as a representative of a class of participants and beneficiaries on behalf of the HP Inc. 401(k) Plan,

Plaintiff/Appellant,

v.

HP Inc.,

Defendant/Appellee.

On Appeal from the United States District Court
for the Northern District of California
(No. 5:23-cv-05875-BLF)
Hon. Beth Labson Freeman

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Washington Legal Foundation has no parent corporation, issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as amicus curiae in cases affecting the private sector's ability to offer employee benefits under the Employee Retirement Income Security Act of 1974 (ERISA).

WLF has regularly participated in ERISA litigation, particularly where questions of fiduciary liability are at stake. It submitted amicus briefs in *Thole v. U.S. Bank, N.A.*, 590 U.S. 538 (2020), and *Amgen Inc. v. Harris*, 577 U.S. 308 (2016), which both addressed core ERISA fiduciary duties. WLF is concerned that expanding those duties beyond their statutory limits would harm the very individuals Congress intended ERISA to protect. If Plaintiff's theory prevails, courts will see a rise in meritless class actions—imposing significant costs and discouraging employers from offering retirement benefits.

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

Congress doesn't compel employers to offer retirement plans. It could have. Instead, ERISA reflects Congress's deliberate policy choice to use carrots, not sticks. The statute uses incentives and safe harbor protections to support voluntary plan formation.

Plaintiff Paul Hutchins is a participant in the HP Inc. 401(k) Plan, a defined contribution individual account plan. (2-ER-226 (FAC ¶¶ 6, 8, 10).) Like other participants, his account bears a proportionate share of the Plan's administrative expenses. HP serves as both the sponsor and administrator of the Plan. (*Id.*) The Plan treats non-vested employer funds as forfeitures. This case concerns the use of forfeitures in the Plan. (2-ER-231 (FAC ¶¶ 33–37).)

The Plan permits use of forfeitures either to reduce future employer contributions or to pay reasonable expenses. (2-ER-120; 2-ER-229.) Plaintiff's theory is that HP breached its fiduciary duties under ERISA by reallocating plan forfeitures to reduce employer contributions, rather than applying them to administrative expenses. (2-ER-299–301.)

Plaintiff's claim, however, rests on a version of ERISA that Congress neither enacted nor endorsed. He contends that plans are obligated to use forfeitures solely for administrative expenses. Anything else, he argues, violates ERISA. But that's not what the statute says. That's not what regulators have said. And that's not what courts have said. The district court correctly rejected that theory. Three reasons support this conclusion.

First, applying forfeitures to fund participant benefits is consistent with ERISA's text and structure. The statute and its regulations authorize fiduciaries to use such funds for the Plan's benefit, including to fund participant benefits or defray expenses. Nothing in ERISA requires fiduciaries to prioritize one permissible use over the other.

Second, adopting Plaintiff's reading would undermine plan formation. Forty percent of small businesses already avoid offering retirement plans due to cost and legal risk. Expanding ERISA exposure would compound those concerns, undermining ERISA's foundational goal of encouraging retirement savings.

Third, Plaintiff seeks to impose a fiduciary duty found nowhere in the statute. That approach would disrupt ERISA's careful balance and expose standard plan decisions to unnecessary litigation. Congress writes the law. Courts apply it. They do not embellish it with duties Congress declined to impose.

ARGUMENT

I. USING FORFEITURES TO PAY CONTRIBUTIONS COMPORTS WITH ERISA'S TEXT, STRUCTURE, AND CONTROLLING GUIDANCE.

ERISA's structure is deliberate, and its commands are clear. Forfeitures may be used to reduce employer contributions, so long as the plan says so. Congress allowed it. The Treasury required it. And courts have upheld it.

Start with the statute. ERISA's anti-inurement rule says that "the assets of a plan shall never inure to the benefit of any employer" and must be used "for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). True, ERISA forbids employers from helping themselves to plan assets. But it does not condemn arrangements where lawful plan action also happens to reduce an employer's bill. If the funds remain in the plan and serve the participants, there is no ERISA violation.

And by its own terms, the Plan here did exactly that. It allowed forfeitures to be used in one of two ways: to pay administrative expenses or to offset future contributions. That is a lawful choice. ERISA does not set up a hierarchy among these options. It allows a choice, so long as that choice is permitted by the plan and is prudent and loyal. 29 U.S.C. § 1104(a)(1)(A), (D).

This approach reflects settled practice, not recent innovation. The Treasury has long required that forfeitures "be used as soon as possible to reduce the employer's contributions." 26 C.F.R. § 1.401-7(a). The Treasury's guidance is similarly straightforward: it permits plans to apply forfeitures to administrative costs or to offset future contributions. Rev. Rul. 84-156, 1984-2 C.B. 97, 99 (IRS 1984).

Congress subsequently endorsed that framework, embedding it in the legislative record. The conference report to the Tax Reform Act of 1986 said that forfeitures "can be either (1) reallocated to the accounts of other participants in a nondiscriminatory fashion, or (2) used to reduce future employer contributions or administrative costs." H.R. Conf. Rep. No. 99-841, at II-442 (1986). This wasn't offhand legislative chatter. It reflected Congress's clear and considered judgment of how it expected plans to treat forfeitures.

Courts interpreting the same language have consistently reached the same understanding. In *Dimou v. Thermo Fisher Scientific Inc.*, No. 3:23-cv-01732, at *12–13 (S.D. Cal. Sept. 19, 2024), the court rejected a claim that fiduciaries must use forfeitures for expenses. The plan allowed offsets, and ERISA did not forbid it, so that ended the analysis. In *Naylor v. BAE Systems, Inc.,* No. 24-CV-00536, 2024 WL 4112322, at *4–5 (E.D. Va. Sept. 5, 2024), the court adopted the same position—requiring that forfeitures be applied to reduce future contributions, in line with plan obligations.

Plaintiff responds by pointing to the duty of loyalty, citing § 1104(a)(1)(A) as if it outlaws every incidental benefit to employers. But ERISA focuses on the use of plan assets—not incidental consequences. Forfeitures used to fund participant benefits satisfy that standard. The Plan participants received the benefits promised. That much is clear. Plaintiff warns of the risk HP might default on its matching obligations if forfeitures were used to pay Plan expenses. Brief for Appellants at 7, *Hutchins v. HP Inc.*, No. 25-826 (9th Cir. May 1, 2025). Yet he insists HP should have done exactly that. The company's actual course—using forfeitures to satisfy contribution obligations—insulated participants from that risk. It built a stronger plan. The fact that HP reduced its cash outlay is incidental. It doesn't change the outcome. Any reduction in the employer's immediate contribution is collateral, not controlling.

That conclusion is consistent with what the Supreme Court has already recognized. In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445–46 (1999), the Court confirmed that when a plan has a surplus, the employer may use that surplus to reduce future contributions, provided the plan's terms and ERISA permit it. Earlier, in *Lockheed Corp. v. Spink*, 517 U.S. 882, 892–93 (1996), the Supreme Court had held that employers do not act as fiduciaries when structuring benefit plans, even if the resulting changes confer incidental benefits on the employer. In both cases, the Court recognized the importance of adhering to the statutory framework and respecting the discretion afforded by plan design.

And when that discretion is used in ways the statute allows, ERISA's prohibited transaction rules don't come into play. ERISA § 406 forbids certain direct dealings between a plan and an insider. 29 U.S.C. § 1106(a)(1)(D). But no "transaction" occurs here. The plan covers its obligations with money it already holds. That's how ERISA is supposed to work. No money changes hands. No deal is made. The employer does not take a dime from the Plan.

Take this basic example. Suppose a plan promises each participant a $1,000 contribution. $400 is available in forfeitures. The employer contributes $800, and the plan adds $200 in forfeitures. The participant gets the full $1,000. No asset leaves the trust. No law is broken. That is not self-dealing. It is plan compliance.

This isn't just theory. ERISA says it outright. Under § 1104(a)(1)(D), fiduciaries must follow the terms of the plan unless those terms conflict with law. No such conflict exists here. This Plan permitted forfeitures to be applied toward contributions. This is what occurred. That was lawful. The Plan participants got every penny the Plan promised them. That's what ERISA requires.

In short, everyone signed off—Congress, Treasury, the courts, and the Plan. Defendants didn't guess. They followed the rules.

II. Expanding Liability as Proposed Would Deter Plan Sponsorship—Especially by Small Employers—and Undermine ERISA's Purpose.

ERISA is not a general pension mandate. Employers need not offer retirement plans at all. Public policy therefore seeks to encourage employers to sponsor plans voluntarily. As the Supreme Court has recognized, ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (citation omitted). Congress didn't want the law to backfire by making benefit plans so burdensome that employers would stop offering them.

But Plaintiff's theory, if adopted, threatens to do just that. It would stretch ERISA to punish a choice both the law and Plan expressly allow. The cost? Fewer plans, fewer employers willing to offer them, and fewer workers with access to retirement savings. Or, at least, fewer plans offering employer contributions. None of this is what Congress enacted. It's not what ERISA demands.

The risk of reduced retirement options is not hypothetical. As of 2023, only 57% of private-sector firms with fewer than 100 workers sponsored retirement plans. Larger firms do far better: 86% of firms with 100 or more workers and 91% of those with 500 or more offer plans. The Pew Charitable Trusts, *Small Employers' Economics of Offering Retirement Savings Plans* (July 25, 2024), https://perma.cc/HA4F-9UZH.

Research confirms that cost, complexity, and perceived legal risk are the leading barriers to employer sponsored retirement benefits. U.S. Gov't Accountability Off., *Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship*, GAO-12-326 (2012), https://perma.cc/KZK3-FVAD. An Aspen Institute forum report on retirement security acknowledged that fear of litigation discouraged employers from offering a plan. *See* The Aspen Inst. Fin. Sec. Program, *Rapid Change, Real Momentum* (May 22, 2023), https://perma.cc/7DMQ-TV68.

Indeed, it "makes little sense" for small employers to shoulder full fiduciary responsibility when "administrative costs and the burden of fiduciary liability" is so high. John N. Friedman, *Building on What Works: A Proposal to Modernize Retirement Savings*, Discussion Paper No. 2015-05, The Hamilton Project (June 2015), https://perma.cc/R2BA-D9N5. This has a compounding effect: when small employers see their peers are not offering retirement plans, they have less incentive to do so themselves. *Id*.

Accepting Plaintiff's position would amplify the challenges facing plan sponsors. If failing to apply forfeitures to administrative expenses suddenly became a basis for liability, employers could be drawn into costly litigation over routine plan operations. That risk could deter new sponsors and prompt existing ones to reconsider optional contributions, cutting off the source of forfeitures. Employees, in turn, would lose meaningful benefits.

The legal shift Plaintiff proposes threatens to tip the balance against plan formation and maintenance. If simply following the plan and the "settled understanding" of the law can land you in court, many employers—quite rationally—will walk away from offering 401(k) plans or cease offering matching contributions. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Who can blame them?

Such an outcome is at odds with ERISA's purpose. As the Supreme Court has explained, ERISA aims to not "discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). For this reason, courts should not adopt ERISA interpretations that "discourage employers from offering [ERISA] plans" by increasing complexity and litigation exposure. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 108 (2013). Courts must be mindful of that objective when evaluating novel ERISA liability theories. Plaintiff's position might result in a one-time windfall for participants.

But that short-term gain risks long-term harm. Fewer employers would sponsor plans, narrowing retirement options for countless employees. Small and mid-sized employers would walk away. And millions of workers would be left with fewer, not more, retirement options. Congress adopted ERISA to increase plan formation through clarity and balance.

Yes, ERISA protects workers. But it does not punish sponsors. This reflects a delicate balance calibrated by Congress: robust protections for participants, tempered by limits on unnecessary burdens for plan sponsors. *Varity Corp.*, 516 U.S. at 498. Upsetting ERISA's careful equilibrium without a clear congressional mandate risks unintended consequences injuring the very people ERISA is meant to help. Increased litigation exposure would raise the cost of plan sponsorship, both in terms of insurance and administrative complexity. Again, that pressure may drive some employers to leave the system entirely.

The downstream effect is simple but significant: fewer plans, fewer savings opportunities for employees. That is why courts have hesitated to recognize novel liability theories under ERISA without clear legislative support. *See id.* (noting that Congress intended ERISA's enforcement scheme to maintain incentives for employers to adopt plans).

The Court should account for the real-world effects of accepting Plaintiff's position. Congress balanced trade-offs in crafting ERISA. Plaintiff would have the Court put that scale aside. Plaintiff's theory raises costs. It multiplies litigation. It will reduce retirement options and thereby harm workers—the very employees ERISA was meant to shield.

III. PLAINTIFF'S THEORY ADDS UNWRITTEN DUTIES, UNDERMINES PLAN ADMINISTRATION, AND INVITES UNWARRANTED LITIGATION.

In essence, Plaintiff asks this Court to impose an additional obligation that Congress never created or authorized. Plaintiff wants ERISA to say that fiduciaries must always use forfeitures to pay administrative expenses when given that choice. And if they don't, they're personally liable. But ERISA says nothing of the kind.

This isn't a close call. ERISA's text is precise. Its obligations are specific. They have been carefully construed by courts in light of trust law. The rule Plaintiff asks for doesn't exist. Congress didn't write it. Courts can't infer it.

This wasn't a drafting error. Congress had decades to act. So did the Department of Labor. Neither did. For 50 years, neither has imposed the rule Plaintiff wants. This case asks the Court to do what Congress and regulators have declined to do for decades: create a new fiduciary duty by judicial decision. That's not statutory interpretation, it's legislation. The Court should say no.

Plaintiff's argument lacks support in ERISA's text and would extend the statute beyond anything Congress enacted. ERISA's rule is simple. Fiduciaries must follow the plan—unless the law says otherwise. *See* 29 U.S.C. § 1104(a)(1)(D). Here, the Plan allowed forfeitures to be allocated to expenses or to contributions. HP fulfilled that duty. It adhered to the Plan instruction.

Plaintiff's theory boils down to this: ERISA should override the Plan. But ERISA doesn't impose Plaintiff's desired rule. It demands loyalty to the Plan's terms, not to Plaintiff's preferences. The Plan set up the rules on forfeiture use. Plaintiff insists that HP use forfeitures to pay administrative expenses, even if the statute and the Plan say otherwise. Under Plaintiff's view, following the Plan becomes a liability. That flips ERISA's mandate upside down. The law doesn't demand that kind of trap.

A fiduciary is not liable for following a plan in accord with ERISA. Plaintiff's proposed rule would rewrite that understanding. It would require fiduciaries to generate formal documentation for routine decisions, even though both uses of forfeitures are equally lawful. That added process—aimed solely at reducing litigation risk—would increase costs. Small plans would be hardest hit. ERISA does not require needless documentation absent harm and conflict of interest. It was designed to make plan administration efficient, not punitive.

Yet needless documentation is what Plaintiff pursues here. Taking forfeiture use as an example, the Plan said yes, the law said yes, but Plaintiff still complains that HP allegedly failed to probe which version of "yes" was optimal for participants. (2-ER-229–30 (FAC ¶ 27).) He claims HP should have crunched hypothetical numbers about eliminating participant fees while offsetting contributions. (2-ER-230

(FAC ¶ 28).) And he insists HP was required to consult an independent advisor before making a choice the Plan permitted. (2-ER-230 (FAC ¶ 29).) But ERISA requires fidelity to the plan.

An expensive kabuki theater of paperwork and consultants is not required whenever a plan grants the discretion Congress allowed. The statute permits thoughtful decision-making. It does not demand exhaustive documentation for choices authorized by the Plan. Nor does it require external consultation when the governing documents provide multiple lawful paths. Fiduciaries may act within the bounds of the Plan without fear of retroactive scrutiny. HP's conduct was consistent with the Plan, authorized by ERISA, and well within the bounds of proper plan design. Imposing liability under these circumstances would risk substituting litigation exposure for plan governance.

Imposing this added process isn't about protecting participants. No one lost out. Everyone got what they were promised under the plan. The added process does little for participants but opens the floodgates to the courthouse. Plaintiff wants courts to second-guess lawful plan decisions where participants received all promised benefits. Over forty class actions have already been filed on this issue. Most don't even allege a loss. The complaint is that forfeitures could have been used differently. That's not a legal injury. It's a litigation strategy. And ERISA was not designed to support it.

At bottom, Plaintiff can point to no actual harm, aside from the abstract idea that plan fees might have been marginally lower. This is not a harm ERISA was meant to address. Plaintiff seeks judicial second-guessing of decisions that harmed no one and violated no rule. No laws were broken. No benefits were lost. Yet he wants the courts to step in. That would turn every plan decision into a legal risk. Plans would face a torrent of lawsuits. Costs would rise. Lawyers would file the suits, but employees would pay the price.

Congress never passed such a rule. Neither did the DOL or IRS. All have allowed forfeiture to be used as HP did here. This Court should not rewrite the law. The inevitable results would be fewer sponsors, fewer plans, fewer matching contributions, and fewer retirement options. If new rules are needed, let Congress or regulators create them. Until then, follow ERISA as written.

CONCLUSION

The district court's dismissal order should be affirmed.

July 8, 2025

Respectfully submitted,

/s/ Saad Gul

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CERTIFICATE OF COMPLIANCE

I certify that this brief:

(i) complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3126 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it is set in 14-point Century Schoolbook font.

July 8, 2025

/s/ Saad Gul