NOS. 26-1303, 26-1314

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUIS HERNANDEZ,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC.,

Defendant-Appellee.

On Appeal from the United States District
Court for the Central District of California
(Case No. 2:25-cv-00676-ODW-PVC) (Hon. Otis D. Wright II)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND AFFIRMANCE

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TABLE OF CONTENTS

Page

RULE 26.1 DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION & SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. HERNANDEZ'S BREACH-OF-FIDUCIARY-DUTY CLAIM FAILS AS A MATTER OF LAW 5

A. Hernandez's theory erases the line between settlor and fiduciary functions 5

B. A plan's authorization of a lawful use is not a breach, and *Fifth Third* does not say otherwise 10

C. The complaint pleads a lawful outcome—not a flawed process—and cannot survive Rule 12(b)(6) 12

II. THE ANTI-INUREMENT AND PROHIBITED-TRANSACTION CLAIMS FAIL ON THE STATUTE'S TEXT 15

A. Forfeitures that never leave the trust do not inure to the employer 15

B. Reallocating forfeitures within the Plan is not a prohibited transaction 17

III. HERNANDEZ'S RULE WOULD HARM THE VERY WORKERS ERISA EXISTS TO PROTECT 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases:

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 19

Amgen Inc. v. Harris,
577 U.S. 308 (2016) 1

Anderson v. Intel Corp. Inv. Pol'y Comm.,
137 F.4th 1015 (9th Cir. 2025), *cert. granted*, No. 25-498 (U.S. Jan. 16, 2026) 9, 12

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 4, 13

Barragan v. Honeywell Int'l Inc.,
No. 25-2609 (3d Cir.) 20

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 4, 13, 20

Bugielski v. AT&T Services, Inc.,
76 F.4th 894 (9th Cir. 2023) 19

Cain v. Siemens Corp.,
No. 25-2564 (3d Cir.) 20

CFTC v. Schor,
478 U.S. 833 (1986) 9

Conkright v. Frommert,
559 U.S. 506 (2010) 6, 19

Coulter v. Morgan Stanley & Co.,
753 F.3d 361 (2d Cir. 2014) 5

Cunningham v. Cornell University,
604 U.S. 693 (2025) 18

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014) 3, 4, 10, 11, 12, 14, 20

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Glazing Health & Welfare Fund v. Lamek,
896 F.3d 908 (9th Cir. 2018) 6

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 6, 15, 16

Hughes v. Northwestern University,
595 U.S. 170 (2022) 11, 12

Hutchins v. HP Inc. (Hutchins I),
737 F. Supp. 3d 851 (N.D. Cal. 2024) 16

Hutchins v. HP Inc. (Hutchins II),
767 F. Supp. 3d 912 (N.D. Cal. 2025) 11

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 6, 17, 18, 21

Loomis v. Exelon Corp.,
658 F.3d 667 (7th Cir. 2011) 6

Madrigal v. Kaiser Found. Health Plan, Inc.,
No. 2:24-cv-05191, 2025 WL 1299002 (C.D. Cal. May 2, 2025) 16

Matula v. Wells Fargo & Co.,
175 F.4th 958 (8th Cir. 2026) 20

Pegram v. Herdrich,
530 U.S. 211 (2000) 9

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,
541 U.S. 1 (2004) 16

Stana v. SAS Inst. Inc.,
No. 26-1305 (4th Cir.) 20

Thole v. U.S. Bank N.A.,
590 U.S. 538 (2020) 1

US Airways, Inc. v. McCutchen,
569 U.S. 88 (2013) 11

Varity Corp. v. Howe,
516 U.S. 489 (1996) 19

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Wright v. JPMorgan Chase & Co.,
No. 2:25-cv-00525, 2025 WL 1683642 (C.D. Cal. June 13, 2025)........16

Wright v. Or. Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 11, 17

Statutes:

26 U.S.C. § 401(a)(8)..9

29 U.S.C. § 1103(c)(1) 15, 17

29 U.S.C. § 1104(a)(1)(B)... 4, 12

29 U.S.C. § 1106 .... 17, 18

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1119, 100 Stat. 2085 9

Regulations:

26 C.F.R. § 1.401-7(a) 14

Use of Forfeitures in Qualified Retirement Plans, 88 Fed. Reg. 12,282
(proposed Feb. 27, 2023).. 14

Other Authorities:

Br. of the U.S. Sec'y of Labor as Amicus Curiae, *Barragan v. Honeywell Int'l Inc.*, No. 25-2609 (3d Cir. Jan. 30, 2026).................... 14

Br. of the U.S. Sec'y of Labor as Amicus Curiae, *Hutchins v. HP Inc.*,
No. 25-826 (9th Cir. July 9, 2025)... 8, 14

H.R. Rep. No. 99-841 (1986) (Conf. Rep.) 9

Rev. Rul. 71-313, 1971-2 C.B. 203 9

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free markets, individual rights, limited government, and the rule of law. It appears often as amicus curiae in Employee Retirement Income Security Act (ERISA) cases that test the bounds of fiduciary liability. *See, e.g., Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020); *Amgen Inc. v. Harris*, 577 U.S. 308 (2016).

ERISA was written to encourage employers to offer benefits, not to punish them when they do. Plaintiff's theory here turns that logic inside out. It stretches the statute to reach a plan participant who received everything his plan promised, and it invites a wave of class actions over a ubiquitous practice that neither ERISA nor the plan forbids. If that theory succeeds on appeal, WLF worries that the cost will land not only on plan sponsors but on the very employees ERISA seeks to protect.

* No party's counsel authored any part of this brief. No one, apart from Washington Legal Foundation and its counsel, contributed money intended to fund the brief's preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

Luis Hernandez sued because his retirement plan used forfeited retirement money to fund retirement contributions. Every dollar he complains about stayed inside the Plan. Every benefit the Plan promised was paid. He does not allege that one participant went a penny short of what the Plan promised. 1-ER-14; *see generally* 4-ER-656–69 (Compl.). Yet he insists that AT&T broke federal law the moment it applied those funds to next year's employer contributions rather than to Plan expenses. This is less a fiduciary-breach case than a demand that the Court rewrite ERISA.

The demand rests on one move, repeated in different guises throughout Hernandez's opening brief. He treats a menu of concededly lawful choices as though the law requires a fiduciary to pick the one he prefers. The Plan explicitly allowed AT&T to apply forfeitures to reduce future employer contributions, to fund corrective contributions, or to pay plan expenses. 2-ER-150 (Plan § 9.5). Hernandez does not dispute that the Plan expressly permits each use, or that the law has historically allowed the one he attacks. 1-ER-13. His theory is that loyalty and prudence compelled AT&T to choose the participant-expense option, every year, on pain of liability. Strip away the talk of "conflict" and "self-interest," and what is left is a *per se* rule that forfeitures must always pay expenses. Courts have rejected that rule almost without exception, and for good reason.

Hernandez's rule cannot be squared with the statute he invokes. ERISA divides plan conduct in two. Creating, designing, and funding a plan are settlor functions, and no fiduciary duty touches them. Administering the plan once it exists is a fiduciary function, and only there do loyalty and prudence attach. How much an employer contributes, and whether the employer or the participants bear plan expenses, fall on the settlor side of that line. Hernandez's theory erases the line. It would let a fiduciary's forfeiture decision override the sponsor's settlor prerogative and, in effect, command a larger employer contribution. No fiduciary has that power, and no participant has that right.

None of his authorities salvage Hernandez's novel theory. He quotes (at 15) *Fifth Third Bancorp v. Dudenhoeffer* for the line that "the duty of prudence trumps the instructions of a plan document." 573 U.S. 409, 421 (2014). Fair enough, but *Fifth Third* was about a plan term that commanded an imprudent investment—an order to keep buying employer stock the fiduciary allegedly knew was sinking. It holds that a fiduciary may not follow a plan into a losing bet. It says nothing about a lawful menu of non-investment uses under which participants receive every promised benefit. No one here was denied a benefit. No imprudent investment was made.

Nor has Hernandez pleaded a breach. Prudence is a matter of process, judged on the "circumstances then prevailing," 29 U.S.C. § 1104(a)(1)(B), in an inquiry the Supreme Court calls "context specific." *Fifth Third*, 573 U.S. at 425. Hernandez pleads no process. He pleads only an outcome—that AT&T chose the offset year after year—and asks the Court to infer a flawed process from that outcome alone. That turns *Twombly* and *Iqbal* upside down. A lawful result that regulators have blessed for five decades supports no plausible inference of imprudence; it supports the opposite. His statutory theories fare no better. Forfeitures that never leave the trust do not "inure" to the employer, and an intra-plan reallocation is not a prohibited "transaction."

The stakes on appeal are high. ERISA's fiduciary duties are a shield, forged to ensure that workers receive the benefits they earned. Hernandez would beat that shield into a sword. If routinely offsetting employer contributions with forfeitures becomes an ERISA violation, many rational employers will do what ERISA lets them do: strip the option from their plans, cut the match, or decline to offer plans at all. Each is a settlor decision no participant can challenge. The workers ERISA seeks to protect would be the ones left worse off. This Court should decline that invitation and affirm.

ARGUMENT

I. HERNANDEZ'S BREACH-OF-FIDUCIARY-DUTY CLAIM FAILS AS A MATTER OF LAW.

The district court assumed that AT&T acted as a fiduciary when it allocated forfeitures. 1-ER-12 n.4. Even on that assumption, the loyalty-and-prudence claim fails at every step. The duty Hernandez posits cannot exist, because it would let a fiduciary's allocation decision commandeer the sponsor's settlor control over plan funding. A plan's authorization of a lawful use is not a breach. And the complaint pleads only a lawful outcome, not a flawed process.

A. Hernandez's theory erases the line between settlor and fiduciary functions.

ERISA divides the world of plan conduct in two. On one side are the settlor functions—establishing, funding, amending, and terminating a plan, including "decisions relating to the timing and amount of contributions." *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 367 (2d Cir. 2014). Nothing in ERISA requires an employer to establish a plan at all, or dictates "what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *accord Conkright v. Frommert*, 559 U.S. 506, 516 (2010). When an employer performs those design and funding functions, it acts as a settlor, not a fiduciary, and the duties of loyalty and prudence do not apply. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443–44 (1999). Only when the employer administers the plan do those duties attach.

Plan funding sits on the settlor side. How much an employer contributes, and whether the employer or the participants bear the plan's expenses, are matters of plan design. An employer's choice to pass plan expenses to participants rather than absorb them is a settlor decision, not a fiduciary one. *See Glazing Health & Welfare Fund v. Lamek*, 896 F.3d 908, 910 (9th Cir. 2018) (plan sponsors are not fiduciaries when making funding decisions); *Loomis v. Exelon Corp.*, 658 F.3d 667, 671–72 (7th Cir. 2011). An employer may contribute a lot or a little, pay plan expenses or pass them along, and amend those choices going forward. None of that is the fiduciary's to override. Nor does it matter that the settlor handed the fiduciary a menu of permitted uses. The menu is itself a settlor choice; it fixes the range of outcomes the sponsor was willing to fund. Even if choosing among the options the settlor authorized was fiduciary work, using that choice to compel funding the settlor never promised is not.

Hernandez's theory does just that—not because AT&T acted as a settlor when it allocated forfeitures (though the Court may assume otherwise), but because the duty Hernandez attaches to that fiduciary act reaches across the line and seizes a decision ERISA reserves to the settlor. His premise (at 17–19) is that using forfeitures to defray participant expenses is *always* better for participants, so loyalty and prudence *always* required AT&T to choose it. But that premise assumes that if forfeitures must pay expenses, the employer will simply fund its full match from its own pocket—that is, contribute more. At bottom, then, Hernandez's fiduciary-breach claim is a demand that a fiduciary compel the sponsor to increase its contributions. But contribution levels are a quintessential settlor decision. No fiduciary duty reaches that far.

Play Hernandez's rule out, and it defeats itself. Suppose the fiduciary must always spend forfeitures on participant expenses. The forfeitures no longer reduce the match, so the same match now takes more of the sponsor's own money. But the sponsor controls plan funding—that is a settlor decision—and no fiduciary can make it pay. The fiduciary is then trapped. It can press the sponsor for the shortfall and, if refused, litigate to collect it, spending down plan assets on a dispute that may fail and that endangers the very participants it serves. It can swallow a funding gap. Or—most likely—the sponsor simply amends the plan to shrink the match going forward, a settlor decision no participant may contest, and everyone walks away with less.

The Department of Labor—ERISA's principal enforcer—has pressed the same point in this Court: because contribution levels are settlor decisions "solely within the sponsor's control," it is "simply not true that if the fiduciary chose to use [p]lan forfeitures to pay [p]lan expenses, the sponsor would automatically have increased its contributions." Br. of the U.S. Sec'y of Labor as Amicus Curiae Supporting Defendant-Appellee at 18, *Hutchins v. HP Inc.*, No. 25-826 (9th Cir. July 9, 2025). Hernandez maintains that steering forfeitures to expenses is always better for participants. Not so—it is often worse. A duty of loyalty cannot command the one course that predictably harms the people it protects. That transforms ERISA into a statute that cannibalizes itself.

The use AT&T chose is an eminently permissible one. Forfeitures applied to reduce future employer contributions never leave the Plan; they fund the very contributions credited to participant accounts. The money stays at work for the participants' retirements. That is why Congress, the Treasury Department, and the Department of Labor have understood for decades that defined-contribution plans may do exactly what AT&T did here. *See* H.R. Rep. No. 99-841, at II-442 (1986) (Conf. Rep.) (defined-contribution plans may use forfeitures "to reduce future employer contributions or to offset administrative expenses"); Tax Reform Act of 1986, Pub. L. No. 99-514, § 1119, 100 Stat. 2085, 2463 (codified at 26 U.S.C. § 401(a)(8)); Rev. Rul. 71-313, 1971-2 C.B. 203; *see also CFTC v. Schor*, 478 U.S. 833, 846 (1986) (when Congress revisits a statute without disturbing a longstanding agency interpretation, that is persuasive evidence Congress intended it). This is the ordinary operation of a retirement plan, not a fiduciary breach that lay hidden for fifty years.

That leaves only Hernandez's theme of "conflict." He says AT&T wore two hats—plan administrator and arm of the corporate family that sponsors the Plan—and chose the one that helped the company. (Opening Br. 17–19). But an ERISA fiduciary "may wear different hats," acting as a plan fiduciary in some contexts and as the sponsor in others. *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). And mere "potential for a conflict, without more, is not synonymous with a plausible claim of fiduciary disloyalty." *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1026 (9th Cir. 2025) (quotation omitted), *cert. granted*, No. 25-498 (U.S. Jan. 16, 2026). An incidental benefit to the corporate family, flowing from a funding structure the sponsor was entitled to build, is not disloyalty. It is the design Congress chose.

B. A plan's authorization of a lawful use is not a breach, and *Fifth Third* does not say otherwise.

Unable to find a breach in what AT&T did, Hernandez relocates it to what the Plan *allowed*. His lead authority is *Fifth Third*'s statement that "the duty of prudence trumps the instructions of a plan document." Opening Br. 1, 15 (quoting 573 U.S. at 421). Read in context, that sentence cannot carry the weight he puts on it.

The plan term in *Fifth Third* told the fiduciaries to load the plan with employer stock. The Court held that prudence overrides "an instruction to invest exclusively in employer stock even if financial goals demand the contrary." 573 U.S. at 421. That is a rule about imprudent investments. It keeps a fiduciary from following a plan term that squanders participants' money.

Nothing like that is alleged here. Offsetting employer contributions with forfeitures is not an investment. Most importantly, it costs participants nothing the Plan promised them. No participant was handed a depreciating stock; no participant lost a dollar he was owed. *Fifth Third* tells a fiduciary it may not blithely follow a plan off a cliff into financial ruin. It does not tell a fiduciary that a lawful menu of uses silently contains only one permissible answer. Hernandez would turn *Fifth Third* inside out—from a shield against ruinous plan terms into a sword that forces fiduciaries to resolve every discretionary choice strictly how an ERISA plaintiff later insists. No case, and no statute, requires that.

What ERISA does require, AT&T indisputably did. ERISA's job is to protect the benefits a plan promises—no more. It does not oblige a fiduciary to "maximize pecuniary benefits" or to "resolve every issue of interpretation in favor of plan beneficiaries." *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004); *see US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013). A fiduciary satisfies its duty when it "ensures that participants have received their promised benefits." *Hutchins v. HP Inc. (Hutchins II)*, 767 F. Supp. 3d 912, 924 (N.D. Cal. 2025). Hernandez does not allege that any participant failed to receive a promised benefit, and he identifies no Plan term AT&T broke. 1-ER-14. That omission is the end of his loyalty-and-prudence claim.

Hughes v. Northwestern University, 595 U.S. 170 (2022), is no better fit for Hernandez's theory. (Opening Br. 16, 20). It holds that a menu containing some prudent investment options does not excuse the imprudent ones—the fiduciary must weed out the bad choices. 595 U.S. at

177. That presupposes a bad choice: an excessive fee, an unsound fund. Again, Hernandez identifies none. He points only to a lawful use he wishes AT&T had passed over. This Court should decline to invent imprudence where a fiduciary picked a use the law expressly allows.

C. The complaint pleads a lawful outcome—not a flawed process—and cannot survive Rule 12(b)(6).

Hernandez protests that he pleaded no *per se* rule at all, just a "failure of process"—that AT&T chose the offset "reflexively," "without considering whether participants would be better served." (Opening Br. 19–20). The framing is clever, but it can't be squared with what the complaint actually says, or with the federal pleading standard that governs it.

ERISA prudence is measured by process, and process is judged on "'the circumstances . . . prevailing' at the time the fiduciary acts." *Fifth Third*, 573 U.S. at 425 (quoting 29 U.S.C. § 1104(a)(1)(B)). Because "the appropriate inquiry will necessarily be context specific," *id.*, a plaintiff must plead facts about that context—facts from which a court can infer that the fiduciary's decision-making fell short under the conditions it faced. *Anderson*, 137 F.4th at 1021 (prudence turns on "a fiduciary's conduct in arriving at an investment decision, not on its results" (quotation omitted)). Hernandez pleads none. He pleads the outcome, that AT&T applied forfeitures to reduce employer contributions each year, and says nothing about the deliberations, the Plan's funding posture, the risks weighed, or the alternatives considered. From that outcome alone he asks the Court to infer a "flawed or absent process."

That is backward under *Twombly* and *Iqbal*. A complaint must plead facts that "allow[] the court to draw the reasonable inference that the defendant is liable," and allegations "merely consistent with" liability "stop[] short of the line between possibility and plausibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). A lawful outcome, standing alone, cannot show that the process behind it was defective. And where the outcome is not merely lawful but blessed by regulators and adopted by plans for decades, the inference runs the other way.

What Hernandez actually pleads, then, is the *per se* rule he disowns: that among the Plan's permitted uses, paying expenses is the only one that ever serves participants, so anything else is a breach. (Opening Br. 17–20). That is an ends-over-means theory, at war with the principle that ERISA is a law of process. The overwhelming majority of courts have rejected it, *see* 1-ER-13–14 (collecting cases), because it asks the judiciary to turn one entry on a lawful menu into a statutory command.

The regulatory backdrop makes the point unanswerable. For defined-benefit plans, the practice Hernandez brands as disloyalty is not merely permitted but required. Since 1963, Treasury regulations have directed that forfeitures "must be used as soon as possible to reduce the employer's contributions under the plan." 26 C.F.R. § 1.401-7(a). And Treasury's 2023 proposed rule would confirm that defined-contribution plans may do so as well. *See Use of Forfeitures in Qualified Retirement Plans*, 88 Fed. Reg. 12,282 (proposed Feb. 27, 2023). The Department of Labor has lately appeared in the courts of appeals—including this one—to defend the practice. *See* Br. of the U.S. Sec'y of Labor as Amicus Curiae Supporting Defendant-Appellee, *Hutchins v. HP Inc.*, No. 25-826 (9th Cir. July 9, 2025); Br. of the U.S. Sec'y of Labor as Amicus Curiae Supporting Appellee, *Barragan v. Honeywell Int'l Inc.*, No. 25-2609 (3d Cir. Jan. 30, 2026). And even Hernandez does not dispute that the law has "historically allowed" the practice. 1-ER-13.

That settled understanding is the "circumstances . . . prevailing" against which prudence is measured. *Fifth Third*, 573 U.S. at 425. A fiduciary that operates within a framework Congress permitted, Treasury endorsed, and the Plan authorized has not flunked the prudent-person standard by following it. Hernandez's quarrel is not with AT&T. It is with a rule the political branches adopted and never withdrew. His remedy, if he has one, lies with them—not with a court asked to declare five decades of ordinary plan administration unlawful.

II. The Anti-Inurement and Prohibited-Transaction Claims Fail on the Statute's Text.

Hernandez's remaining claims rest on the text of two ERISA provisions, and neither reaches the conduct alleged. Both fail for the same structural reason: the money never left the Plan. Assets that stay in the trust and fund participant accounts do not "inure" to the employer, and an intra-plan reallocation is not a prohibited "transaction."

A. Forfeitures that never leave the trust do not inure to the employer.

The anti-inurement claim fails for the same reason the breach claim does: The forfeitures never left the Plan. Section 1103(c)(1) forbids plan assets from inuring to the employer—from reverting or being diverted out of the Plan for the employer's benefit. 29 U.S.C. § 1103(c)(1). The Supreme Court has told us what that inquiry asks: whether "fund assets were used to pay . . . benefits to plan participants." *Hughes Aircraft*, 525 U.S. at 442. Incidental benefits to the employer are no offense. *Id.* at 442–45; *accord*

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 22 (2004).

Here nothing reverted and nothing was diverted. The forfeitures stayed in the trust and funded the contributions credited to participant accounts. The employer's smaller out-of-pocket cost is the incidental byproduct of a lawful funding structure—the very kind of incidental benefit *Hughes Aircraft* holds is permissible. As the district courts have recognized almost uniformly, because the forfeitures never leave the plan, the anti-inurement clause is not triggered. *See, e.g., Madrigal v. Kaiser Found. Health Plan, Inc.*, No. 2:24-cv-05191, 2025 WL 1299002, at *6 (C.D. Cal. May 2, 2025) (failure to allege "that any assets left the Plan is sufficient to foreclose" the claim) (collecting cases); *Wright v. JPMorgan Chase & Co.*, No. 2:25-cv-00525, 2025 WL 1683642, at *5–6 (C.D. Cal. June 13, 2025); *Hutchins v. HP Inc. (Hutchins I)*, 737 F. Supp. 3d 851, 864–65 (N.D. Cal. 2024); 1-ER-15–16.

Hernandez answers (at 22–24) that *Hughes Aircraft* was a defined-benefit case, and that in a defined-contribution plan each forfeiture dollar not spent on expenses is a dollar out of a participant's account. But the anti-inurement holding turns on whether plan assets were used for participants or diverted to the employer outside the plan—not on what kind of plan held them. These forfeitures were used for participants by funding the contributions credited to their accounts. A contrary reading would turn Section 1103(c)(1) into a silent ban on the ordinary, Treasury-blessed practice of offsetting contributions with forfeitures—a revolution smuggled into the word "inure" that no court has accepted and that five decades of practice refute.

B. Reallocating forfeitures within the Plan is not a prohibited transaction.

Section 1106 is aimed at a particular danger: "commercial bargains that present a special risk of plan underfunding" by placing plan assets in the hands of outsiders. *Lockheed*, 517 U.S. at 892–93. To state a claim, a plaintiff must identify a truly prohibited transaction. *Id.* at 888. Moving forfeited funds from one permitted use to another, inside the Plan, is not one. It is not a sale, a lease, or a bargain with anyone. This Circuit treats a fiduciary's decision to apply funds in accord with the plan's terms not as a prohibited transaction but as "merely a lawful decision to remain in full compliance with the explicit language of the Plan's terms." *Or. Metallurgical*, 360 F.3d at 1101. The district court correctly followed that rule. 1-ER-16–17.

Hernandez's textual move (at 24–25)—that § 1106(b)(1) bars a fiduciary from "deal[ing] with" plan assets "in his own interest," and that "dealing" sweeps more broadly than "transaction"—fails on its own terms. The "own interest" element is missing. The forfeitures stayed in the Plan and were credited to participants' accounts. Any savings to the employer are the incidental byproduct of a lawful funding structure, *see supra* II.A, not a fiduciary dealing with plan assets for its "own" account. And Hernandez's reading proves far too much besides: every allocation of plan assets is, literally, "dealing" with them. On that reading, a fiduciary that shifts a dollar from one lawful use to another engages in self-dealing whenever the choice touches the employer's bottom line—transforming the most routine acts of plan administration into prohibited transactions, the very result *Lockheed* forecloses.

Cunningham v. Cornell University, 604 U.S. 693, 700–02 (2025), which Hernandez invokes (at 25–26), does not change the analysis. It holds that once a plaintiff pleads a § 1106(a) transaction, the statutory exemptions become affirmative defenses the defendant must raise. It presupposes a prohibited transaction to exempt; it does not conjure one up. Where the conduct is an intra-plan reallocation that is neither a § 1106(a) "transaction" nor § 1106(b) self-dealing, *Cunningham*'s burdenshift never engages. Hernandez's other case, *Bugielski v. AT&T Services, Inc.*, 76 F.4th 894 (9th Cir. 2023), is likewise beside the point: it concerned a genuine arrangement with third-party service providers, not a plan's reshuffling of its own assets.

III. HERNANDEZ'S RULE WOULD HARM THE VERY WORKERS ERISA EXISTS TO PROTECT.

One added consideration should give the Court pause: Hernandez's rule would injure the very people ERISA was written to safeguard. Congress enacted ERISA "to ensure that employees would receive the benefits they had earned." *Conkright*, 559 U.S. at 516. But it pursued that goal through a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.* at 517 (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004)). Congress deliberately refused to build a system "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

This case is a template for thwarting that aim. Since 2023, dozens of materially identical suits have been filed against the fiduciaries of large defined-contribution plans, each alleging that the routine, plan-authorized use of forfeitures to offset employer contributions is a fiduciary breach. The vast majority of courts have dismissed them. *See* 1-ER-13–14 (collecting cases). Six such appeals are already pending before this Court. *See* Answering Br. 64 (Statement of Related Cases). More are pending in the Third and Fourth Circuits. *See Barragan v. Honeywell Int'l Inc.*, No. 25-2609 (3d Cir.); *Cain v. Siemens Corp.*, No. 25-2564 (3d Cir.); *Stana v. SAS Inst. Inc.*, No. 26-1305 (4th Cir.). The one court of appeals to rule so far affirmed a dismissal for want of Article III standing. *Matula v. Wells Fargo & Co.*, 175 F.4th 958, 962 (8th Cir. 2026). No court of appeals has yet addressed the theory on the merits, and this Court's decision can supply guidance the district courts sorely need.

And the pleading stage is where that guidance matters most. A motion to dismiss is an "important mechanism for weeding out meritless claims," *Fifth Third*, 573 U.S. at 425, and without it, the threat of discovery expenses "will push cost-conscious defendants to settle even anemic cases," *Twombly*, 550 U.S. at 559—a settlement pressure that ultimately lands on the plans and the workers, who both bear the cost.

That balance matters because "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed*, 517 U.S. at 887. Employers watch these cases. If this Court holds that routinely offsetting employer contributions with forfeitures exposes a sponsor to fiduciary liability and class-action discovery, then rational employers will act to avoid the risk—by removing the offset option, by cutting the match, or by declining to offer a plan at all. Again, each of those responses is a settlor decision that neither a fiduciary nor a participant may contest. And each leaves workers with less: a smaller match, a thinner benefit, or no plan to join.

That is the paradox at the heart of Hernandez's suit. ERISA's fiduciary duties exist to protect workers' retirement security. Hernandez has not lost a dollar he was owed. Yet he asks this Court to endanger the retirement plans of countless workers who *are* owed real benefits, to vindicate a litigation theory that would leave them *worse off*. ERISA's careful balance forbids that result, and the Court should not disturb it. Doing so would convert ERISA from a shield for the American worker into a vehicle that enriches the plaintiffs' bar.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because it contains 4,480 words. This brief also complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a) because it was prepared in 14-point font using a proportionally spaced typeface, Century Schoolbook.

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