No. 25-826

**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.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BENEFITS COUNCIL, AND THE ERISA INDUSTRY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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July 9, 2025

CORPORATE DISCLOSURE STATEMENT

Each of the *Amici Curiae* individually certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation has ten percent or greater ownership.

Dated: July 9, 2025

s/ Jaime A. Santos
Jaime A. Santos

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INTEREST OF THE AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

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

The American Benefits Council ("the Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's more than 430 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families.

Many of *Amici*'s members maintain, administer, and/or provide services to employee-benefit plans governed by the Employee Retirement Income Security Act

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

of 1974 ("ERISA"), covering virtually all Americans who work in the private sector and participate in employer-sponsored programs. *Amici* regularly participate as *amicus curiae* in this Court and in others on issues that affect benefit-plan design or administration. *See, e.g.*, *Cunningham v. Cornell Univ.*, 604 U.S. ___, 145 S. Ct. 1020 (2025); *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Anderson v. Intel Corp. Inv. Policy Comm.*, 137 F.4th 1015 (9th Cir. 2025); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018).

Amici file this brief to provide the Court with greater context and historical background regarding employers' treatment of forfeited employer contributions, and to explain why employers are not properly understood as fiduciaries with respect to their treatment of these forfeited contributions.

INTRODUCTION

Employees are always full vested in their own contributions to their defined-contribution retirement plans. ERISA requires no less. But the rule is different for employer contributions, which under ERISA can be made subject to a vesting schedule. When retirement plan participants leave their employment before their employer's retirement contributions fully vest, they forfeit their interest in those employer contributions. Under ERISA, these forfeited employer contributions cannot be refunded to the employer; they must stay within the plan and be used to provide plan benefits. Employers who sponsor retirement plans recognize this, and in anticipation often design their plans to permit those forfeited amounts to be used to satisfy their employer-contribution obligations to participants who remain in the retirement plan. In other words, employers write their plans to permit *forfeited* employer contributions of former employees to be used as employer contributions for other employees who remain in the plan.

Until a recent rash of lawsuits, this common practice was widely understood to be entirely permissible under ERISA, and the Internal Revenue Service ("IRS") likewise understood this practice to conform to the provisions of the Internal Revenue Code governing tax-advantaged retirement plans. For decades—predating ERISA's enactment—the Treasury Department has expressly allowed the use of forfeited contributions in these tax-advantaged plans to offset remaining employer contributions under the Tax Code, including Tax Code provisions that mirror ERISA's fiduciary provisions. Congress has acknowledged the same. It would be not just exceedingly odd but legally incoherent for ERISA to impose fiduciary liability for a practice that is allowed under the Tax Code's analogous regulations and does not result in participants receiving fewer benefits than they were promised. In reliance on this settled understanding, employers like HP have specified in plan documents that they have the flexibility to choose whether to use forfeitures to offset employer contributions or for other purposes, *e.g.*, to restore benefits for former employees who return to employment or to pay administrative expenses.

Importantly, when a plan containing this type of provision is submitted to the IRS for an advance determination of the plan's conformity to applicable provisions of the Tax Code, the IRS has for decades issued favorable "determination letters." Dozens of employers have now been singled out and sued, however, for following that settled practice.

Plaintiff invites this Court to disrupt the long-standing consensus regarding the use of forfeitures. Yet he offers no valid basis for upending widespread settled expectations and adopting his novel approach. To the contrary, Plaintiff's theory is fundamentally inconsistent with a foundational tenet of ERISA—that when an employer makes a decision about whether and on what terms to provide benefits, it does so in its capacity as a settlor *setting the terms* of a plan, not as a fiduciary *of the plan*. Apart from an employer's contractual obligations, as set out in plan documents, an employer is not obligated to provide any particular level of benefits through a plan. And here, there is no dispute that HP followed its plan documents to a T. The Court should reject Plaintiff's efforts to require HP to offer a purported benefit (free or highly subsidized plan expenses) that has no basis in either the text of the statute or the text of the plan documents.

ARGUMENT

I. The use of forfeitures to reduce employer contribution obligations has extensive historical support.

Decades of practice reflected in long-existing regulations, legislative history, and proposed clarifying regulations demonstrate that both Congress and the Treasury Department have long understood that retirement plans may operate *exactly* in the way that Plaintiff faults HP's Plan for operating here.

This extensive history is highly relevant. ERISA commands fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Despite Plaintiff's novel theory about how plans *should* operate, a long-established practice based on a settled understanding of the relevant regulatory and statutory context clearly bears on how a reasonable and prudent person would act "under the circumstances then prevailing." Thus, as the district court recognized, the settled understanding of Congress and the Treasury Department are at a minimum "persuasive authority in evaluating the plausibility of Plaintiff's claims." 1-ER-25. That settled understanding decisively undermines the viability of Plaintiff's theory of breach, for the reasons described in HP's answering brief. *See* HP Br. 27-38. But it also undermines Plaintiff's theory of fiduciary status. Long-established practice addressing how employers can structure plans only underscores that the relevant conduct at issue here is the conduct of a *settlor*, not the conduct of a *fiduciary*. And settlor conduct cannot be the basis of claims for violations of ERISA's fiduciary provisions.

A. The Treasury Department's long-standing view of forfeitures validates HP's approach here.

1. The Treasury Department's treatment of forfeitures informs the proper interpretation of ERISA.

The Treasury Department's understanding of how forfeitures may be used is highly probative because ERISA and the Tax Code are inextricably linked. Indeed, the "401(k)" in "401(k) plan" is a Tax Code designation, not an ERISA designation, and ERISA itself amended the Tax Code and serves as the source of many of the Tax Code's qualification requirements (through which certain plans qualify for tax-advantaged status). *See, e.g.*, Dep't of Labor, *History of EBSA and ERISA*, https://bit.ly/45UrBeC (last visited July 7, 2025) ("Title II of ERISA, which amended the Internal Revenue Code to parallel many of the Title I rules, is administered by the IRS."). The Department of Labor ("DOL") and the Treasury Department therefore coordinate in promulgating regulations and enforcing ERISA to the extent the statutes overlap. *See* 29 U.S.C. § 1204(a). The Treasury Department also has the statutory authority to apply particular provisions of ERISA, including its vesting provisions. *See* Reorg. Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790 (transferring relevant authority to the Treasury Secretary); 29 U.S.C.

§ 1202(c) (Treasury Department's authority over ERISA's participation, vesting, and funding standards). It likewise has non-exclusive enforcement authority with respect to prohibited transactions. *See* 26 U.S.C. § 4975.

The Tax Code and ERISA contain a number of parallel provisions, and courts appropriately look to the Treasury Department's interpretation of the Tax Code for guidance on the proper interpretation of the corollary provision in ERISA. In particular, the HP Inc. 401(k) Plan (the "Plan")—like all tax-advantaged retirement plans—must comply with numerous provisions in the Tax Code both to ensure the deductibility of employer contributions and the tax deferral of employer and pre-tax employee contributions and investment earnings. *See* 26 U.S.C. § 401. One of those provisions is 26 U.S.C. § 401(a)(2), which lists the requirement for a trust to be treated as a "qualified" retirement plan—including that assets in the trust not be "used for, or diverted to, purposes other than for the exclusive benefit of" the employees and beneficiaries for whom the trust is established. ERISA has an analogous provision, 29 U.S.C. § 1104(a)(1)(A), that directs fiduciaries to act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits to participants and defraying reasonable plan expenses. Whether conduct is consistent with the "exclusive benefit" language in § 401(a)(2) of the Tax Code is thus directly relevant to whether that same conduct is consistent with ERISA's analogous "exclusive purpose" provision. And critically, it is § 1104(a)(1)(A) that provides the basis for Plaintiff's claim for breach of the duty of loyalty. Opening Br. 9.

Plaintiff argues that the Treasury Department's interpretation merely "provide[s] guidance about how plans can qualify for favorable tax treatment, not about how fiduciaries can comply with their duties under ERISA." Opening Br. 36. That ignores how inextricably intertwined the two statutes are. In particular, Plaintiff fails to explain how there could be meaningful daylight between when assets in a trust are "used for … purposes other than for the exclusive benefit of" employees under the Tax Code and when fiduciaries are acting "for the exclusive purpose" of providing benefits to participants under ERISA. If the Treasury Department has concluded that using forfeitures to reduce employer contributions is consistent with acting for "the exclusive benefit of" employees, then it makes no sense for that same act to run afoul of ERISA's analogous "exclusive purpose" provision.

2. The Treasury Department has long understood that employers may use forfeitures to reduce employer contributions.

For more than 60 years (even before ERISA was enacted), Treasury Department regulations have expressly authorized using forfeitures to reduce employer contributions, at least for certain types of plans. Before ERISA's enactment, the Treasury Department promulgated a regulation *requiring* qualified pension plans (*i.e.*, defined-benefit plans) to contain provisions expressly providing that forfeitures "be used as soon as possible to reduce the employer's contributions under the plan." 26 C.F.R. § 1.401-7(a). Under this regulation, forfeitures in fact could *not* "be applied to increase the benefits any employee would otherwise receive under the plan." *Id.*; *see also* Rev. Rul. 67-68, 1967-1 C.B. 86, 1967 WL 15409, at *1 (Jan. 1, 1967). The Treasury Department later invoked this provision when explaining that defined-contribution plans—including stock-bonus plans like HP's Plan here—could satisfy the Tax Code's § 401(a) qualification provisions where they provide that "forfeitures are to be used to reduce the employer contributions that would otherwise be required under the plan." Rev. Rul. 71-313, 1971-2 C.B. 203, 1971 WL 26693, at *1 (Jan. 1, 1971). Critically, the § 401(a) qualification provisions include the "exclusive benefit" requirement that mirrors ERISA. *See supra*, pp. 7-8.

Informal guidance from both DOL and the Treasury Department has only bolstered that understanding over the past 50 years, repeatedly making clear that employers who sponsor defined-contribution plans may use forfeitures to reduce employer contributions. In 1979, after ERISA was enacted, DOL provided a set of opinions on a defined-contribution plan for which forfeitures were "applied to reduce future employer contributions." DOL Adv. Op. 79-56A, 1979 WL 7031, at *2 (Aug. 9, 1979). While addressing at length certain other aspects of the plan, DOL notably never suggested that the plan's use of forfeitures violated ERISA. *See id.*

The Treasury Department has been even more explicit. In 2010, the IRS explained to employers sponsoring defined-contribution plans that "forfeitures may be used to pay for a plan's administrative expenses and/or to reduce employer contributions." Dep't of the Treasury, Internal Rev. Serv., *Retirement News for Employers* 4-5, Publ'n 4278-B (May 2010), https://bit.ly/3Tp0lh0 ("*Retirement News for Employers*").[2] Similarly, the IRS's Internal Revenue Manual states that forfeitures in a profit-sharing plan may not "revert back to the plan sponsor," but rather "must be allocated to the remaining participants or used to reduce employer contributions that are otherwise required under the plan." *Forfeitures*, Internal Revenue Manual § 7.12.1.9 (Feb. 16, 2017), https://bit.ly/4lCikwm. It would entirely upend this understanding if this same conduct were suddenly held to violate ERISA.

B. Congress has likewise consistently recognized that forfeitures may and will be used to reduce employer contributions.

The history of the Tax Code demonstrates that Congress holds the same understanding as the Treasury Department. In 1986, Congress amended 26 U.S.C. § 401(a)(8)—which prohibits using forfeitures to "increase the benefits any

[2] While this publication cites 26 C.F.R. § 1.401-7(a), which governs pension plans, it does so in the context of addressing the treatment of forfeitures for defined-contribution plans. If anything, the publication underscores that the Treasury Department sees no distinction in the handling of forfeitures for defined-benefit plans versus defined-contribution plans.

employee would otherwise receive"—to clarify that this prohibition applies to defined-benefit plans. Pub. L. No. 99-514, § 1119(a), 100 Stat. 2085 (1986). In explaining the bill, however, the House Conference Report explained that Congress understood existing law to *already* permit defined-contribution plans to "reduce future employer contributions or to offset administrative expenses." H.R. Rep. No. 99-841, Vol. II at 442 (1986). As the Supreme Court has recognized, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). That principle is particularly forceful where Congress did not simply *silently* fail to revise the administrative interpretation, but rather echoed it in describing the state of then-existing law.

Most recently, the Treasury Department has proposed regulations to "clarify that," as described in the House Conference Report, "forfeitures arising in *any* defined contribution plan … may be used for one or more of the following purposes, as specified in the plan: (1) to pay plan administrative expenses, (2) to reduce employer contributions under the plan, or (3) to increase benefits in other participants' accounts in accordance with plan terms." 88 Fed. Reg. 12282, 12283 (Feb. 27, 2023) (emphasis added) (citing the House Conference Report). The purpose of this regulation was to clarify uses of forfeitures that would *not violate* the Tax Code's qualification provisions, including the ERISA-analogous "exclusive benefit" provision, 26 U.S.C. § 401(a)(2), which the Treasury Department referenced expressly. 88 Fed. Reg. at 12282.

C. Plaintiff's theory would flip longstanding practice on its head.

The consistent understanding of Congress and the Treasury Department, including the Treasury Department's proposed clarifying regulation, explicitly authorizes the very practice that Plaintiff challenges.[3] Accordingly, to accept Plaintiff's theory that ERISA's fiduciary provisions prohibit using forfeitures to reduce employer contributions would require this Court to conclude that the Treasury Department (which is vested with co-regulatory and enforcement authority over ERISA-governed retirement plans) has explicitly and continuously authorized a practice that violates ERISA. It would also require the Court to construe the "exclusive purpose" requirement in ERISA's fiduciary-breach provision (29 U.S.C. § 1104(a)(1)(A)) to have a different scope than the analogous "exclusive benefit"

[3] Plaintiff misses the point in objecting that "[n]either the proposed regulations nor the conference report has the force of law." Opening Br. 36. The existence of the proposed regulation to "clarify" long-existing law demonstrates the implausibility of Plaintiff's theory. *Cf. Plancarte Sauceda v. Garland*, 23 F.4th 824, 832 (9th Cir. 2022) (finding "a proposed regulation is 'entitled to respect' if it has the 'power to persuade,'" particularly where it "addresses the precise situation at issue"). The same is true for the Conference Report, which underscores that Plaintiff's novel theory is at odds with settled understanding on this issue.

requirement in the Tax Code (26 U.S.C. § 401(a)(2)).

The district court properly rejected Plaintiff's approach as implausible. 1-ER-30 (recognizing that Plaintiff's claim "would improperly extend ERISA beyond its bounds and would be contrary [to] the settled understanding of Congress and the Treasury Department regarding defined contribution plans like the one at issue in this case"). So, too, have the vast majority of district courts tasked with resolving the recent wave of forfeiture actions, likewise leading to grants of motions to dismiss. *See, e.g.*, *Madrigal v. Kaiser Found. Health Plan, Inc.*, No. 24-cv-5191, 2025 WL 1299002, at *4-7 (C.D. Cal. May 2, 2025) (explaining that the plaintiff's similar forfeiture theory "marks a significant departure from previously well-settled law"); *see also McWashington v. Nordstrom, Inc.*, No. 24-cv-1230, 2025 WL 1736765, at *12-16 (W.D. Wash. June 23, 2025); *Wright v. JPMorgan Chase & Co.*, No. 25-cv-525, 2025 WL 1683642, at *3-7 (C.D. Cal. June 13, 2025); *Bozzini v. Ferguson Enters. LLC*, No. 22-cv-5667, 2025 WL 1547617, at *2 (N.D. Cal. May 29, 2025); *Sievert v. Knight-Swift Transp. Holdings, Inc.*, No. 24-cv-2443, 2025 WL 1248922, at *4 (D. Ariz. Apr. 30, 2025); *Dimou v. Thermo Fisher Sci. Inc.*, No. 23-cv-1732, 2024 WL 4508450, at *8-11 (S.D. Cal. Sept. 19, 2024); *Barragan v. Honeywell Int'l Inc.*, No. 24-cv-4529, 2024 WL 5165330, at *4-7 (D.N.J. Dec. 19, 2024). This Court should do the same.

II. Plaintiff's fiduciary-breach claims fail as a matter of law for two independent reasons.

Even putting aside this incongruity, Plaintiff's claims fail as a matter of law out of the gate. First, Plaintiff's theory runs smack into ERISA § 514(d), 29 U.S.C. § 1144(d), which provides that ERISA cannot be interpreted to modify or invalidate other existing federal law—here, the Treasury Department regulations authorizing HP's approach to forfeitures. Second, Plaintiff has failed to allege that HP was acting in a fiduciary capacity with respect to its treatment of forfeitures. Thus, while *Amici* fully agree with the district court's conclusion that Plaintiff has failed to allege a plausible claim of breach, this brief focuses on the preceding threshold questions that would render the breach analysis unnecessary.[4]

A. Plaintiff's claims fail under ERISA § 514(d) because the conduct Plaintiff challenges is consistent with Treasury Regulations.

Under Plaintiff's theory, HP violated ERISA by doing precisely what the Treasury Department permits. In addition to making little sense historically, *see supra*, pp. 5-12, Plaintiff's theory cannot be reconciled with ERISA § 514(d), which states that "[n]othing" in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States … or any rule or

[4] The benefit of the grounds for affirmance advanced in this brief is that either ground would establish a bright-line rule that can be consistently and predictably applied, and would thus provide more certainty and clarity for lower courts, employers, and employees.

regulation issued under any such law." 29 U.S.C. § 1144(d). Under this provision, it is "'explicit that [ERISA] shall not be construed to invalidate or impair any federal regulation.'" *Martin v. Nat'l Bank of Alaska*, 828 F. Supp. 1427, 1433 (D. Alaska 1992) (quoting *First Nat'l Bank of Chi. v. Comptroller*, 956 F.2d 1360, 1368 (7th Cir. 1992)). Therefore, "[t]here can be no violation of ERISA" if a plan "compl[ies] with a valid regulation." *First Nat'l Bank of Chi.*, 956 F.2d at 1368.

Courts have repeatedly applied this principle to reject alleged ERISA violations. In *First National Bank of Chicago*, for example, the Seventh Circuit held that a defendant could not violate ERISA by complying with a regulation promulgated by the Office of the Comptroller of the Currency. *Id.* (citing 29 U.S.C. § 1144(d)). Likewise, while ERISA's anti-inurement rule might be interpreted to prohibit the return of contributions to a debtor's estate in certain circumstances, bankruptcy courts have nevertheless held that they can authorize such a return so long as it is permitted by the Bankruptcy Code. *See In re Pulaski Highway Express, Inc.*, 41 B.R. 305, 309 (Bankr. M.D. Tenn. 1984) (rejecting the argument that ERISA's anti-inurement rule "is an exception to the unambiguous language of" § 1144(d)). As one court explained in rejecting an anti-inurement challenge, "[t]he language of § 1144(d) could be no clearer: *nothing* in ERISA should be interpreted to impact other federal law." *Id.*

DOL has also repeatedly invoked § 514(d) when interpreting ERISA. For example, DOL has advised that, "pursuant to ERISA section 514(d)," plan trustees that comply with a section of the Tax Code concerning tax levies are "not … in violation of ERISA sections 403(c)(1) and 404(a)(1)." DOL Adv. Op. 79-90A, 1979 WL 7027, at *3 (Dec. 28, 1979). Section 404(a)(1) is, of course, ERISA's fiduciary-breach provision—the same one Plaintiffs invoke here. *See* 29 U.S.C. § 1104(a)(1).[5]

DOL has taken a similar approach with respect to the intersection of ERISA and the Securities Exchange Act of 1934. The Securities Exchange Act permits, but does not require, a variety of investment-related conduct. Specifically, it allows trustees or managers who exercise discretion with respect to an account (and are therefore fiduciaries with respect to that account) to enter into "soft dollar" arrangements through which they purchase goods or services with a portion of the brokerage commission paid for executing a transaction. *See* 15 U.S.C § 78bb(e). While these arrangements are hypothetically susceptible to challenge under ERISA's anti-inurement and prohibited transaction provisions, DOL has explained that these arrangements comply with ERISA so long as they comply with the Securities Exchange Act. *See* ERISA Technical Release No. 86-1 (1986) at 3-4.[6]

Applying these principles here, HP's treatment of forfeitures is protected by § 514(d). Forfeitures of non-vested employer contributions are governed by the Tax

[5] For a helpful ERISA/U.S. Code cross-reference guide, see https://bit.ly/4eubbf4.
[6] http://bit.ly/3GhiVER.

Code, in addition to ERISA. *See generally* 26 U.S.C. § 411; *see supra*, pp. 6-8. As discussed above, a Treasury Department regulation governing defined-benefit pension plans states 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); *see supra*, p. 9. Plaintiff's forfeiture theory—which is in no way cabined to defined-contribution plans—would abrogate this regulation by tying employers' hands and requiring them to use forfeitures to offset plan expenses. Moreover, the Treasury Department has consistently applied 26 C.F.R. § 1.401-7(a) in the context of defined-contribution and stock-bonus plans. *See supra*, pp. 8-9. In the exact context of this case, then, Plaintiff's theory would contravene the regulatory authority allowing forfeitures to be used to decrease employer contributions, in direct violation of § 514(d). *See First Nat'l Bank of Chi.*, 956 F.2d at 1368. Thus, the fundamental inconsistency between Treasury Department regulations and Plaintiff's theory renders Plaintiff's theory not just implausible but unlawful under § 514(d).

B. Plaintiff's claims fail for lack of relevant fiduciary status.

Plaintiff's theory is infirm for an entirely separate reason. At bottom, Plaintiff's complaint is that HP should have been required to contribute *more* to the Plan, and that plan participants should have been required to pay *less* in administrative expenses. But when a plan sponsor determines how to structure a plan—including the cost to both employer and employee—it does so in its capacity as a settlor, not a fiduciary. And a sponsor cannot be subject to fiduciary liability for a decision it did not make in a fiduciary capacity. Plaintiff's theory can be rejected on this basis alone. *See, e.g.*, *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1102 (9th Cir. 2004) (citing a series of cases in which the Supreme Court has "affirmed Rule 12(b)(6) dismissals of ERISA claims on the ground that the conduct of the defendant was not that of a 'fiduciary,' but rather a 'settlor'").

1. A plan's treatment of forfeited employer contributions is a non-fiduciary "plan design" decision.

ERISA does not require employers to offer a retirement plan, let alone to maximize pecuniary benefits for any plan they do offer. *Wright*, 360 F.3d at 1100. Employers therefore "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" employee benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). And "[w]hen employers undertake those actions, they do not act as fiduciaries," but rather "are analogous to the settlors of a trust." *Id.*

"This rule is rooted in the text of ERISA's definition of fiduciary," 29 U.S.C. § 1002(21)(A). *Id.* Because the statutory definition of a fiduciary extends only to "certain defined functions"—notably not including plan design—any plan design decisions fall outside ERISA's fiduciary obligations and cannot lead to fiduciary liability. *See id.*; *see also Siskind v. Sperry Ret. Pgm., Unisys*, 47 F.3d 498, 505 (1995) ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.") (alterations omitted).

Plan design decisions are decisions "regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Included within that category is the decision whether to cover plan expenses. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671 (7th Cir. 2011), *abrogated on other grounds by Hughes v. Nw. Univ.*, 595 U.S. 170, 176-77 (2022). As the Seventh Circuit has explained, employees cannot use fiduciary liability to force an employer "to contribute more to the Plan than it" did. *Id.* In other words, "ERISA does not create any fiduciary duty requiring employers to make" retirement plans "more valuable to participants." *Id.* Nor does ERISA "create an exclusive duty to maximize pecuniary benefits." *Wright*, 360 F.3d at 1100. Rather, "[w]hen deciding how much to contribute to a plan, employers may act in their own interests." *Loomis*, 658 F.3d at 671; *see also Coulter v. Morgan Stanley & Co., Inc.*, 753 F.3d 361, 367 (2d Cir. 2014) (explaining that "non-fiduciary duties generally include 'decisions relating to the timing and amount of contributions'").

An employer is not immune from liability involving all plan design decisions, but the basis of that liability must derive from the plan documents, and not from fiduciary status. Once an employer has decided to sponsor a plan, employees can "rel[y] on the face of written plan documents" to "protect contractually defined benefits." *U.S. Airways, Inc. v. McCutcheon*, 569 U.S. 88, 100-101 (2013) (identifying "ERISA's principal function" as the "protect[ion]" of contractual benefits); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). Put slightly differently, because ERISA does not guarantee a substantive right to any particular benefits, "ERISA does no more than protect the benefits which are due to an employee under a plan." *Wright*, 360 F.3d at 1100.

Applying these principles here, Plaintiff's claim has no legal basis. The HP Plan expressly states that forfeitures "may be used to reduce employer contributions, to restore benefits previously forfeited, to pay Plan expenses, or for any other permitted use." 2-ER-120 (Plan § 11(h)). As everyone agrees, HP complied with that provision, and likewise with the provision that Plan expenses shall be paid out of the Plan "pursuant to *directions of the Company*," *i.e.*, HP. 2-ER-138, 2-ER-145 (Plan §§ 17(b), 21(k)) (emphasis added). Plaintiff thus does not—and could not—argue that HP violated the terms of the Plan when it used forfeited contributions to reduce its remaining employer contributions. Rather, Plaintiff maintains that, notwithstanding the menu of options provided by the Plan, HP was *required* to select the option of using forfeited contributions to pay Plan expenses. Opening Br. 20-21. This theory is "a non-starter." *Loomis*, 658 F.3d at 671.

The treatment of forfeited contributions under the Plan is a classic settlor decision. Whether forfeited contributions are used to reduce employer contributions or to pay Plan expenses is a decision regarding how much an employer is obligated to contribute and how much employees owe in expenses—both squarely questions of "the form or structure of the Plan." *Hughes Aircraft*, 525 U.S. at 444. Plaintiff would presumably agree that he could not raise a cognizable claim that HP violated its fiduciary duty by declining to pay a specific percentage of administrative expenses, but his current theory seeks to accomplish precisely that: namely, an increase in the amount forfeited employer contributions offset administrative expenses. Similarly, Plaintiff would presumably agree that he could not raise a cognizable claim that HP violated its fiduciary duty by declining to make, on a discretionary basis, employer contributions that are not promised by the terms of the Plan—but, again, his current theory seeks to accomplish precisely that. Plaintiff should not be able to use forfeitures as an end-run to accomplish indirectly what he could not accomplish directly. *See Loomis*, 658 F.3d at 671 (rejecting a theory that would require the plan sponsor "to contribute more to the Plan than it does").

2. Plaintiff's approach to the Plan document undermines his own position.

According to Plaintiff, this would be a different case if the Plan had directed HP to use forfeitures only to offset employer contributions. But because HP included in the Plan "a choice among a menu of options for reallocating plan assets," it was required to select "the option that is best for participants." Opening Br. 29. In other words, HP could have treated forfeitures in *precisely the same way* if it had simply tweaked the plan document to eliminate flexibility—but, once it provided the Plan with *options* for allocating forfeitures, it was in fact limited to one option in particular. That makes no sense, and further reveals a fundamental flaw in Plaintiff's legal theory.

To start, this argument suggests that the problem Plaintiff identifies is not about the exercise of any *actual* fiduciary discretion but a quibble with how the Plan was written—in other words, that a change in one sentence could somehow flip the switch on fiduciary liability. But the writing of the plan document is yet another *settlor* function, not a fiduciary one. Indeed, the whole purpose of the settlor-fiduciary distinction is that an employer is *not* subject to fiduciary liability arising from plan design decisions if it adheres to the contractual benefits it promised to participants. *See supra*, pp. 18-21. It would eviscerate the settlor function if an employer could nonetheless be sued for following the terms of the plan it put into place.

Moreover, Plaintiff's argument is premised on the notion that the plan document, if written differently, could have displaced ERISA's fiduciary obligations—*i.e.*, that the fiduciary obligation to use forfeitures to pay administrative expenses applies only where the plan does not provide otherwise. But that is completely contrary to the position consistently being taken in many contexts by ERISA plaintiffs, who frequently point to the directive in 29 U.S.C. § 1104(a)(1)(D) that fiduciaries must discharge their fiduciary obligations "in accordance with" the plan document "insofar as" the plan document is "consistent with the provisions of this subchapter." *See also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) ("This provision makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary."). Indeed, Plaintiff argued that very point below. Dist. Ct. Dkt. No. 28, at 16-17 (citing *Dudenhoeffer* and arguing that "[b]y statute, Defendants had a fiduciary duty to" use forfeitures to defray participants' expenses and "cannot hide behind the Plan's terms" if they failed to use forfeitures in that way).

In short, if the decision of how to use forfeitures were actually a fiduciary decision (rather than a settlor one)—and if ERISA's fiduciary obligations *always* require funds to be used to increase participant benefits—then under Plaintiff's theory ERISA would *require* plan fiduciaries to disregard the plan document and *always* use forfeitures to pay administrative expenses in order to avoid committing a fiduciary breach. Accordingly, it makes no sense to suggest, as Plaintiff now attempts to do, that HP has a fiduciary obligation to use contributions in a particular way *but* a plan sponsor can effectively override that obligation by writing the plan document in a slightly different way.

Notably, there are many sound reasons *why* plan documents provide choices about how to use forfeitures—and none that suggest it is a *fiduciary* determination whether to use forfeitures to benefit employees. For one thing, retirement plans governed by the Tax Code (which most retirement plans are, *see supra*, pp. 6-8) have long understood that they are not permitted to keep unallocated forfeitures sitting in plans; instead, the Treasury Department instructs plans to use or allocate forfeitures "in the plan year incurred," or else they can lose their "qualified" status (*i.e.*, their eligibility for significant tax benefits). *Retirement News for Employers* 4; *see also* Rev. Rul. 80-155, 1980-1 C.B. 84, 1980 WL 130029, at *1 (June 16, 1980). At the same time, how best to use forfeitures can vary significantly from year to year in ways that cannot be predicted *ex ante*. Depending on how many employees leave in a given year before their benefits vest, what the current employer contribution levels are, when forfeitures arise, when employer contributions are made, and when administrative expenses are due, it may make more or less sense to use forfeitures to fund administrative expenses over employer contributions. Under Plaintiff's approach, however, a plan sponsor can use forfeitures to fund employer contributions *only* if it eliminates the option to use forfeitures to fund administrative expenses—meaning a plan sponsor would never be able to account for these factors when deciding how to use forfeitures. Instead, before each plan year begins, a sponsor would have to lock itself in to a particular approach that might in fact make little sense when it comes time to use forfeitures.

For another thing, a plan document providing a choice between using forfeitures to reduce employer contributions *or* to pay administrative expenses is not inherently a choice between one option that benefits the employer and another that benefits the employee. That is because, even in defined-contribution plans in which participants pay recordkeeping expenses, there are *many* administrative expenses often paid by the plan sponsor—including the costs of an independent auditor, legal counsel, and more. And at ERISA's enactment in 1974, when defined-benefit plans were the norm (and four years *before* Section 401(k) was even added to the Tax Code), most if not all administrative expenses were paid by the plan sponsor. Accordingly, a choice about whether to use forfeitures to pay expenses or reduce employer contributions need not have *anything* to do with reducing participant costs at all. Instead, it could simply implicate *which* bucket of employer-incurred plan-related expenses forfeitures are allocated to. While Plaintiff repeatedly attempts to tie his theory to what is in the best interests of the participant, using forfeited contributions to pay administrative expenses need not invariably benefit participants more than using forfeited contributions to reduce employer contributions. Rather, an employer selecting between using forfeitures either to offset remaining contributions or to pay plan administrative expenses might simply be choosing between two different options that each fulfill an employer's obligations—suggesting, again, that treatment of forfeitures is in fact not a fiduciary determination.

* * *

Clarity of fiduciary status is critical. Because significant obligations attach to fiduciary status, courts have not lightly imputed fiduciary status in a way that is inconsistent with an employer's reasonable expectations, even where those decisions impact (positively or negatively) plan participants. *E.g.*, *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639 (8th Cir. 2007); *In re Luna*, 406 F.3d 1192 (10th Cir. 2005). And that makes sense: an employer needs to be able to clearly and predictably understand when particular conduct triggers ERISA's fiduciary duties.

Plaintiff's theory turns that approach on its head. Plaintiff suggests that a decision that started as a settlor function (*i.e.*, how to use forfeited contributions) can nevertheless morph into a fiduciary function merely based on how the plan document is written. A decision that does not subject an employer to fiduciary liability one year might suddenly become a source of fiduciary liability the following year merely because the employer amended the plan documents. Fiduciary status should not be a moving target.

III. Plaintiff's claims, if accepted, will undermine ERISA's text and purpose and harm plan participants.

A. Plaintiff's approach cannot be squared with Congress's objectives in enacting ERISA.

Plaintiff repeatedly trumpets ERISA's fiduciary provisions—and in particular the "exclusive purpose" language in 29 U.S.C. § 1104(a)(1)(A)—as directing a ruling in his favor. But that provision requires fiduciaries to act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." Allocating forfeited employer contributions to participant accounts—*i.e.*, using forfeited employer contributions *to provide plan benefits*—is fully consonant with those obligations, and with the concept of acting "solely in the interest of the participants." *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442 (1999) (ERISA's "exclusive purpose" language "focuses exclusively on whether fund assets were used to pay pension benefits to plan participants"); *cf. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 22 (2004) ("The [anti-inurement] provision demands only that plan assets be held for supplying benefits to plan participants.").

Nothing in ERISA's directive that fiduciaries act to "defray[] reasonable expenses of administering the plan" compels a different conclusion. That provision requires that fiduciaries keep costs or expenses at a "reasonable" level; it does not require fiduciaries to ensure that participants have *no* costs, or that the *plan sponsor's* contributions shoulder the expenses of administering a plan. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (fiduciaries must "incur only costs that are reasonable in amount and appropriate") (quotations omitted); *Loomis*, 658 F.3d at 671 ("ERISA does not create any fiduciary duty requiring employers to make pension plans more valuable to participants" by paying plan expenses). A contrary conclusion would effectively read ERISA's "fiduciary duties of loyalty and prudence [to] create a benefit: the payment of [Plaintiff's] administrative costs." 1-ER-30. But "the Plan does not provide any such benefit," and nothing in ERISA does so either. *Id.* To the contrary, ERISA exists to protect the benefits promised under the Plan, not to create a substantive right to new benefits that were never promised. *See supra*, pp. 18-21. Plaintiff does not dispute that he received precisely the benefits he was promised. His failure to receive *additional* benefits is not a violation of ERISA.

Moreover, Plaintiff's theory undercuts the flexibility Congress afforded plan sponsors who offer retirement plans. As discussed above, ERISA does not impose any obligation on employers to offer a particular level of benefits, or even to offer benefits at all. *See Lockheed*, 517 U.S. at 887. Thus, an employee's entitlement to benefits is a "contractually defined" right that is protected by the "written plan documents." *U.S. Airways*, 569 U.S. at 100-101. Plaintiff's theory here, however, is that even if plan participants get every benefit and every penny they are promised by the plan documents, ERISA's fiduciary provisions require plans to be interpreted in a way that would entitle participants to *more* benefits than they have been promised—here, free (or highly subsidized) plan expenses. That makes no sense and is completely inconsistent with Congress's objective.

B. Plaintiff's theory harms both employers and employees.

Interpreting ERISA to give rise to fiduciary obligations that Congress and regulators have *never* understood to exist would disrupt the settled expectations of plan sponsors. It would impose "gotcha" liability on plan sponsors who simply incorporated Treasury regulations into their plan documents, simply because they did not use whatever magic words Plaintiff suggests could have enabled them to avoid a lawsuit. As the Supreme Court has explained, though, when enacting ERISA Congress knew that if it adopted a system that was too inflexible or "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Plaintiff's theory would have precisely that effect.

Nor will Plaintiff's theory redound to the benefit of employees. According to Plaintiff's theory, so long as a plan writes its plan document to dictate that forfeitures must be used to offset employer contributions, then there is no requirement they be used to offset administrative expenses. The result? Plan documents will simply be revised to remove the flexibility allowed by plans like HP's—the same flexibility that the Treasury Department has permitted for decades. *See supra*, pp. 6-10. Moreover, with no assurance that forfeited contributions could be used as specified in the plan document without giving rise to liability for a potential fiduciary breach (or, at minimum, to an expensive and time-consuming lawsuit), Plaintiff's theory would discourage employers from offering "match" contributions as incentives for remaining employed for a particular period of time.

* * *

At the end of the day, Plaintiff's theory has nothing to recommend it. It will not result in any meaningful benefit to employees, and it is inconsistent with ERISA, historical practice, and employers' settled expectations. The Court should reject this novel approach.

CONCLUSION

The judgment of the district court should be affirmed.

July 9, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 6,959 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32.1(c).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: July 9, 2025

s/ Jaime A. Santos
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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2025, I electronically filed the foregoing using the Court's CM/ECF system.

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