No. 18-1116

IN THE

Supreme Court of the United States

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, ET AL.,

Petitioners,

v.

CHRISTOPHER M. SULYMA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

JOHN J. BUCKLEY, JR.
DANIEL F. KATZ
VIDYA ATRE MIRMIRA
DAVID KURTZER-ELLENBOGEN
JULI ANN LUND
TANYA ABRAMS
JYOTI JINDAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9208

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

LEGISLATIVE MATERIALS

DICTIONARIES

OTHER AUTHORITIES

INTRODUCTION

Respondent Christopher Sulyma urges a construction of the phrase "had actual knowledge" in Section 1113(2) that is divorced from the context, purpose, and history of the statute. But it makes no sense to construe Section 1113(2) without considering ERISA's extensive mandatory disclosure framework. The very purpose of ERISA's disclosure regime is to confer knowledge of the disclosures' contents on plan participants to enable them to enforce their rights against plan fiduciaries. For purposes of Section 1113(2)'s three-year limitations period, then, a participant "ha[s] actual knowledge" of information that is in his possession when it is conveyed to him pursuant to ERISA's disclosure scheme—whether or not it can later be proven that he read the disclosures.

Sulyma's reading of Section 1113(2) is also impossible to square with the statute's history. As originally enacted, Section 1113 provided that the three-year limitations period would be triggered in two circumstances: when a plan participant had "actual knowledge" of the breach or when disclosures filed with the Department of Labor contained information sufficient to put the participant on notice of the breach. 29 U.S.C. § 1113(a)(2) (1976). If Sulyma were correct that "actual knowledge" means only subjective awareness, then the three-year limitations period would have been triggered under the original Section 1113 by the disclosure to the Department of Labor of facts showing a breach, *but not by the direct disclosure of the same facts to the participant.* Congress would never have enacted so nonsensical a provision. The only sensible way to construe the original provision, therefore, is that plan participants had actual knowledge of the contents of disclosures made to them,

and were charged with constructive knowledge of facts not disclosed to them directly, but to the Department of Labor. Congress's subsequent repeal of the constructive knowledge provision did not alter the original meaning of "actual knowledge," which Congress did not amend.

Sulyma and the government resist this sensible contextual construction of Section 1113(2), arguing that the plain meaning of "actual knowledge" invariably encompasses only subjective awareness, and therefore any form of imputed knowledge must be categorized as constructive knowledge. That is incorrect. Courts have long found willful blindness and other forms of imputed knowledge sufficient to satisfy statutory knowledge requirements, despite a person's *lack* of subjective awareness of the relevant facts, when the statutory context and history so dictated. Here ERISA's context and history leave no doubt that Congress intended mandatory disclosures to convey actual knowledge of the information they contain.

An ERISA plan participant's decision not to read disclosures provided directly to him should be understood for what it is: a deliberate decision to remain ignorant of information that is, in effect, in the palm of his hand. Sulyma's construction of Section 1113(2) would perversely reward plaintiffs who choose to defeat the knowledge-conferring objectives of the mandatory disclosures with a *longer* limitations period than that enjoyed by attentive participants. Sulyma's only response is to assert, without support, that participants have adequate incentive to read the disclosures, and that they can be expected to recall doing so in litigation years later. But common sense and *this very case* undermine that assertion, as Sulyma claims that he did not read or did not recall reading the disclosures in question.

Sulyma's construction of Section 1113(2) would subject employers and plan administrators to the six-year repose period as a matter of course—even when they have disclosed all information relevant to the plaintiff's claims. The burden of increased damages exposure will be severe. So will the litigation burdens: defendants will routinely be forced to litigate whether and when a plaintiff had subjective awareness of the alleged violation. To be sure, Sulyma's construction of "actual knowledge" should foreclose certification of class actions brought more than three years after plan disclosures of facts supporting a class-wide claim. But if courts nevertheless certify classes in such cases, Sulyma's construction of Section 1113(2) will produce intractable case-management issues and impose massive burdens on ERISA defendants. By contrast, construing Section 1113(2)'s three-year limitations period to begin running when a plan administrator has disclosed the relevant information to participants is fair to beneficiaries and provides plan administrators with clarity about the scope and extent of potential liability.

ARGUMENT

I. A PLAN PARTICIPANT HAS ACTUAL KNOWLEDGE OF INFORMATION THAT PLAN ADMINISTRATORS DISCLOSED TO HIM PURSUANT TO ERISA.

A. Section 1113(2)'s text, construed in light of ERISA's disclosure provisions, establishes that a plan participant has actual knowledge of the information contained in plan disclosures.

1. a. Sulyma urges a narrow construction of the phrase "had actual knowledge" in Section 1113(2) that

cannot be reconciled with ERISA's text, structure and history. It is a fundamental axiom of statutory construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted); *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015). Here, ERISA's mandatory disclosure framework provides indispensable context for interpreting Section 1113(2)'s "actual knowledge" requirement.

Congress included extensive disclosure requirements in ERISA in order to confer knowledge of vital plan information on employees to enable them to enforce their rights against plan fiduciaries. See H.R. Rep. No. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649; S. Rep. No. 93-127 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. Section 1113(2), in turn, regulates the time within which employees must bring suit, including suits that rest on disclosures required by ERISA.

ERISA's text establishes that Congress intended mandatory disclosures to confer "actual knowledge" of the information so disclosed. Fiduciaries have a "duty of disclosure" with respect to certain materials, 29 U.S.C. § 1021, and the resulting disclosures must be written to be "understood by the average plan participant," and must be "sufficiently accurate and comprehensive to reasonably *apprise* such participants * * * of their rights and obligations under the plan," *id.* § 1022(a) (emphasis added). To "disclose" is to "make known," and to "apprise" is to "impart knowledge." *Disclosure* & *Apprise*, Oxford English Dictionary (2d ed. 1989). ERISA's disclosure provisions thus require that the enumerated disclosures "apprise" plan participants—confer *knowledge*

on them—of the information the disclosures contain regarding "their rights and obligations under the plan." 29 U.S.C. § 1022(a). Given those requirements, the only sensible reading of the "had actual knowledge" language in Section 1113(2) is that a plan participant has actual knowledge of the facts made known to him by a plan administrator in the disclosures that ERISA requires.[1]

b. Sulyma acknowledges (Br. 32-36) that the disclosure provisions "might" inform the proper construction of the term "knowledge," but he contends that petitioners' construction accords no independent meaning to the modifier "actual." That is wrong. Petitioners' construction gives specific meaning to the word "actual": it distinguishes the required knowledge from the constructive knowledge provision that was included in the original Section 1113. Construed against that backdrop, *actual* knowledge is supplied by disclosures that are made directly to plan participants so that they actually possess it, while plan participants were charged with *constructive* knowledge, under the originally enacted version, only of disclosures filed with the Secretary of Labor. By including the modifier "actual," Congress made clear that plan participants were not charged with a general

---

[1] The United States objects (Br. 23-24) that the disclosure provisions are irrelevant because they appear in the part of ERISA that sets forth the disclosure requirements. But this Court has never imposed a textual-proximity limitation on the relevant statutory context. See, *e.g.*, *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (court must examine "both the specific context in which * * * language is used and the broader context of the statute as a whole") (citation omitted). What matters is that the disclosure provisions and Section 1113(2) share a common focus: the knowledge of plan participants as it relates to asserting their statutory rights.

"should-have-known" duty of inquiry. Apart from information actually provided directly to them, they were charged only with constructive knowledge of information contained in the specified Department of Labor filings.

That much is clear from the original version of Section 1113. As initially enacted, Section 1113 provided a three-year limitations period running from either the date on which the participant "had actual knowledge," or the date on which "a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter." 29 U.S.C. § 1113(a)(2) (1976). As respondent agrees (Br. 4), the latter prong was a *constructive* knowledge provision. By providing that a plan participant would be charged with knowledge of all reports filed with the Secretary—regardless of whether the participant actually had possession of that information—Congress indicated that for purposes of Section 1113, *constructive* knowledge arose from disclosures *not* in the participant's possession.

That in turn establishes how Congress understood the scope of the "actual knowledge" prong. If Congress had intended that mandatory plan disclosures provided directly to beneficiaries would give rise only to *constructive* knowledge, rather than actual knowledge, it surely would have included those disclosures in the original constructive knowledge provision along with the disclosures to the Department of Labor. But Congress did not do so. The only reasonable inference is that Congress drew a line of demarcation between mandatory disclosures that are not in participants' possession (which confer only constructive knowledge) and mandatory

plan disclosures that *are* in their possession (which confer actual knowledge). That focus on possession is reinforced by Section 1113(2)'s requirement that the participant "*ha[ve]* actual knowledge," which indicates that the participant must "be in possession of" knowledge of the facts, having received or acquired it. *Have*, Oxford English Dictionary (3d ed. 2015).

This interpretation of "had actual knowledge" in Section 1113(2) is necessary to avoid leaving an inexplicable gap between Section 1113's original two prongs. Under the constructive knowledge prong, a participant would be charged with knowledge of information disclosed in reports filed with the Secretary of Labor in Washington, D.C.—beyond the reach of the ordinary participant in pre-digital 1974. But under respondent's construction of the "actual knowledge" prong, the participant would lack actual knowledge of information in mandatory disclosures *provided directly to him*, so long as he chose not to read the documents—and he would enjoy a six-year limitations period. Respondent does not even attempt to explain why Congress would have established a stringent rule that shortens the limitations period based on filings made with the Secretary that participants were unlikely ever to see, while leaving the longer period in place when information was directly provided to participants but they chose not to read it.

Thus, the only fair reading of Section 1113 as originally enacted is that its "actual knowledge" prong encompassed knowledge conveyed by receipt of mandatory disclosures. Although Congress subsequently repealed the constructive knowledge prong for disclosures made to the Department of Labor, it did not alter the "actual knowledge" prong. That prong therefore retains its original scope. See *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139

S. Ct. 873, 881 (2019) (amendment of provision does not alter original meaning of unchanged related provision); *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC,* 137 S. Ct. 1514, 1520 (2017).

2. Sulyma and the government argue, however, that the statutory context and history must be disregarded in favor of a rigid conception of the plain meaning of "actual knowledge." Sulyma Br. 16-17; U.S. Br. 11-13. Invoking dictionary definitions and inapposite cases, Sulyma and the government contend that "actual knowledge" is satisfied only by purely subjective awareness of a particular fact, and that any construction of Section 1113(2) that is less than completely subjective is necessarily "a form of constructive knowledge." U.S. Br. 23. But that reductive argument fails to account for courts' longstanding recognition that, in appropriate contexts, an "actual knowledge" requirement can be satisfied even absent proof of subjective awareness. Petrs.' Opening Br. 22-24. Context is therefore critical, and the context here establishes that a participant "ha[s] actual knowledge" under Section 1113(2) of information conveyed to him through required disclosures.

a. Notably, the "actual knowledge" requirement in various civil and criminal enforcement schemes can be satisfied by willful blindness. This Court recognized in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754 (2011), that willful blindness is equivalent to actual knowledge: reviewing decades of English and American authorities, this Court observed that "persons who know enough to blind themselves to direct proof of critical facts *in effect have actual knowledge of those facts*." *Id*. at 766 (emphasis added). There, the Court accepted the defendant's argument that 35 U.S.C. § 271(b), which prohibits actively inducing patent infringement, requires

"actual knowledge" of the existence of a patent. *Id*. at 760 (describing defendant's argument); *id*. at 766 ("induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement"). The Court then held that evidence that a defendant was willfully blind to the existence of the patent would satisfy the knowledge requirement, despite the defendant's lack of subjective awareness of the patent. *Id*. at 766.

Sulyma and the government contend (Br. 26; U.S. Br. 21-22) that willful blindness is "not the same" as actual knowledge. But that simply demonstrates that the concept of actual knowledge can be broad enough to include imputed knowledge. *Global-Tech* is the latest in a long line of cases to hold that willful blindness should be treated as equivalent to actual knowledge—even though a willfully blind party lacks subjective awareness. See, *e.g.*, *RRW Legacy Mgmt. Grp., Inc.* v. *Walker*, 751 F. App'x 993, 996 (9th Cir. 2018) (state of mind that is the "equivalent of actual knowledge"); *Shacket* v. *Philko Aviation, Inc.*, 841 F.2d 166, 171 (7th Cir. 1988) (describing "the form of actual knowledge that consists of closing your eyes because you're afraid of what you would see if you opened them"); *United States* v. *One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 808 n.12 (3d Cir. 1994); *Hard Rock Cafe Licensing Corp.* v. *Concession Servs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992). In other words, the necessary knowledge can be *imputed* to a party who in fact lacks subjective awareness. See *United States* v. *Farrell*, 921 F.3d 116, 145 (4th Cir. 2019).

More broadly, courts have routinely construed "actual knowledge" contextually to encompass more than just subjective awareness. See, *e.g.*, *Breckenridge* v. *Farber,* 640 So. 2d 208, 211 (Fla. Dist. Ct. App. 1994) (receipt

of card containing an arbitration clause "created a means by which the broker had actual knowledge" of the clause, despite lack of subjective awareness; disavowing reliance on constructive knowledge). And various state cases apply the doctrine of "implied" actual knowledge. *Poffenberger* v. *Risser,* 431 A.2d 677, 680-681 (Md. 1981). Sulyma's attempts (Br. 29-32) to distinguish these decisions on their facts are irrelevant; the point is that courts have recognized that actual knowledge may encompass "awareness implied from knowledge of circumstances" where a lack of subjective awareness can be likened to "bad faith." *Id.* at 681; see also *Kugel* v. *Knuckles*, 69 S.W. 595, 596 (Mo. Ct. App. 1902) (factfinder may infer "actual knowledge" from possession of means of knowledge). The United States' attempt to dismiss (Br. 14) these decisions as "outliers" is equally unsuccessful. This implied knowledge is recognized as a form of "actual knowledge" in *Black's Law Dictionary*, and it has been recognized in numerous state cases. *Actual knowledge*, Black's Law Dictionary (11th ed. 2019); *Slachter* v. *Swanson*, 826 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 2001); *Black* v. *Pub. Serv. Elec. & Gas Co.*, 237 A.2d 495, 499 (N.J. Super. Ct. App. Div. 1968).

b. Respondent and the government are therefore wrong to argue that anything beyond subjective awareness is necessarily "constructive knowledge" that is categorically distinct from "actual knowledge." In Section 1113(2), "actual knowledge" encompasses more than just subjective awareness, just as it does in other contexts.

For the same reason, the government's argument (Br. 23) that petitioners' construction of Section 1113(2) necessarily imposes "a form of constructive knowledge" is misplaced. As the originally enacted version of Section

1113(2) demonstrates, Congress drew a different line between actual and constructive knowledge—one based on possession of the information. That line makes eminent sense in view of Congress's simultaneous creation of an extensive mandatory disclosure regime. Thus, a participant "ha[s] actual knowledge" of the contents of mandatory disclosures that were directly provided to him. Cf. *Cetel* v. *Kirway Fin. Grp.*, 460 F.3d 494, 512 (3d Cir. 2006) (holding that "possession of the material facts" constitutes actual knowledge) (internal quotation marks and citation omitted). At the same time, neither the originally enacted version of Section 1113(2) nor the current version of that provision imposes a constructive knowledge standard. Plan participants are not placed under any duty to investigate further to learn facts that are not already in their possession as a result of the disclosures.

Construed that way, Section 1113(2) is perfectly consistent with an accepted understanding of constructive knowledge—*i.e.*, knowledge that triggers a duty to seek out *additional* information not already in one's possession. See *Conmar Corp.* v. *Mitsui & Co.*, 858 F.2d 499, 502 (9th Cir. 1988) (constructive knowledge exists when a plaintiff "should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim"); cf. *ABN AMRO Mortg. Grp., Inc.* v. *Roush*, No. 04AP-457, 2005 WL 858182, at *7 ¶ 31 (Ohio Ct. App. 2005) (constructive knowledge or notice arises from instruments that are publicly filed, and actual notice is "given to a party directly"). And under that construction, a participant does not have actual knowledge "of the breach or violation," 29 U.S.C. § 1113(2), based on information in disclosures if the facts contained in those

disclosures (no matter how concerning) are not in themselves sufficient to alert the participant to the alleged violation. See Petrs.' Opening Br. 36-37.[2]

In all events, participants who decline to read the disclosures that ERISA requires are engaging in conduct that effectively amounts to willful blindness. Such participants blind themselves to facts that are *in their possession*. They are not charged with conducting any additional inquiry on the basis of the information provided to them. Sulyma fights the willful-blindness analogy, asserting (Br. 27-28) that willful blindness requires an active step to avoid knowledge. But where the participant need not investigate further because he is provided with the knowledge-conferring information, his decision

---

[2] Here, the court of appeals correctly held that all of the essential information upon which respondent's claims rest was disclosed to him. Pet. App. 16a. Sulyma's argument (Br. 35) that he did not actually receive the disclosures because they were provided by email is meritless. The regulations expressly permit electronic disclosures, rendering that method equivalent, for purposes of satisfying the disclosure requirements, to personal delivery. See 29 C.F.R. § 2520.104b-1(c)(1)(i)(A), (c)(1)(iii). The emails alerted Sulyma to "Important Information Regarding the Intel 401(k) Savings Plan," and instructed him where to find the documents online. J.A. 149. These mandatory disclosures informed Sulyma that his funds were invested in 30% "hedge funds and commodities"—the allegedly imprudent investment decision. J.A. 227, 236; Petrs.' Opening Br. 9-11.

Sulyma's suggestion that one of the emails was misleading because it stated that "[n]o action is required on your part" is equally wrong. Br. 28 n.3 (citing J.A. 152). That email stated that it contained important information, and simply clarified that no benefits election or other affirmative action was required. J.A. 152. In any event, Sulyma did not appeal the district court's dismissal of his failure-to-disclose claim. See Pet. App. 5a n.2. He may not resurrect that contention now.

not to read that information is tantamount to "deliberately clos[ing] his eyes to what would otherwise have been obvious to him." *United States* v. *Brooks*, 681 F.3d 678, 701 (5th Cir. 2012); *id*. at 702 (defendant's failure to read email containing reporting instructions constituted deliberate avoidance); *Brooks* Gov't C.A. Br., 2011 WL 4735105, at *143-*144; *Erhard* v. *Comm'r*, 87 F.3d 273, 275 (9th Cir. 1996) (drawing analogy to "willful blindness to the actions of the IRS" because "the least we can expect of taxpayers is that they open the mail they receive from the IRS").

c. Sulyma's and the government's remaining arguments lack merit.

First, Sulyma and the government argue (Sulyma Br. 21; U.S. Br. 16) that Congress's 1987 repeal of the constructive knowledge provision compels a reading of Section 1113(2) that equates "actual knowledge" with subjective awareness. But as demonstrated, see pp. 5-8, *supra*, the very narrowness of the now-repealed constructive knowledge provision establishes that Congress intended the phrase "actual knowledge" in the original version of Section 1113 to cover information provided to plan participants in required disclosures. When Congress repealed the constructive knowledge provision in 1987, it left the "actual knowledge" provision unchanged. So that provision continues to have the meaning it had when Congress first enacted it, and that meaning encompasses information conveyed in required disclosures.

Second, the government also ignores (Br. 16) the scope of the original constructive knowledge prong when it argues that petitioners' interpretation would reinstate that now-repealed provision. The constructive

knowledge provision charged participants with knowledge of not merely the contents of reports filed with the Secretary, but also of any facts that were reasonably ascertainable upon further inquiry. See *Brock* v. *TIC Int'l Corp.*, 785 F.2d 168, 172 (7th Cir. 1986). Under Section 1113(2)'s "actual knowledge" prong, by contrast, a participant has knowledge only of information disclosed, *i.e.*, made known by, mandatory disclosures; the provision does not establish that participants have knowledge of any facts outside the disclosures themselves.

Finally, the government contrasts Section 1113(2) with other, unrelated, ERISA limitations periods that run from the date on which the plaintiff "acquired or should have acquired actual knowledge of the existence of such cause of action." Br. 16 (citing 29 U.S.C. §§ 1303(e)(6), 1370(f)(2)(A); 1451(f)) (emphasis omitted). But those provisions were all enacted years *after* Section 1113(2), and they govern distinct situations, including claims by the Pension Benefit Guaranty Corporation. See Pub. L. No. 99-272, § 11014(a), (b)(1), 100 Stat. 82 (1986); Pub. L. No. 96-364, § 104, 94 Stat. 1208 (1980). These provisions therefore raise no inference about the proper construction of Section 1113(2).

B. The statutory structure and purpose confirm that Section 1113(2) should be construed to mean that a plan participant "ha[s] actual knowledge" of information conveyed to him in required disclosures.

1. a. Sulyma's construction of "had actual knowledge" is irreconcilable with Section 1113(2)'s two-tiered structure, as it would frequently render Section 1113(2)

a dead letter in the common circumstances presented here: a challenge to a plan's investment strategy.

Under Sulyma's construction, defeating a limitations defense at the pretrial stage will be a trivial task: all a plaintiff has to do to survive summary judgment is deny knowledge of material facts in the plan disclosures, or simply profess an inability to recall having read them. Sulyma calls (Br. 38-39) this concern "unfounded," arguing that plaintiffs will tell the truth under oath. But as any litigator knows, witnesses commonly claim not to know, or not to remember, a particular fact. That is no doubt why the district courts that have considered the issue have overwhelmingly rejected the argument that Section 1113(2) requires defendants to prove subjective awareness. See, *e.g.*, *Reeves* v. *Airlite Plastics, Co.*, No. 04-56, 2005 WL 2347242, at *5 (D. Neb. Sept. 26, 2005) ("A plaintiff can always disavow actual knowledge."); Petrs.' Opening Br. 29-33. Those courts have recognized that requiring proof of subjective awareness would render the operation of the three-year limitations period entirely dependent on what a plaintiff is willing to admit.[3]

The government replies (Br. 30-31) that fiduciaries will be able use objective evidence to prove at trial that the plaintiff "had actual knowledge." But the only objective evidence that will typically exist is the very evidence that the government deems insufficient: evidence

---

[3] Sulyma discounts the possibility that even participants who read disclosures may forget their contents by the time litigation arises, observing (Br. 32) that Section 1113(2) is triggered upon "the *earliest date* on which the plaintiff had actual knowledge." But Sulyma's argument highlights the fundamental difficulty with his purely subjective approach: if a plaintiff cannot recall reading a disclosure, how can a defendant prove he once did?

that the fiduciary provided, and the participant received, compliant disclosures. As this case demonstrates, the plaintiff can easily contravene objective evidence that he received the disclosures, no matter how compelling, simply by asserting not to have read or to remember reading them. The application of the three-year limitations period will therefore depend entirely on the uncertain outcome of credibility determinations at trial.

b. Sulyma and the government next contend that rendering the actual knowledge provision essentially inoperative does not contravene congressional intent, because Section 1113(2) contains a "backstop" six-year statute of repose. Sulyma Br. 36; U.S. Br. 30. But Congress intended *both* prongs of Section 1113 to operate independently, and to serve distinct purposes. While the six-year statute of repose "effect[s] a legislative judgment" that plan fiduciaries "should be free from liability after the legislatively determined period of time," *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 9 (2014) (internal quotation marks and citation omitted), the three-year limitations period permits plan administrators who fulfill their fiduciary disclosure obligations to enjoy greater repose and narrower exposure to liability. As this Court has observed, some statutes of limitations are designed to "achieve a broader system-related goal[.]" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). Section 1113(2) is one of them.

Moreover, Congress clearly did not consider the six-year "backstop" sufficient on its own to protect fiduciaries, because Congress originally enacted the unforgiving constructive knowledge provision alongside the actual knowledge provision. 29 U.S.C. § 1113(a)(2) (1976). Congress evidently intended the time for bringing suit

to be shortened considerably by a fiduciary's compliance with the disclosure requirements. Construing the actual knowledge provision so as to render it entirely dependent on a plaintiff's willingness to admit reading, or recalling having read, the disclosures is irreconcilable with that intent.

2. Respondent's interpretation of "had actual knowledge" is also irreconcilable with ERISA's robust disclosure framework. The very purpose of ERISA's disclosure regime is to *make information known* to participants by directly providing it in easily understood form—so that they have the knowledge necessary to enforce their rights. H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. at 4649. The required disclosures do not serve that purpose if participants decline to read them. Yet Sulyma's construction of Section 1113(2) would perversely reward participants who disregard plan disclosures with a longer limitations period than their counterparts who read them.

Sulyma's primary response is that participants have other "significant incentives" to read ERISA disclosures. Br. 37. Sulyma misses the point. No matter how a statutory disclosure regime is structured, some participants will be more attentive than others. The question, however, is whether Congress would design a limitations scheme that rewards those who ignore the disclosures Congress thought were fundamental to ERISA's enforcement regime. S. Rep. No. 93-127 (1974), 1974 U.S.C.C.A.N. at 4863. Sulyma's construction is impossible to reconcile with that legislative intent. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

Sulyma also argues (Br. 39) that petitioners' construction "does not find support in the policies of" the

disclosure regime because that regime "exists to benefit *participants*." But the benefit to plan participants is the *information* conveyed to them in the disclosures, which enables them to enforce their rights. It is entirely natural that Congress would also have imposed a concomitant obligation on participants to act with reasonable diligence in enforcing those rights.

II. A PURELY SUBJECTIVE RULE WOULD THWART ERISA'S CAREFUL BALANCE OF COMPETING POLICIES.

A. Sulyma's construction of Section 1113(2) will impose significant burdens on employers, particularly in the class-action context.

1. Section 1113(2)'s three-year limitations period plays a vital role in maintaining the balance "between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of [employee benefit] plans." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004) (internal citation omitted). Sulyma and the government discount Section 1113(2)'s importance, asserting that the six-year statute of repose provides plan fiduciaries with adequate protection. U.S. Br. 30. But if Congress thought that the six-year period alone would strike the appropriate balance, it would not also have enacted the three-year limitations period.

Moreover, Sulyma and the government ignore Section 1113(2)'s special relevance to defined-contribution plans. As 401(k) plans have become the primary retirement savings vehicle nationwide, plan administrators have faced a flood of fiduciary-breach suits based on second-guessing of investment strategies. Petrs.' Opening Br. 42-44. In this environment, the difference between

the potential liability and damages exposure based on a three-year limitations period and a six-year limitations period may be significant. The longer the limitations period, the longer plaintiffs can wait to see how funds perform and potentially second-guess investment strategies with the benefit of hindsight. That is contrary to Section 1113(2)'s evident purpose of encouraging participants who have relevant information to assert their rights earlier rather than later—*before* damages multiply. Properly construed, Section 1113(2) helps cabin that exposure, as the most common bases for fiduciary-breach claims—fund performance, administrative fees, and choice of assets—must be disclosed to participants. 29 C.F.R. § 2550.404a-5.

Under Sulyma's construction, participants who decline to read, or disavow reading, these disclosures are rewarded with a longer limitations period. If disclosures by plan administrators no longer limit the time within which to assert a claim, ERISA claims are certain to proliferate even more, accelerating the already burdensome surge in ERISA litigation. See George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?* 1 (Center for Retirement Research at Boston College 2018).[4]

Sulyma's only response (Br. 40-41) is that few ERISA class actions are filed between three and six years after the alleged violation, and the meaning of "had actual knowledge" accordingly has rarely been dispositive of timeliness. In fact, plaintiffs have frequently attempted to avoid the limitations period by claiming not to have read disclosures. See Petrs.' Opening Br. 33 n.2 (collecting cases). But until the Ninth Circuit's decision in this

[4] https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.

case, the consensus among the lower courts was that defendants need not prove that plaintiffs read plan disclosures to trigger the shortened limitations period. That consensus has surely deterred suits asserting claims older than three years—but such suits will just as surely become more prevalent should Sulyma prevail.

2. Sulyma's construction of Section 1113(2) would raise particularly acute issues in the class action context. A requirement that ERISA defendants prove subjective awareness in order to invoke the three-year limitations period would be virtually impossible to administer in a class action. The need for individualized timeliness determinations should preclude class certification in virtually every case. But if courts were to nevertheless certify classes in this context, then the timeliness defense would depend on onerous plaintiff-by-plaintiff adjudications of subjective awareness. Indeed, the government makes clear (Br. 26) just how burdensome this task will be, asserting that a plaintiff's "actual knowledge" will turn not only on whether he has read the disclosures, but whether, in light of the individual's unique education level and financial experience, he has "read [the disclosures] without fully understanding them." Faced with the near-impossibility of predicting the outcome of hundreds or thousands of individual adjudications—and the tremendous expense of litigating them—defendants may well be forced into abandoning meritorious statute-of-limitations defenses.

B. No other consideration justifies the increased burden on plan fiduciaries.

Although Sulyma complains (Br. 39) that petitioners' construction of Section 1113(2) is unduly fiduciary-friendly, Sulyma is unable to identify any unfairness

that would result from adopting that construction. That is not surprising. ERISA and its implementing regulations require that disclosures be drafted in clear language that actually apprises participants of the relevant information in understandable form. See, *e.g.*, 29 U.S.C. § 1022(a); 29 C.F.R. § 2520.102-2(a). To remain ignorant, a participant must make a conscious choice to disregard the information provided directly to him. It is hardly unfair to deny participants who choose that option a longer limitations period than more attentive participants. And to the extent that the mandatory disclosures do not themselves reveal all of the facts necessary to obtain "actual knowledge of a breach or violation," the plaintiff will be subject to Section 1113(2) only if the defendant establishes that the plaintiff is aware of additional facts beyond those disclosed.[5]

Nor can employers, as the government worries (Br. 25), use the disclosures as a "sword" to attempt to insulate themselves from liability. ERISA does not permit employers to draft "extensive and confusing" disclosures. *Ibid*. The statutory requirements that disclosures be understandable have real force, as violating them can itself constitute a breach of fiduciary duty. See, *e.g.*, *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936,

---

[5] Sulyma's *reductio ad absurdum* (Br. 3) of a participant lying "comatose in a hospital bed" does not advance his argument. The problem of a plaintiff who lacks capacity to understand her rights or bring suit is not unique to Section 1113(2). It is instead a concern in all limitations contexts, including where limitations periods—like ERISA's six-year statute of repose—are triggered by objective events. Time-bar rules generally address such issues by tolling the limitations period. *E.g.*, *Di Joseph* v. *Standard Ins. Co.*, 776 F. App'x 343, 348-349 (7th Cir. 2019).

945 (2016); *King* v. *Blue Cross & Blue Shield of Illinois*, 871 F.3d 730, 740-744 (9th Cir. 2017).

The government also asserts (Br. 27-29) that petitioners' construction of Section 1113(2) would impede the Labor Department's enforcement of ERISA by subjecting it to the shorter limitations period when relevant mandatory disclosures have been filed with the Secretary. That concern is significantly overstated. For one thing, petitioners' construction of Section 1113(2) *has* been the rule in the lower courts, and the government does not identify any adverse effects on its enforcement efforts. In addition, ERISA requires fiduciaries to provide the Labor Department with only a subset of the disclosures given to participants—primarily the plan's annual reports, which contain general financial information about the plan as a whole. 29 U.S.C. § 1021(b); *Fink* v. *Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 956 (D.C. Cir. 1985); Dep't of Labor, *Reporting and Disclosure Guide for Employee Benefit Plans* 20-21 (2017).[6] The Department does not, for instance, receive QDIA notices, 29 U.S.C. § 1104(c)(5)(B)(ii), which here revealed the investment allocation that Sulyma challenges. J.A. 236. In addition, because the Department prioritizes "major cases,"[7] it is unlikely to pursue matters whose underlying facts are entirely revealed in the annual reports provided to the Secretary. See, *e.g.*, *Scalia* v. *WPN Corp.*, No. CV 14-1494, 2019 WL 4748052, at *3 (W.D. Pa. Sept. 30, 2019). Rather, additional facts will be necessary to

---

[6] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf.

[7] https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement.

understand the potential violations, and thus the Department will not be subject to Section 1113(2).

Finally, Sulyma and the government overlook that both employers *and* employees benefit from a more stable and predictable construction of the limitations provision. The financial and administrative burdens that ERISA's disclosure requirements impose on plan administrators are "ultimately borne by the beneficiaries." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 150 (2001). This Court has accordingly been careful to maintain ERISA's balance of employee rights and fiduciary burdens, lest employers offset additional expenses by reducing wages or eliminating benefits. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983). Construing Section 1113(2) to allow plaintiffs to avoid Section 1113(2)'s three-year statute of limitations by choosing not to read (or claiming they do not remember reading) information disclosed to them would upset the balanced framework that Congress created in ERISA, ultimately to participants' detriment. This Court should hold that participants have actual knowledge under Section 1113(2) of information expressly conveyed to them, and within their possession, as a result of plan disclosures made pursuant to ERISA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN J. BUCKLEY, JR.
DANIEL F. KATZ
VIDYA ATRE MIRMIRA
DAVID KURTZER-ELLENBOGEN
JULI ANN LUND
TANYA ABRAMS
JYOTI JINDAL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, DC 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9208

Counsel for Petitioners

NOVEMBER 20, 2019