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

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974, known as ERISA, has a generally applicable six-year limitations period. 29 U.S.C. § 1113(1). That period applies unless the plaintiff had "actual knowledge of the breach or violation" more than three years before filing suit, in which case the suit is time-barred even if it was brought within the six-year period. *Id.* § 1113(2).

The question presented is whether ERISA's "actual knowledge" exception, as applied to a breach-of-fiduciary-duty claim alleging imprudent investments, requires the plaintiff "to have actual knowledge both that those investments occurred, and that they were imprudent," as the court of appeals held, Pet. App. 16a, or whether the exception is instead triggered by a plaintiff having only constructive knowledge that the "investments occurred."

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INTRODUCTION

The general limitations period for ERISA is six years. 29 U.S.C. § 1113(1). But there is an exception for when the plaintiff had "actual knowledge of the breach or violation" more than three years before filing suit. *Id.* § 1113(2).

The court of appeals in this case held that ERISA's "actual knowledge" exception—as applied to a breach-of-fiduciary-duty claim alleging imprudent investments—requires "actual knowledge both that those investments occurred, and that they were imprudent." Pet. App. 16a. The court also held that "actual knowledge" means actual, not constructive, knowledge. Applying these holdings, the court concluded that there is a factual dispute in this case as to whether the plaintiff had actual knowledge both that the investments occurred *and* that they were imprudent.

Ignoring half of that conclusion, the petitioners seek certiorari on the question whether ERISA "bars suit where all of the relevant information was disclosed to the plaintiff by the defendant more than three years" prior. But this case does not present that question: all relevant information was *not* disclosed. As the court below held, the exception requires knowledge that the investments were imprudent, and the petitioners' disclosures did not convey this information. That independent holding is outcome-dispositive, case-specific, and correct. The petitioners do not contend otherwise.

With the key factual premise removed, the petitioners' case for certiorari collapses. Even assuming that merely receiving information on how to access a document could somehow be said to constitute "actual knowledge" of the document's contents, as one circuit has mistakenly held, that would not change the judgment below. If this Court were inclined to review that infrequently occurring question, it should at least wait for a case in which the answer actually matters.

STATEMENT

A. Statutory background

For over 30 years, ERISA has included a specific statute of limitations governing breach-of-fiduciary-duty claims. But whereas most statutes of limitations run from the time a claim accrues, ERISA's provision is different. It establishes a general cutoff of six years (except in cases of "fraud or concealment") from the date of the last act constituting the breach or violation, while providing a shorter limitations period for cases where the plaintiff had "actual knowledge of the breach or violation" more than three years before bringing suit. 29 U.S.C. §§1113(1), (2). That narrow category of cases is time-barred regardless of whether the general six-year limitations period is met. Other ERISA limitations provisions, by contrast, do not demand as much. *See, e.g.*, *id.* § 1303(e) (starting the clock from "the earliest date on which the corporation acquired or *should have acquired* actual knowledge of the existence of such cause of action."); *id.* § 1370(f)(2)(A) (same).

Congress did not always insist on "actual knowledge of the breach or violation" to cut short the six-year period. When Congress first enacted section 1113(2) in 1976, it was like most other ERISA limitations provisions, and had both a constructive-knowledge and actual-knowledge trigger. It allowed the three-year period to begin running either when a plaintiff had "actual knowledge of the breach or violation" or when a plaintiff "could reasonably be expected to have obtained knowledge" of such breach or violation from reports filed with the Secretary of Labor. *See Martin v. Consultants*

& Adm'rs, Inc., 966 F.2d 1078, 1084, 1085 n.6 (7th Cir. 1992) (quoting removed statutory language). But in 1987, Congress amended the provision to eliminate the constructive-knowledge provision. Thus, for the last 32 years, actual knowledge has been necessary.

B. Factual background

The petitioners' imprudent investments. This case involves the petitioners' 401(k) plan and retirement plan. Both are ERISA defined-contribution plans, "meaning that participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015). As for the 401(k) plan, the default investment is a target-date portfolio (or TDP), which is tailored to the participant's expected retirement date. CA9 ER-81. As for the retirement plan, it is designed so that the vast majority of participants could invest only in the so-called "diversified fund." CA9 ER-118. The TDPs and diversified fund are the two funds at issue here.

After the financial crisis of 2008, the petitioners managed these two funds very differently than their peers. Whereas most managers of such funds devote only a sliver of the portfolio (if any) to investments like hedge funds and private equity, the petitioners took a different tack. From 2011 to 2015, they increased hedge-fund investments in TDPs by 1,300%. CA9 ER-59–60. Over a similar period, they increased hedge-fund and private-equity investments in the diversified fund more than tenfold. CA9 ER-86. The petitioners did so even though, "since 1998, the effective return to hedge-fund clients has only been 2.1% a year, half the return they could have achieved by investing in boring old Treasury bills." CA9 ER-108.

As a result of the increases, hedge-fund and private-equity investments made up a disproportionately large percentage of the assets in these funds. In 2014, for example, "the Intel 2030 TDP had approximately 21% of assets allocated to hedge funds and 5% to commodities." CA9 ER-89. By comparison, the 2030 target-date funds from eight leading investment firms allocated an average of 0% to hedge funds and 2.9% to commodities. *Id.* The diversified fund held an even greater portion of its assets in such investments—nearly 37% by 2013. CA9 ER-86.

Exactly how the petitioners reached these outlier decisions is not yet clear. Nor is it clear how much consideration the petitioners gave to other ways of managing plan assets. What is clear from the complaint, however, is that the petitioners' decision to adopt a hedge-fund-heavy allocation model diverged widely from prevailing practices and caused the participants to pay more in fees for subpar performance, resulting in a significant loss of investment income. CA9 ER-90–92.

What the plaintiff knew. Christopher Sulyma worked at Intel from 2010 to 2012. CA9 ER-673. As a recent graduate, he had virtually no investing experience: He did not know what a hedge fund was and had never heard of private equity. *Id.*

After joining Intel, he was automatically enrolled in its retirement plan, where he was required to invest in the diversified fund, and in the 401(k) plan. For his 401(k), the petitioners said that the default TDP was the way to go because financial experts would "invest, monitor, and rebalance my investments so [he wouldn't] have to." CA9 ER-652, 668. Having little financial expertise, he chose to keep the default and was placed into the TDP 2045. CA9 ER-63.

Sulyma received account statements by mail. They informed him that 26% of his diversified fund and 21% of his TDP were invested in "short-term/other" investments. *See, e.g.*, CA9 ER-118, 600. The statements said that these investments "add stability to [the] portfolio" and "include certificates of deposit (CDs), Treasury Bills and Money Market Instruments." CA9 ER-558. They omitted any mention hedge funds, private equity, or commodities. *Id.*

The petitioners instead put those details in documents posted online. CA9 ER-289–368. Although the paper statements told participants that they could go online to access unspecified additional information, *see, e.g.*, CA9 ER-554, the petitioners did not directly provide any of these documents to participants.

Sulyma did not see those documents, and he testified that he would not have understood the information they conveyed even if he had seen them. CA9 ER-484; ER-673. It wasn't until 2015—when news reports shed light on the petitioners' investing and he consulted with financial experts—that he learned facts indicating that the petitioners had potentially breached their fiduciary duties by imprudently investing his retirement assets. CA9 ER-673–74. He still does not know how the allocation decisions were made, or whether the petitioners considered other investment options.

C. Procedural background

District court proceedings. In 2015, Sulyma filed this case alleging a breach of fiduciary duty. ERISA imposes "a duty of care with respect to the management of existing trust funds, along with liability for breach of that duty, upon plan fiduciaries" who administer plan assets.

See Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996). These duties are embodied in ERISA's codification of a "prudent man standard of care." *See* 29 U.S.C. § 1104(a). Under this standard, fiduciaries must act "solely in the interest of the participants and beneficiaries," and exercise "the care, skill, prudence, and diligence under the circumstances" of a "prudent man." *Id.* §§ 1104(a)(1), 1104(a)(1)(B).

The complaint alleges that plan fiduciaries breached their duties in several ways: *First*, they imprudently placed a large portion of plan assets into costly and high-risk hedge-fund and private-equity investments, and did so without properly considering the risks. *Second*, the fiduciaries adopted asset-allocation models that radically departed from prevailing standards. *Third*, the fiduciaries failed to adequately disclose the imprudent investment strategy to participants.

The complaint was filed within ERISA's general six-year limitations period. Yet the petitioners moved to dismiss the claims as untimely under the actual-knowledge exception, contending that Sulyma had "actual knowledge of the breach" more than three years before filing suit. That is so, they claimed, because a "variety" of materials had "revealed" in "the aggregate" the "allocation levels" of the plans' investment in hedge funds and private equities to Sulyma as early as 2011. Dist. Ct. ECF No. 122, at 1–2.

The district court converted the motion to dismiss into a motion for summary judgment and ordered discovery on the actual-knowledge question. After discovery, the court adopted the petitioners' theory and held that the claims were time-barred. It determined that there were no disputes of fact that Sulyma had "actual knowledge of the breach"—even though he "had little experience with financial issues" and "didn't know what 'hedge funds,' 'alternative investments,' and 'private equity' were," and even though his quarterly plan statements said "nothing about investments in private equity or hedge funds." CA9 ER-7–9.

Appeal. In a unanimous opinion by Judge Wallace, the Ninth Circuit reversed. It held that the statutory text—"actual knowledge of the breach or violation"—requires the plaintiff to be "actually aware of the facts constituting the breach." Pet App. 13a. This has two components. First, the phrase "knowledge of the breach or violation" means that the plaintiff must have "sufficient knowledge to be alerted to the particular claim," so the "exact knowledge required" will "vary depending on the plaintiff's claim." Pet App. 12a–13a. For a breach case, the plaintiff must be "aware of the nature of the alleged breach." Pet. App. 13a. Second, the phrase "actual knowledge" means that "the plaintiff must have *actual* knowledge, rather than constructive knowledge." *Id.* Putting these together, the court held that the petitioners "must show that there is no dispute of material fact that [Sulyma] was actually aware that [the petitioners] acted imprudently." Pet. App. 13a–14a.

The court of appeals then applied this rule to the facts and held that the petitioners had not made the necessary showing. Although Sulyma had enough information "available to him to know about the allegedly imprudent investments" three years before bringing suit, "that is insufficient." Pet. App. 16a. The court elaborated: "Because Sulyma brought [an imprudent-investment claim], he was required to have actual knowledge both that those investments occurred, and that they were imprudent." *Id.* Evidence in the record showed that he had neither, so the court reversed the grant of summary judgment for the petitioners.

REASONS FOR DENYING THE PETITION

I. The petitioners' question is not presented because they did not disclose "all of the information relevant" to the breach-of-fiduciary-duty claim.

The most fundamental problem with the petition is that its question is not actually presented. The petitioners ask this Court to grant certiorari to decide whether ERISA's actual-knowledge exception "bars suit where all of the information relevant to an alleged violation was disclosed to the plaintiff more than three years before the plaintiff filed the complaint." Pet. 2. The premise of that question is that "all of the relevant information was disclosed to the plaintiff by the defendant." Pet. i.

That premise is not satisfied here. The court of appeals squarely held that, when a plaintiff asserts a claim for breach of fiduciary duty based on imprudent investments, the "relevant" information is twofold: the plaintiff must know (1) "that those investments occurred," and (2) "that they were imprudent." Pet. App. 16a. Here, the court agreed that the petitioners' disclosures provided information that "the allegedly imprudent investments" were made. *Id.* But "that is insufficient," the court explained, because it is only one half of what is necessary. "Because Sulyma brought a claim under section 1104, he was required to have actual knowledge both that those investments occurred, *and* that they were imprudent." *Id.* (emphasis added). At most, the disclosures may have provided some or "all of the relevant information" about the former, but not the latter.

In their petition, the petitioners do not take issue with any of this reasoning, either as a legal matter or as a factual matter. On the law, the petitioners do not challenge the court's holding that Sulyma "was required to have actual knowledge both that those investments occurred, and that they were imprudent." *Id.* Nor do they contend that this holding conflicts with any decision from any court, or otherwise presents a cert-worthy issue in any respect. Any objection to this rule of law has therefore been waived.

On the facts, the petitioners make no attempt to show that they provided Sulyma with all the necessary information to put him on notice that the investments were imprudent. They try to convey the impression that they did so, but only cite a paragraph from their disclosures saying why the petitioners believed the investments were *prudent*. Pet. 7 (citing Pet. App. 38a). This paragraph mentions, in general terms, "the fund's reduced market exposure," and contains a vague reference to the higher costs associated with "actively run strategies." Pet. App. 38a. But those non-specific assertions are not the facts constituting the breach here. Far from it: The alleged breach is not simply having a fund with reduced market exposure or actively managed investments in some general sense. It is having a fund in which the fiduciaries adopted allocation models that were radically out of step with prevailing practice; invested heavily in costly, high-risk, and historically weak hedge-fund and private-equity investments; and did so without properly considering the alternatives.

The petitioners' disclosures failed to provide information about any of these important details: not the specific allocation models of peer funds or the prevailing investment strategies; not the risks and historical returns of hedge funds; and not the process by which the petitioners made these decisions, or the alternatives they may have considered.

In short, these disclosures do not contain anywhere near all the relevant information—"the facts constituting the breach." Pet App. 13a. So the only way the petitioners' question would be presented here is if this Court were to first confront (and then disagree with) that highly factbound determination. But the petitioners provide nothing in their petition that would allow the Court to reach such a conclusion. This case is thus anything but an "optimal vehicle" for resolving the question presented. Pet. 11.

II. The circuit split the petitioners identify is shallow and this case would be a poor vehicle to resolve it.

The petitioners claim (at 11) that this case implicates a circuit split on a frequently arising question. They are wrong on both points. The split the petitioners identify is not implicated here because its resolution will have no impact on the outcome of this appeal. And the split is shallow and concerns a question that affects very few cases.

A. The petitioners identify a split between two circuits: the court below and the Sixth Circuit in *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564 (6th Cir. 2010). *Brown* involved an ERISA claim based on a fiduciary's failure to sell stock before "it became virtually worthless when the company filed for bankruptcy." *Id.* at 566. The Sixth Circuit held that the claim was time-barred because "the Plaintiffs [did] not dispute that," three years before filing suit, "they were aware of [the] bankruptcy filing and that their investment in [the stock] was virtually worthless," and that "someone had the power to take steps to protect their Plan investments." *Id.* at 570–71. Then, as additional support for this holding, the court went on to note that "at least some" plaintiffs were given instructions on how to access certain disclosures that clearly provided this information. *Id.* at 571. In four sentences of dicta, the court explained why it thought that "being given instructions on how to access" documents means having actual knowledge of their contents. *Id.* It cited two district-court decisions as the authority for this view—one of them unpublished; the other relegating the issue to a footnote. This analysis, however, was not necessary to the court's holding, which was that *all* the plaintiffs' claims, not just "some" of them, were time-barred regardless. *Id.*

The petitioners' assertion of a circuit split is thus based entirely on these four sentences of dicta and the fact that the court below disagreed with them. *See* Pet. App. 14a. The petitioners say that this disagreement is implicated here because *Brown*'s reasoning "would have led to the opposite result in this case." Pet. 12. It would not have. Under that reasoning, as the petitioners rightly point out, "defendants can satisfy the actual-knowledge requirement by establishing that a participant is provided with, or specifically directed to, documents disclosing all the material facts relevant to his claim." *Id.* But again, the petitioners did *not* give Sulyma access to documents "disclosing *all* the material facts relevant to his claim." So the disagreement with *Brown*'s dicta, though real, is not outcome-determinative in this case (nor was it outcome-determinative in *Brown*, for that matter). Even if the court of appeals had embraced *Brown*'s mystifying conclusion that "being given instructions on how to access" documents necessarily confers actual knowledge of their contents, it would have still reached the same conclusion.[1]

B. In addition to the split not being implicated here, it is also shallow and involves an issue that has not proven to be especially important. The petitioners do not cite a single appellate decision in which the issue actually mattered. They identify only two circuit-court decisions that have decided this issue in the 43 years that the actual-knowledge exception has been in effect: this case and *Brown*. And in neither did the issue even affect the outcome. As for the handful of unpublished district-court decisions cited by the petitioners (at 16), as well as the published decision affirmed on different grounds on appeal, they just serve to make the point: the issue affects an exceedingly small number of cases. And if that were to change for some reason going forward, and another circuit (at long last) were to decide the question in a case in which it actually matters, this Court will have an opportunity to step in at that point and resolve the split.

III. The decision below is correct—actual knowledge means actual, not constructive, knowledge.

Finally, the decision below is correct. The court held that "section 1113 means what it says: to trigger the

[1] The petitioners claim (at 15) that the split is presented because the court of appeals "conceded that *Brown* would have come out the other way under the rule it was adopting." That is incorrect. The court conceded that the hypothetical "plaintiff described in *Brown*" would "hav[e] constructive knowledge only," not the actual plaintiff in *Brown*. Pet. App. 14a. Regardless, the relevant question for vehicle purposes is not whether *Brown* would have come out the other way on the Ninth Circuit's rule; it is whether *this case* would have come out differently on the Sixth Circuit's rule. As already explained, it would not have.

three-year limitations period, a plaintiff must have 'actual knowledge of the breach or violation.'" Pet. App. 15a. The court further held that, "for a plaintiff to have sufficient knowledge to be alerted to his or her claim, the plaintiff must have *actual* knowledge, rather than constructive knowledge." *Id.* at 13a. These holdings are undeniably correct, and the petitioners tacitly concede as much.

The court also correctly held that "the phrase 'actual knowledge' means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff." *Id.* It is this holding that the petitioners claim forms the basis of the circuit split and ask this Court to review. But the petitioners' argument for why this holding is incorrect has no basis in the statutory text, which the petitioners make no effort to analyze, nor in the ordinary meaning of actual knowledge. "Actual" means "existing in fact," not by operation of law. *See Black's Law Dictionary* 40 (9th ed. 2009). So, for example, if someone receives a book as a present and does not read it, they do not have "actual knowledge" of what the book is about. Nor do they have actual knowledge if they are instead told how to locate the book in the stacks of the public library and they don't do so. And if they receive an email with a link to an article that they don't open, no one would say that they have "actual knowledge" of the article's contents because they received the email. Yet that is the petitioners' position in this case.

The petitioners make two arguments in support of this position, neither of which is persuasive. First, they contend (at 19) that imputing knowledge that is not actually possessed is a permissible form of "implied actual knowledge"—a term that has never appeared in a federal appellate decision (at least not one on Westlaw). But the statute doesn't use those words, and there is no reason to think that Congress intended to incorporate such an oxymoronic concept when it enacted the statute in 1976. Indeed, the only case the petitioners cite in which the concept was discussed is a state-court decision from 1981. Moreover, saying that someone has knowledge of something merely because they have access to it is just another way of saying that they should be *construed* as having knowledge as a matter of law—in other words, constructive knowledge. *See Black's Law Dictionary*, at 950 (defining constructive knowledge as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person"). And that is exactly the formulation that the petitioners use, saying (at 17, 19) that actual knowledge should be "[c]onstru[ed]." Needless to say, that is a contradiction in terms; actual knowledge doesn't need to be construed.

Second, the petitioners make a policy argument, claiming that "[c]onstruing actual knowledge in this manner" would achieve the right "balance." Pet. 19–20. But that is a question for Congress. And Congress knows well how to impose a constructive-knowledge requirement because it had one in place until 1987—and then removed it.

For what it is worth, however, the petitioners' policy arguments are misplaced. They claim that, by following the statute's plain language, the decision below will "discourage[]" employees "from timely reviewing the disclosures provided by the plan, knowing that doing so will insulate them from a limitations defense." Pet. 20. That is absurd. The six-year limitations period applies regardless of whether the plaintiff had actual knowledge.

No rational person will "refus[e] to read plan documents" about their retirement investments solely in the hopes that, three to six years later, they can try to figure out whether the investments were imprudent and sue if so. And if Congress is troubled by that implausible scenario, it can do the opposite of what it has done in the past: switch from requiring actual knowledge to allowing constructive knowledge. Until then, the standard is actual knowledge, and the court of appeals correctly applied it. This Court's intervention is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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