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

BRIEF FOR THE PETITIONERS

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

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

Counsel for Petitioners

QUESTION PRESENTED

Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, 29 U.S.C. 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit where all of the relevant information was disclosed to the plaintiff by the defendants in statutorily mandated disclosures more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

PARTIES TO THE PROCEEDING

Petitioners named in the operative complaint are the Intel Corporation Investment Policy Committee; the Finance Committee of the Intel Corporation Board of Directors; the Intel Retirement Plans Administrative Committee; Intel 401(k) Savings Plan; Intel Retirement Contribution Plan; Charlene Barshefsky; Terra Castaldi; Susan L. Decker; Ronald D. Dickel; John J. Donahoe; Tiffany Doon Silva; Christopher Geczy; Tami Graham; Reed E. Hundt; Ravi Jacob; Cary Klafter; Stuart Odell; Nanci S. Palmintere; James D. Plummer; David S. Pottruck; Arvind Sodhani; Richard Taylor; and Frank D. Yeary.

Respondent is Christopher M. Sulyma.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.3d 1069, and reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-18a. The opinion of the district court is unreported, and is reprinted at Pet. App. 19a-49a.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2018. This Court granted certiorari on June 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1113 of Title 29 of the United States Code provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*., regulates employee retirement plans such as 401(k) and other defined contribution plans. The statute protects plan participants and beneficiaries by establishing standards of conduct for plan fiduciaries, and by providing participants with rights of action for breaches of fiduciary duties. To ensure that participants are "armed with enough information to enforce their own rights," S. Rep. No. 93-127 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4863, ERISA imposes rigorous disclosure obligations on plan administrators. At the same time, Congress carefully calibrated ERISA's remedial scheme to strike a balance between protecting plan participants and avoiding undue burdens on plan administrators and employers. See *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010). One important aspect of that balance is ERISA's statute of limitations, which provides in relevant part that plan participants must bring suit within three years of the date on which they "had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).

The question presented in this case is whether Section 1113(2) bars suit where the information that a plaintiff claims shows a breach of fiduciary duty under ERISA was disclosed to the plaintiff, in accordance with ERISA's mandatory requirements, more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or does not recall reading the information provided to him. The court of appeals held that under those circumstances, the plaintiff could de-

feat a defense based on Section 1113(2)'s statute of limitations. That construction disregards the cardinal rule that statutory text must be read not in isolation but in context, in light of the structure and purposes of the statutory scheme. Specifically, the phrase "had actual knowledge" in Section 1113(2) must be construed in light of ERISA's disclosure provisions, which require plan administrators to "disclose"—to *confer knowledge of*—critical plan information to plan participants, and to ensure that they actually have that knowledge in their possession. When read in its proper context, Section 1113(2)'s actual knowledge requirement is satisfied when a plaintiff receives mandatory disclosures that apprise the plaintiff of the facts that form the basis of his claim.

The Ninth Circuit's contrary reading of the provision flies in the face of the policies animating ERISA's disclosure regime and its limitations provision. Rather than cabining a plan administrator's potential liability when the administrator has disclosed all relevant information to plan participants, the Ninth Circuit's construction *rewards* participants who choose to ignore the very disclosures that are intended to enable participants to enforce their rights. By permitting plaintiffs to evade the three-year limitations period unless the plan administrator can disprove their denials that they read (or remember) plan disclosures, the Ninth Circuit's rule will foreclose summary judgment on ERISA statute-of-limitations defenses, place plan administrators at an unfair disadvantage in trying to prove a statute-of-limitations defense at trial, and severely complicate the litigation of ERISA cases (and ERISA class actions in particular). Congress could not possibly have intended such a result.

STATEMENT

1. a. ERISA governs employee welfare and retirement plans, including defined contribution plans like 401(k) plans. Such plans "permit[] participants to direct the investment of their contributions in accordance with specified procedures and requirements." *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250-251 (2008). Although ERISA does not require employers to provide employee benefit plans, the statute protects employee interests in any plan that an employer chooses to offer. See *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). It does so by, among other things, imposing various fiduciary duties on plan administrators, including a duty of care to invest trust funds prudently. See 29 U.S.C. §§ 1104, 1101-1114. In establishing these standards and providing for their enforcement, Congress was careful to moderate the burdens imposed on employers in order to strike a balance "between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright*, 559 U.S. at 517 (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004)). ERISA is thus a "complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens* v. *Hewitt Assocs*., 508 U.S. 248, 262 (1993).

ERISA contemplates that plan participants and beneficiaries will enforce the fiduciary duties set forth in the statute. 29 U.S.C. § 1132 (vesting a private right of action in any "participant or beneficiary"); see also *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108, (1989) ("ERISA provides a panoply of remedial devices

for participants and beneficiaries of benefit plans.") (internal quotation marks and citation omitted). ERISA establishes a private right of action for breach of fiduciary duty and imposes personal liability and other sanctions in the event of breach. 29 U.S.C. §§ 1131-1145.

Actions brought to challenge a fiduciary's alleged breach or other violation of ERISA are governed by the limitations periods set forth in Section 1113. Section 1113(1) establishes a six-year statute of repose running from "the last action which constituted a part of the breach or violation," absent fraud or concealment. 29 U.S.C. § 1113(1). Section 1113(2) shortens the limitations period to three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id.* § 1113(2).

b. In enacting ERISA, Congress recognized that the statutory enforcement scheme would be effective only if individual participants and beneficiaries were "armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general." S. Rep. No. 93-127 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. To enable participants to "police their plans" effectively, *ibid.*, ERISA requires that plan fiduciaries disclose to participants and beneficiaries extensive information about the plan and its performance. 29 U.S.C. §§ 1021-1031. ERISA further delegates to the Secretary of Labor the authority to establish additional disclosure requirements, and to regulate the format and contents of disclosures and the means by which they are made to plan participants. *Id.* §§ 1135, 1029(c).

As relevant here, ERISA and its implementing regulations obligate plan fiduciaries to furnish the following disclosures:

– *Summary Plan Descriptions*. ERISA requires plan administrators to furnish a "summary plan description" within 90 days of a beneficiary's enrollment in an ERISA-compliant retirement plan. 29 U.S.C. § 1024(b)(1)(A). A summary plan description "communicate[s] to beneficiaries the essential information about the plan" in a shortened form that is easy to understand. *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). The statute requires that summary plan descriptions contain certain information, 29 U.S.C. § 1022(b), and that they "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan," *id.* § 1022(a). As this Court has explained, the "fundamental purpose" of summary plan descriptions is "clear, simple communication" to plan participants. *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 437-438 (2011).

– *Qualified Default Investment Alternative (QDIA) Notices*. For defined contribution plans in which participants may select their own plan investments, such as 401(k) plans, ERISA obligates plan administrators to provide a QDIA Notice to enrollees. 29 U.S.C. § 1104(c)(5)(B)(ii). QDIA Notices explain how the participant's account will be invested in the absence of an affirmative election, and must include "a description of the investment objectives, risk and return characteristics (if applicable), and fees and expenses attendant to the investment alternative." See 29 C.F.R. § 2550.404c-5(c)(3), (d)(3). Like summary plan descriptions, QDIA

notices must be "sufficiently accurate and comprehensive to apprise the employee of [his] rights and obligations," and must be "written in a manner calculated to be understood by the average employee." 26 U.S.C. § 401(k)(12)(D).

–*Annual Disclosures*. The Department of Labor has promulgated regulations supplementing the disclosure requirements pertaining to 401(k) and other participant-directed individual retirement plans. See 29 C.F.R. § 2550.404a-5. Plan administrators must provide participants with periodic "Annual Disclosures," containing information about the past performance of the investments, as well as "an explanation of any fees and expenses" charged in connection with plan investments. *Id.* § 2550.404a-5(c)-(d). The information contained in the disclosures must be "written in a manner calculated to be understood by the average plan participant." *Id.* § 2550.404a-5(e). Once again, Annual Disclosures are designed to provide plan participants with "complete, but concise and user-friendly, information about their plan investment alternatives" to enable them to make informed decisions and protect their rights. Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,915 (Oct. 20, 2010).

c. The Department of Labor has also promulgated general regulations establishing standards to ensure that disclosures actually convey the required information and are actually received and understood by participants. All disclosures must be drafted in clear and comprehensible language. See, *e.g.*, 29 C.F.R. § 2520.102-2(a) (directing plan administrators to "tak[e] into account such factors as the level of comprehension and education of typical participants in the plan and the

complexity of the terms of the plan" in drafting disclosures). In addition, the Department has authorized plan administrators to make disclosures through electronic means such as email and plan websites, provided that "appropriate and necessary measures" are taken to ensure that the means of electronic transmission "[r]esults in actual receipt of transmitted information" and "apprises the individual of the significance" of the electronically transmitted document. *Id.* § 2520.104b-1(c)(1)(i)(A), (c)(1)(iii).

2. a. Respondent Christopher Sulyma began working at Intel Corporation ("Intel") in 2010 after earning a doctorate in experimental physics. During the two years he spent at Intel, Sulyma participated in two retirement plans, both governed by ERISA and sponsored by Intel: the Retirement Contribution Plan and the 401(k) Savings Plan.

Sulyma's Retirement Contribution Plan account was funded by discretionary contributions from Intel that were invested in a single investment fund, the Intel Global Diversified Fund. Sulyma's 401(k) Savings Plan was funded by his personal contributions, which were invested in a plan of his choice—the Intel Target Date Fund 2045.

The funds available in each plan were managed by the Intel Investment Policy Committee. The funds in which Sulyma invested included holdings in hedge funds and private equity—so-called "alternative investments." In the aftermath of the 2008 financial crisis, the Investment Policy Committee selected that allocation as an alternative to the typical equity-heavy allocation of 401(k) plans to increase diversification and reduce vola-

tility. Because they were actively managed, the alternative investments came with higher fees. And, as would be expected of funds intended to dampen volatility compared to funds composed principally of equities, when equity markets surged after the financial crisis, the funds' returns, although positive, were lower than those of equity-heavy funds. Pet. App. 3a-4a.

b. In disclosures mandated by ERISA and its implementing regulations, Intel plan administrators "disclosed these investment decisions to Sulyma," specifying both the fact of the allocation to alternative investments and the strategy behind that decision. *Ibid*. These disclosures were made primarily by emails directed to individual participants, in a manner that was calculated to ensure actual receipt, in accordance with Labor Department regulations. Generally speaking, Intel plan participants received emails that alerted them to required disclosures and directed them to click on a link to the documents in question. Participants could then review these disclosures and other information about their investments on a website called "NetBenefits." Sulyma created a NetBenefits account within a week of joining Intel, and he logged onto the NetBenefits website repeatedly in his first month at the company. During his brief tenure at Intel, Sulyma logged onto NetBenefits 68 times and visited more than 1,000 different pages on the site. Joint Appendix ("J.A.") 258-276.

The mandatory disclosures that informed Sulyma of the investment allocation and strategy included:

– *Summary Plan Descriptions*. The 2012 Summary Plan Description disclosed that both the Global Diversified Fund that Sulyma invested in through his Retirement Contribution Plan and the Target Date Fund that

Sulyma invested in through his 401(k) contained alternative investments, such as hedge funds and private equity. The Summary Plan Description explained that the Global Diversified Fund comprised "domestic and international equity, global bond and short-term investments, hedge funds, private equity, and real assets (e.g. commodities, real estate & natural resource-focused private equity)." J.A. 227. It further explained that the Target Date Funds included a "broadly diversified mix" of assets, including "investments not typically available to individual investors, such as hedge funds and commodities." *Ibid.* The Summary Plan Description also directed participants to fund fact sheets (which served the same purpose as a prospectus for a publicly traded fund) on the NetBenefits website for more information. *Ibid*.

– *QDIA Notices*. In November 2011, Sulyma and other participants received an email entitled "Important Information Regarding the Intel 401(k) Savings Plan." J.A. 149. The email explained that information regarding Sulyma's Target Date Fund investment was available on NetBenefits, and it provided a link to the Intel 401(k) Savings Plan Annual QDIA Notice and instructions on how to access it. *Ibid.* The section of the QDIA Notice discussing the fund in which Sulyma was invested—Target Date 2045—disclosed the specific expense ratio and target allocation for the fund: "The target asset allocation for this fund is 10% bond funds and short-term investments, 60% equity funds, 25% hedge funds, and 5% commodities." J.A. 236. Like the Summary Plan Description, the QDIA Notice told participants that they could find more information about specific funds in the fund fact sheets on NetBenefits. *Ibid*.

– *Annual Disclosures*. In mid-2012, Sulyma received emails bearing the subject line "Important Plan Information" and containing links to the Annual Disclosures for the Retirement Contribution Plan and 401(k) Savings Plan. J.A. 154, 156. For the Global Diversified Fund, the Annual Disclosure stated the precise annual gross expense ratio (0.900%), and also stated the fund's specific return over one-year, five-year, and ten-year periods. J.A. 243. The Annual Disclosure also compared these yields to a similar benchmark fund. *Ibid.* The Annual Disclosure for the 401(k) Savings Plan showed similar data for the Target Date 2045 Fund in which Sulyma was invested. J.A. 251. Both Annual Disclosures directed plan participants to visit NetBenefits for more information about each plan's investment options. J.A. 242, 250.

c. Beyond the disclosures required by ERISA and its implementing regulations, Intel's plan administrators provided Sulyma, through NetBenefits, with detailed quarterly fact sheets containing information about the investment strategy, expenses, performance, and operations of the two funds in which he was invested:

– *Target Date 2045 Fund fact sheets*. The fact sheets for the Target Date 2045 Fund illustrated the investment allocation in a color chart at the top of the page, graphically summarizing both how the fund's capital was divided between conventional and alternative investments and how the allocation would change over time as participants approached their 2045 target retirement dates. J.A. 280.

The Target Date 2045 Fund fact sheets also concisely described the fund's investment strategy. For example, the June 2011 fact sheet explained that the fund's

"hedge fund and commodity investments" were designed to "provide diversification benefits and reduce investment risk by investing in assets whose returns are less correlated to equity markets." J.A. 280; see also J.A. 287. The fact sheets also disclosed the principal disadvantages of that strategy, including potential underperformance in periods when equity markets were rising. The March 2010 fact sheet—the most recent one available when Sulyma first logged onto NetBenefits in mid-2010—explained that the fund's exposure to hedge funds was "the culprit in the recent relative underperformance," because the fund's lower allocation to equities meant that it benefited less from a year-long stock rally than did competing funds. J.A. 277. The fact sheets further disclosed that the fund's employment of "actively run strategies" such as "dynamic hedge funds" would "mean higher expense ratios." J.A. 280; see also J.A. 307.

– *Global Diversified Fund fact sheets*. Each of the fact sheets for the Global Diversified Fund during the period when Sulyma participated in the Retirement Contribution Plan similarly used visually striking color charts to disclose the fund's allocation to hedge funds and other alternative investments. See, *e.g.*, J.A. 318, 323.

The Global Diversified Fund fact sheets also explained the advantages and disadvantages of the fund's investment in alternative assets. While the fund's allocation strategy gave individual investors access to assets uncorrelated with the equity markets, J.A. 313, "the fund's reduced market exposure [was] bound to serve as a drag when markets are experiencing rapid run-ups." J.A. 321.

3. a. In October 2015, more than three years after the relevant information about his retirement investments was disclosed to him, Sulyma filed a putative class action against petitioners—the two retirement plans, as well as certain committees and individuals that played a role in administering the plans—for breaching various fiduciary duties under Section 404(a) of ERISA, 29 U.S.C. § 1104(a). Pet. App. 4a.

The gravamen of Sulyma's complaint was that the plan administrators for the Global Diversified Fund and Target Date Funds imprudently overinvested in "alternative investments" such as hedge funds and private equity, and failed to disclose relevant facts about those allocations to plan beneficiaries. J.A. 113-116 ¶¶ 238–247, 119-121 ¶¶ 257-262. Sulyma alleged that the plan administrators' excessive allocation to alternative investments caused the plans to suffer losses, via both the payment of excessive fees and underperformance relative to more prudently allocated funds. *Ibid.*; Pet. App. 21a.

b. Petitioners moved to dismiss Sulyma's complaint on the grounds that it failed to state a claim and that the claims were time-barred by Section 1113(2) of Title 29, which provides that the plaintiff must file suit within three years of the date on which he "had actual knowledge of the breach or violation." The district court converted the motion into a motion for summary judgment and ordered supplemental discovery on the limitations issue.

In his deposition, Sulyma testified that he frequently visited the NetBenefits site, J.A. 173, and that plan disclosure documents for both the ERISA plans in which he participated were available on NetBenefits, J.A. 183. When asked whether he had reviewed particular plan

disclosures, however, Sulyma repeatedly testified that he did not "think [he] did." J.A. 182-183; see also J.A. 174, 175, 193. Sulyma acknowledged that he received emails containing links to the QDIA Notice and the Annual Disclosures for the 401(k) Savings Plan and Retirement Contribution Plan, but he testified that he could not "specifically remember" clicking on the links in the email to obtain the documents. J.A. 193-195. Sulyma also testified that he "probably" opted not to read certain documents on NetBenefits, including the Summary Plan Description, although he did not deny that such documents were available for him to read. J.A. 197.

The district court granted petitioners' motion for summary judgment, holding that Sulyma "had actual knowledge" of the facts underlying his ERISA claims more than three years before filing suit. Pet. App. 48a. The district court concluded that Sulyma's imprudence allegations rested on two pieces of information: (1) that plan fiduciaries had decided to invest the funds' assets in alternative investments, such as hedge funds and private equity; and (2) that they had allocated between 25 percent and 40 percent of the funds' capital to such investments. *Id.* at 33a. The district court further found that Sulyma had actual knowledge of these facts because they were specifically disclosed to Sulyma in the plan disclosures, including information about both "plan asset allocation" and an "overview of the logic behind [the] investment strategy." *Id.* at 34a.

Specifically, the court found that all the particular facts necessary to inform Sulyma of the basis for his claims were contained in the Summary Plan Descriptions, the QDIA Notice, and the fund fact sheets. *Id.* at 34a–39a. The district court emphasized that Sulyma

did not dispute that he had received the relevant disclosures. *Id.* at 34a–35a. Nor did Sulyma dispute that the mandatory disclosures directed him to review the fund fact sheets that also described the funds' allocations and investment strategies. *Id.* at 35a–36a, 40a. The court therefore concluded that Sulyma had actual knowledge of the facts underlying his claim. *Id.* at 40a-41a.[1]

c. The court of appeals reversed. Pet. App. 1a-18a.

At the outset, the court observed that "ERISA does not define 'knowledge' or 'actual knowledge.'" *Id.* at 6a. After canvassing its precedents, the court held that for purposes of a fiduciary-breach claim, the plaintiff must be aware of the fiduciary's challenged action or transaction, as well as facts suggesting that "those acts were imprudent." *Id*. at 12a. The court acknowledged that between 2010 and 2012 petitioners had disclosed to Sulyma "the mix of investments that Sulyma claims was imprudent, along with the costs and benefits of such an approach." *Id*. at 16a. Accordingly, the court stated, "[w]e agree that [petitioners'] evidence demonstrates that Sulyma had sufficient information available to him to know about the allegedly imprudent investments before October 29, 2012," more than three years before Sulyma filed suit. *Ibid*.

The court of appeals nevertheless concluded that petitioners' disclosure of adequate information, and

[1] Sulyma also alleged that certain plan disclosures did not comply with ERISA's implementing regulations. The district court rejected Sulyma's construction of the relevant regulations and granted summary judgment to petitioners on that ground. See Pet. App. 45a & n.11. Sulyma did not appeal that determination, and the judgment on those counts is final. See *id.* at 5a n.2.

Sulyma's receipt of it, was "insufficient" to bar respondent's claim at the summary judgment stage because Sulyma had testified in his deposition that he did not read, or did not remember reading, the disclosures provided to him. *Id*. at 16a-17a. That testimony, the court held, was sufficient to create a disputed issue of fact as to whether Sulyma had actual knowledge.

The court of appeals viewed that construction as necessary to avoid applying a constructive knowledge standard. *Id*. at 14a. The court of appeals took the view that, because receiving materials directly from a plan fiduciary can suffice to establish that the plan participant had *constructive* knowledge, the receipt of such materials must be insufficient to establish that he had *actual* knowledge within the meaning of Section 1113(2). *Id.* at 14a. Accordingly, the court of appeals adopted a purely subjective construction of "actual knowledge," holding that unless the undisputed record established that a participant specifically reviewed the provided materials and became "actually aware" of the disclosed information, the limitations defense must be adjudicated at trial. *Id.* at 13a. The court acknowledged, but declined to adopt, the Sixth Circuit's rule that plan participants' "failure to read the documents" provided by the plan "will not shield them from having actual knowledge of the documents' terms." *Id.* at 14a (quoting *Brown* v. *Owens Corning Investment Review Committee*, 622 F.3d 564, 571 (6th Cir. 2010)). The court therefore reversed the grant of summary judgment on the relevant counts and remanded to the district court for further proceedings. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

The court of appeals held that a plaintiff who has received plan disclosures that include the very facts on which his fiduciary-breach claim is based nevertheless lacks "actual knowledge" of those facts unless the defendant can prove that the plaintiff actually read the plan disclosures. That construction cannot be reconciled with ERISA's text and structure, the purposes of ERISA's extensive disclosure requirements, and Congress's evident intent that individuals who possess knowledge of a potential claim should be required to file within three years. Properly construed, Section 1113(2) does not require a defendant to prove that the plaintiff actually read or remembers the information contained in mandatory disclosures that the plaintiff received pursuant to ERISA. Rather, a plaintiff "ha[s] actual knowledge" of information that has been disclosed to him in the manner that ERISA contemplates.

I. Section 1113(2) provides that the three-year limitations period runs from the date on which the plaintiff "had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). That language must be construed together with ERISA's disclosure provisions, which are expressly intended to provide plan participants with knowledge of the facts necessary to enable them to invoke ERISA's rights of action. The disclosure requirements provide that specific information must be "disclosed"—that is, made *known* to—participants, and that participants must actually receive that information. See *Firestone Tire*, 489 U.S. at 118 (disclosure provisions "ensur[e] that 'the individual participant *knows* exactly where he stands with respect to the plan'" (emphasis

added) (quoting H.R. Rep. No. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4693 ("House of Representatives Report")). Construed in that light, Section 1113(2) contemplates that a participant "ha[s] actual knowledge" when he has possession of particular information because he has received it through plan disclosures, in the manner that ERISA and its implementing regulations require. To invoke the three-year limitations period, then, a defendant must prove that the plaintiff received the disclosures, but not that the plaintiff read and subjectively absorbed and remembered them.

That construction best effectuates Section 1113's two-tiered structure. Congress's provision of a six-year statute of repose, paired with a three-year limitations period when the plaintiff has actual knowledge, reflects Congress's expectation that plaintiffs will sue within three years when they have information suggesting a breach. But under the Ninth Circuit's construction, a plaintiff faced with a limitations defense will be able to create a factual issue with respect to knowledge simply by claiming not to have read (or not to remember reading) the disclosures. As a practical matter, summary judgment on Section 1113(2) grounds will be unavailable, and at trial, defendants will be hard-pressed to prove the subjective contents of the plaintiff's mind. Defendants will be left subject to the six-year statute of repose in most cases.

The Ninth Circuit's construction would also perversely reward plaintiffs who act to defeat the knowledge-conferring purpose of the mandatory disclosures. In view of that purpose, a participant's decision *not* to read the disclosures he has received should be

treated as what it is: a willful decision to remain ignorant. Plaintiffs who purposely choose to ignore information that is in their possession and that was provided to enable them to enforce their rights should not be given the benefit of a longer limitations period than plaintiffs who act in the manner ERISA contemplates by reviewing the documents they receive.

II. The Ninth Circuit's construction of Section 1113(2) will undermine the careful balance that Congress struck between protecting employee rights and avoiding undue burdens on employers and plan fiduciaries. Section 1113(2) and ERISA-mandated disclosures play a particularly important role in the context of defined contribution retirement plans such as 401(k) plans. Those plans now represent the majority of employee retirement plans, and their investment allocations and strategies are particularly susceptible to claims of fiduciary breach when investment funds do not perform as well as plan participants would like or when fees are higher than expected. Class actions based on such claims are common, and they often threaten hundreds of millions of dollars in liability.

The additional certainty provided by Section 1113(2) is therefore critical in moderating the burdens that ERISA places on employers and plan administrators. If plan fiduciaries are routinely denied the protection of ERISA's three-year statute of limitations and are instead subject as a matter of course to the six-year repose period despite disclosing all information relevant to plaintiffs' claims, they will face even greater damages exposure and will face that exposure for years longer than Congress intended. On top of that, the need for individualized determinations of every plaintiff's subjec-

tive state of mind will vastly increase the cost and burdens of litigation. By contrast, construing the statutory phrase "had actual knowledge" in Section 1113(2) to be satisfied by a showing that a plan administrator has disclosed information to the plaintiff in the manner ERISA requires will provide plan administrators with much-needed clarity about the scope and extent of the plan's potential liability.

ARGUMENT

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

Section 1113(2) provides that the three-year limitations period runs from the date on which the plaintiff "had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). In applying that standard, the Ninth Circuit concluded that petitioners' disclosures pursuant to ERISA's extensive disclosure requirements conveyed to Sulyma the facts underlying his claim of fiduciary breach. As the court put it, Sulyma "had sufficient information *available to him* to know about the allegedly imprudent investments" more than three years before filing suit. Pet. App. 16a (emphasis added). But the court nonetheless held that Sulyma had created a factual issue with respect to whether he "had actual knowledge of the breach or violation" three years before filing suit. That conclusion was based solely on Sulyma's testimony that he did not read, or did not remember reading, the disclosures he received—disclosures that were designed and made specifically to ensure that Sulyma had in his possession the very information that he denied knowing.

The court of appeals' construction of Section 1113(2) cannot be reconciled with ERISA's text and structure, and disrupts the careful balance that Congress struck in the statute. ERISA's disclosure provisions require that the enumerated disclosures must "apprise" plan participants—confer *knowledge* on them—of the information the disclosures contain. Given those requirements, the only sensible reading of the "had actual knowledge" language in ERISA's statute-of-limitations provision is that a plaintiff has actual knowledge of the facts disclosed to him—i.e., made known to him—by a plan administrator as mandated by ERISA. See *Brown* v. *Owens Corning Investment Review Committee*, 622 F.3d 564, 571 (6th Cir. 2010) (holding that when plaintiffs were provided with summary plan descriptions containing the relevant facts, "[a]ctual knowledge does not require proof that the individual Plaintiffs actually saw or read" them) (internal quotation marks omitted). The Ninth Circuit's contrary construction renders Section 1113(2)'s shortened limitations period a virtual nullity with respect to a category of common ERISA claims, and perversely rewards plaintiffs who deliberately ignore disclosures that Congress intended would empower participants to police their rights (or who dissemble about their awareness of the information made known to them).

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 a fiduciary's disclosures.

Section 1113(2)'s provision that the three-year limitations period runs from the date on which the plaintiff "had actual knowledge" of a breach must be construed

in light of ERISA's enforcement scheme as a whole, and, in particular, the disclosure provisions that Congress designed to ensure that plan participants have sufficient knowledge to enforce their rights under the plan. ERISA does not define what it means to "ha[ve] actual knowledge" sufficient to trigger the three-year limitations period. In ascertaining the meaning of that phrase, this Court must apply the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion); accord *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010, (2017) (the Court "look[s] to the provisions of the whole law" to determine the meaning of a statutory phrase, rather than focusing on the "single sentence" in which the phrase appears) (citation omitted). ERISA's extensive mandatory disclosure provisions make clear that Congress intended the required disclosures to confer knowledge of the information they contain on plan participants. Those provisions establish that a plan participant "ha[s] actual knowledge" of information that is in his possession because it was conveyed to him pursuant to ERISA's disclosure scheme—regardless of whether he actually read the disclosures.

1. The precise meaning of the phrase "had actual knowledge" can vary according to the statutory context. At a high level of generality, "actual knowledge" can connote subjective awareness of a particular fact. See *UMG Recordings, Inc.* v. *Shelter Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013). But, depending on the context, the term "actual knowledge" can be, and often has been, construed to encompass more than that.

For instance, it is well established that the term "actual knowledge" can include willful blindness, i.e., situations in which a party does *not* subjectively know a fact because he deliberately avoided acquiring that knowledge. See, *e.g.*, *United States* v. *Zayyad*, 741 F.3d 452, 463 (4th Cir. 2014) (subjective knowledge element could be satisfied by willful blindness); accord *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 766 (2011). When a statutory knowledge requirement is construed to include willful blindness, proof of subjective knowledge of the relevant fact is unnecessary. *United States* v. *Wells*, 163 F.3d 889, 898 (4th Cir. 1998). Similarly, some courts have also held that a person has the statutorily required "actual knowledge," despite a claim of ignorance, "when the means of knowledge are immediately at his hand; or at least [he has] the possession of complete means of information," such as possession of a document containing the information. *Kugel* v. *Knuckles*, 69 S.W. 595, 596 (Mo. Ct. App. 1902). Still others have held that "actual knowledge" goes beyond "express cognition" to encompass "awareness implied from knowledge of circumstances" that are sufficiently clear to suggest that the failure to learn the relevant fact is a product of "bad faith." *Poffenberger* v. *Risser*, 431 A.2d 677, 681 (Md. 1981); accord, *e.g.*, *Knowledge*, Black's Law Dictionary (9th ed. 2009) (defining "implied actual knowledge" as distinct from "constructive knowledge"). And courts have held, in the context of a California statute construed to require "actual knowledge" of one's obligation to register, that one who forgets to register has the requisite actual knowledge, even though technically "a person cannot be said to know something if he or she has forgotten it." *People* v. *Barker*, 96 P.3d 507, 514, 515 (Cal. 2004).

As these examples show, an "actual knowledge" requirement may, depending on the context, be satisfied by circumstances that do not establish purely subjective cognition of a particular fact. To determine the meaning of "had actual knowledge" in Section 1113(2), therefore, this Court must look to the statutory structure and context in which that phrase is used. See *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019) (term "the defendant" takes its meaning from the statutory context).

2. ERISA's disclosure requirements provide the necessary context for interpreting the meaning of "had actual knowledge" in Section 1113(2). The language delineating those requirements, as well as Congress's evident intent that the disclosure provisions will enable participants to police their plans, establish that a plan participant "ha[s] actual knowledge" of facts that are in his possession because they were disclosed to him pursuant to ERISA.

a. ERISA's disclosure provisions are the foundation upon which the statutory enforcement scheme rests. The express purpose of those provisions is to ensure that employees have "sufficient information and data to enable them to know whether the plan [i]s financially sound and being administered as intended." S. Rep. No. 93-127 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. Congress contemplated that "the information disclosed would enable employees to police their plans," *ibid.*, and that the disclosures would "ensur[e] that 'the individual participant *knows* exactly where he stands with respect to the plan,'" *Firestone Tire*, 489 U.S. at 118 (quoting House of Representatives Report at 4649) (emphasis added).

ERISA's disclosure provisions thus require plan fiduciaries to convey sufficient information to plan participants to enable them to avail themselves of ERISA's remedies. Armed with the disclosed information, participants are able to invoke ERISA's right of action for breach of fiduciary duty. 29 U.S.C. § 1132(a)(2). Section 1113(2)'s limitations provision, in turn, regulates participants' invocation of Section 1132's right of action by requiring participants to bring suit within three years of obtaining "actual knowledge" of the breach or violation. Given that the disclosure provisions are intended to enable participants to discern when they have a claim for fiduciary breach that warrants invoking Section 1132, Congress necessarily contemplated that one way in which a plan participant may obtain "actual knowledge" of some or all of the facts underlying a breach or violation is through disclosures made pursuant to ERISA.

The statutory language of the disclosure provisions establishes that Congress intended disclosures made pursuant to those provisions to give plan participants "actual knowledge" of the information so disclosed. Section 1021 establishes that fiduciaries have a "duty of disclosure" with respect to the materials enumerated in that and subsequent sections. 29 U.S.C. § 1021. "Disclosure" is the "action of making something openly *known*" by revealing information. *Disclosure*, Oxford English Dictionary (2d ed. 1989) (emphasis added); *Disclose*, The American Heritage Dictionary of the English Language 514 (5th ed. 2011) ("disclose" means "to make known"). ERISA further requires that the mandated disclosures must include specified content and must be "written in a manner calculated to be *understood* by the average plan participant, and * * * be sufficiently accurate and comprehensive to *reasonably apprise* such participants

and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a) (emphasis added) (summary plan description); 29 U.S.C. § 1104(c)(5)(B)(ii) (QDIA Notices; cross-referencing disclosure provision of 26 U.S.C. § 401(k)(12)(D)); 29 C.F.R. § 2550.404c-5(c)(3), (d); 29 C.F.R. § 2550.404a-5(e)(5). To "apprise" someone of a fact is to "impart *knowledge* or information" of that fact to them. *Apprise*, Oxford English Dictionary (2d ed. 1989) (emphasis added). Congress thus contemplated that disclosures made pursuant to the statute would ensure that participants have knowledge of the substance of those disclosures.

That conclusion is reinforced by ERISA's requirement that the disclosures be received by plan participants. The statute requires that the disclosures be "furnished" to plan participants at specified times and on request. 29 U.S.C. §§ 1021-1025. The Department of Labor has construed the statute to require "measures reasonably calculated to ensure *actual receipt* of the material." 29 C.F.R. § 2520.104b-1(b) (emphasis added). Thus, the information made known in the disclosures must in fact come into the possession of plan participants. That reinforces the statutory premise that the disclosures actually impart knowledge to plan participants.

b. Construed in light of these provisions, Section 1113(2) contemplates that a plan participant necessarily "ha[s] actual knowledge" of the information that is disclosed—made known—to him pursuant to ERISA.

A participant who has received the disclosures "ha[s] actual knowledge" of their contents whether or not he reads or remembers the disclosures. That construction

is confirmed by Section 1113(2)'s provision that the limitations period runs from the date on which the participant "had" actual knowledge. To "have" something means to "be in possession of (something received, acquired, earned, etc.)." *Have*, Oxford English Dictionary (3d ed. 2015); *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("have" means to "[p]ossess in a certain relationship"). To "ha[ve] actual knowledge" of a fact, then, is to have received or acquired knowledge of the fact and therefore to possess knowledge of it. The phrase "had actual knowledge" therefore refers back to ERISA's requirement that fiduciaries ensure that plan participants "actual[ly] recei[ve]" the knowledge-conferring disclosure materials. 29 C.F.R. § 2520.104b-1(c); see also 29 U.S.C. § 1021. A participant "ha[s] actual knowledge" when he has possession of the information because he has received it in the manner that ERISA and its implementing regulations require. See *Cetel* v. *Kirwan Fin. Grp.*, 460 F.3d 494, 512 (3d Cir. 2006) (holding that plaintiffs have "actual knowledge of the alleged breach" when the "evidence establishes that [they] were in possession of the material facts necessary to understand that some claim exists") (internal quotation marks and citation omitted).

That reading makes perfect sense. The most common way to confer knowledge of a fact on someone else is to tell them that fact. Courts have generally held that a party who is told a fact has actual knowledge of that fact, without further epistemological inquiry into the party's state of mind. See, *e.g.*, *Bartlett* v. *Dep't of the Treasury*, 749 F.3d 1, 10 (1st Cir. 2014) ("Actual knowledge occurs where an employee either learns or *is told of* his ADEA rights." (emphasis added)); *Americare Sys., Inc.* v. *Pinckney*, 635 F. App'x 305, 309 (6th Cir.

2016) (actual knowledge where a person is "informed" of a fact by another); *Estate of Mapes*, No. A136086, 2014 WL 2467009, at *11 (Cal. Ct. App. June 3, 2014) (actual knowledge present where party was "affirmatively told" facts). ERISA's disclosure requirements are designed to provide the written equivalent of orally conveying all the necessary information to plan participants. It would be impracticable for large employers to convey that information orally, so ERISA requires that they do so in writing. That method of informing individuals of particular facts is no less intended to convey actual knowledge simply because that knowledge is communicated through writing rather than speaking. And just like a person who orally tells a fact to another, the plan administrator who furnishes disclosures and ensures that the participant receives them has conferred knowledge.

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 disclosures made pursuant to ERISA.

1. a. The structure and purpose of Section 1113 confirm that Section 1113(2) should be construed to mean that plan participants "ha[ve] actual knowledge" of information conveyed to them in disclosures pursuant to ERISA. In ERISA, Congress established a two-tiered limitations framework in which the length of the limitations period turns on the plaintiff's possession of actual knowledge. Section 1113(1) establishes a six-year statute of repose running from "the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1). Section 1113(2) imposes a limitations period

of three years whenever a plaintiff gains "actual knowledge of the breach or violation." *Id.* § 1113(2).

Congress's enactment of a shorter limitations period for plaintiffs who have actual knowledge of a breach reflects Congress's expectation that, given the rigorous disclosure regime, plan participants will regularly acquire actual knowledge of an alleged breach, including through disclosures. Congress clearly intended that in such circumstances, plan participants should be required to sue expeditiously. A purely subjective construction of actual knowledge would be irreconcilable with Section 1113(2)'s two-tiered structure, as it would frequently render Section 1113(2) meaningless in the common circumstances presented here: a challenge to a plan's investment strategy.

As a practical matter, plaintiffs will be able to avoid summary judgment on a Section 1113(2) limitations defense as a matter of course. Plaintiffs can simply retreat behind the veil of ignorance, asserting that they did not read or do not specifically remember the relevant disclosures—assertions that, under the Ninth Circuit's rule, are sufficient in themselves to create a material factual dispute. *Young* v. *General Motors Investment Mgmt. Corp.,* 550 F. Supp. 2d 416, 419 n.3 (S.D.N.Y. 2008) (observing that construing "actual knowledge" subjectively would allow a participant to avoid the statute of limitations by "disregard[ing] information clearly provided" to her)*, aff'd on other grounds,* 325 F. App'x 31 (2d Cir. 2009). And even conscientious plan participants may fail to recall, years after the fact, whether they read specific plan disclosures or what those disclosures said. In every case in which the plaintiff simply says that he cannot remember reading a particular document—which may be most if not all cases—the existence of actual

knowledge will then turn on the defendant's ability to prove that, despite the failure of recollection, the plaintiff did in fact read the document years before.

This case well illustrates the problem. As the district court found, the undisputed evidence established that Sulyma visited the NetBenefits website where the plan disclosures were housed dozens of times between 2010 and 2012, and did not dispute that he received the Summary Plan Description and other mandatory plan disclosures. Pet. App. 24a, 34a-35a. Those disclosures informed Sulyma of the core facts underlying his claim of fiduciary breach: in clear and simple language, they stated that the investment funds that Sulyma had chosen contained alternative investments like hedge funds, and they specified the precise allocation of those investments. But in his 2016 deposition, Sulyma variously testified that he did not read plan disclosure documents that he concededly received, J.A. 197, and that he could not recall whether or not he received certain disclosures from petitioners, J.A. 194. Those assertions, in the court of appeals' view, created a factual issue that prevented summary judgment.

It is no answer that plan administrators may attempt to prove at trial that the plaintiff "had actual knowledge." In many ERISA cases, the only direct evidence of the plaintiff's actual knowledge will be the testimony of the plaintiff himself. And it will be easy for plaintiffs to deny subjective knowledge: even proof that a plaintiff was told a fact orally, was handed a newsletter, or was present at a seminar can be rebutted by testimony that the plaintiff did not listen to the speaker, read the paper, or pay attention to the presentation (or that the plaintiff simply does not recall doing so). See *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, and the inner workings of the plaintiff's mind are impossible for a defendant to prove."). Defendants will therefore be hard pressed to overcome a plaintiff's testimony that he lacked subjective knowledge of particular facts about his retirement plan. See *Flores-Figueroa* v. *United States,* 556 U.S. 646, 655 (2009) (acknowledging "the difficulty in many circumstances of proving * * * that a defendant has the necessary knowledge"); cf. *Brown* v. *N. Am. Mfg. Co.*, 576 P.2d 711, 720 (Mont. 1978) (burden of proving assumption of the risk by direct evidence is "virtually impossible to discharge" because "[s]eldom would a products liability plaintiff admit through his own testimony that he had knowledge of the danger and appreciated the risk involved").

As a result, the Ninth Circuit's construction will mean that an ERISA defendant will almost never succeed in invoking the three-year limitations period of Section 1113(2) at summary judgment, and will face the daunting task at trial of seeking to disprove a plaintiff's claim of subjective ignorance through circumstantial evidence—except in those rare cases where the plaintiff voluntarily concedes prior subjective knowledge of the facts underlying his claim. Section 1113(2) will thus be deprived of any meaningful practical effect in many cases challenging plan investment strategies, leaving Section 1113 to function as a single six-year limitations period.

2. The Ninth Circuit's construction also would have the perverse effect of permitting participants who have acted to thwart the knowledge-conferring purpose of ERISA's disclosure requirements to evade Section 1113(2)'s limitations period. That is contrary to both the

purposes animating the disclosure provisions and Congress's intent that plaintiffs should be required to sue within three years when they possess information regarding an alleged breach.

ERISA's disclosure provisions ensure, with a high degree of confidence, that participants in fact come into possession of the mandated plan disclosures. Congress intended the disclosures to inform participants of their rights and to enable enforcement by providing a meaningful opportunity to learn of fiduciary breaches. Against that backdrop, a participant's professed failure to read disclosed material must be viewed as a willful decision by the plaintiff to remain ignorant. Cf. *Edes* v. *Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005) (in promulgating ERISA's statute of limitations, "we do not think Congress intended the actual knowledge requirement to excuse willful blindness by a plaintiff"); *Reeves*, 2005 WL 2347242, at *5 (plaintiff who threw disclosures away must not be permitted to "disavow 'actual knowledge' of an alleged fiduciary breach by deliberately ignoring information that is clearly presented"). Permitting participants to evade Section 1113(2)'s three-year limitations period by refusing to read information in their possession rewards them for acting in a manner that defeats the knowledge-conferring purpose of the disclosure regime.

The phrase "had actual knowledge" cannot be construed to countenance that sort of evasion. In this respect, holding that participants have actual knowledge of information conveyed to them through disclosures is analogous to courts' employing the concept of willful blindness when doing so is necessary to further statutory policies. Courts have employed willful blindness to ensure that "defendants cannot escape the reach" of

statutes that require actual knowledge "by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances." *Global-Tech*, 563 U.S. at 766. While a willfully blind person does not have subjective knowledge of all the facts in question, the "traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge." *Ibid*.; see also, *e.g*., *Erhard* v. *Commissioner*, 87 F.3d 273, 275 (9th Cir. 1996) (where statute required actual receipt of IRS notice, taxpayer who deliberately refuses delivery must be treated as having actually received the notice even though he had not; such an action should be treated as a form of willful blindness). Such a construction of actual knowledge is necessary to ensure that parties are unable to manufacture an end run around the statute in question by manipulating the state of their own subjective knowledge. Here too, the purposes of ERISA's disclosure regime and the three-year limitations period are best served by construing "had actual knowledge" in a manner that prevents plaintiffs from benefitting from their disregard of the very information that Congress has required plan administrators to give them in order to enable them to enforce their rights.[2]

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[2] For that reason, the lower courts to consider the issue have overwhelmingly held that a defendant need not prove that plaintiffs actually read plan disclosures. *Young*, 550 F. Supp. 2d at 419 n.3; see also *Edes*, 417 F.3d at 142; *Enneking* v. *Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1284 (D. Kan. 2012); *Shirk* v. *Fifth Third Bancorp*, Civ. No. 05-49, 2009 WL 3150303, at *3, *6 (S.D. Ohio Sept. 30, 2009); *Reeves*, 2005 WL 2347242, at *5-*6; *Lorenz* v. *Safeway, Inc.*, 241 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017); *In re Northrop Grumman Corp. ERISA Litigation*, Civ. No. 06-6213, 2015 WL 10433713, at *22 (C.D. Cal. Nov. 24, 2015).

C. The reasoning supporting the court of appeals' purely subjective construction of Section 1113(2) is flawed.

Notwithstanding the statutory text, structure, and purposes, the court of appeals held that to prevail on a Section 1113(2) defense, the defendant must prove that the plaintiff actually read and understood the disclosures that conveyed the information underlying the claimed breach. The court was concerned that any other construction would amount to a constructive knowledge standard. That concern was misconceived.

1. *Construing "actual knowledge" in Section 1113(2) to encompass information made known to participants in ERISA-mandated disclosures does not impose a constructive knowledge standard.*

Holding that a plan participant "ha[s] actual knowledge" of information that was disclosed, i.e., made known, to him—even if he did not read, or does not remember reading, the documents containing the information—does not impose a constructive knowledge standard.

a. A person has constructive knowledge of a particular fact if the information actually in his possession triggers a duty to seek out *additional* information, and that investigation would have revealed the fact in question. See, *e.g.*, *Estate of Pepper* v. *Whitehead*, 686 F.3d 658, 666 (8th Cir. 2012) ("Once a claimant learns information that would inform a reasonable person of the need to investigate, the claimant is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation."); *Brock* v. *Nellis*, 809 F.2d 753, 754 (11th Cir. 1987) (defining constructive knowledge as

"knowledge of facts sufficient to prompt an inquiry which, if properly carried out, would have revealed appellees' misdeed").

In the context of disclosures pursuant to ERISA, by contrast, the participant need not conduct an investigation to learn the facts contained in the disclosures. Rather, he *already* possesses the relevant information because ERISA required that it be made known to him. Concluding that such a participant has actual knowledge of the disclosed information therefore does not attribute to the plaintiff knowledge of facts that the plaintiff would have gleaned in an investigation that he did not actually conduct, as would be the case under a constructive knowledge regime.

This understanding of Section 1113(2) is thus far more akin to the doctrine of willful blindness than to constructive knowledge. Willful blindness is a departure from a purely subjective understanding of knowledge, in that the party is held to have knowledge of facts of which he is not subjectively aware. See *Global-Tech*, 563 U.S. at 766. But willful blindness remains distinct from constructive knowledge, because the party has no duty to investigate and learn additional facts. Rather, the willfully blind party is held to have knowledge only if the relevant facts are readily available to him and he takes deliberate steps to avoid learning them. See *ibid*.

Similarly, ERISA plan participants have the disclosed information in their possession and for all intents and purposes deliberately opt out of ERISA's disclosure framework. See pp. 32-33, *supra*. As in a willful blindness regime, ERISA plan participants have no duty to

obtain facts outside their possession, but they are foreclosed from evading the intended operation of the statutory disclosure scheme by turning a blind eye to facts provided to them. See *Young*, 550 F. Supp. 2d at 419 n.3.

b. In addition, a participant's receipt and consequent actual knowledge of disclosed information does not trigger any duty to inquire into any facts *not* contained within the disclosures. In that respect as well, Section 1113(2) does not impose a constructive knowledge standard.

Section 1113(2) runs from the date on which the plaintiff "ha[s] actual knowledge *of the breach or violation*." 29 U.S.C. § 1113(2) (emphasis added). Whether plan disclosures themselves convey all of the underlying facts necessary to confer "actual knowledge of the breach or violation" will turn on the nature of the plaintiff's claim. Generally speaking, the plaintiff must be aware of both the underlying transaction and facts suggesting the fiduciary's "acts were imprudent" in order to have actual knowledge "of the breach or violation." Pet. App. 12a. That "plus" factor is ordinarily satisfied by knowledge of the risks of, or harm resulting from, the transaction. See *Fish* v. *GreatBanc Tr. Co.*, 749 F.3d 671, 681 n.4 (7th Cir. 2014).

While facts indicating imprudence will sometimes be evident on the face of plan disclosures, sometimes they will not. Where, for instance, a plaintiff contends that a characteristic of a particular investment rendered it imprudent, plan disclosures describing the investment and its characteristics would be sufficient to confer actual knowledge of the breach and trigger the three-year limitations period. See *Brown* v. *Am. Life Holdings, Inc.*, 190 F.3d 856, 860 (8th Cir. 1999) (finding claim time-

barred where plaintiff contended that investments were improperly undiversified and admitted he knew the nature of the investments when made; undiversified nature of investments would have been evident from plan disclosures). But the facts underlying other theories of fiduciary breach might not be evident from plan disclosures. See *Int'l Union of Electronic, Electric, Salaried, Mach. & Furniture Workers* v. *Murata Erie N. Am., Inc.*, 980 F.2d 889, 901 (3d Cir. 1992) (rejecting limitations defense where plan documents disclosed fact that plan had been amended but not the specific contents of the amendment that allegedly constituted a breach of fiduciary duty).

Thus, although the Section 1113(2) inquiry should take as a given that the plaintiff has actual knowledge of information contained in mandated disclosures, those facts alone will not always be sufficient to give rise to actual knowledge "of the breach or violation." In that event, the facts contained in the disclosures, no matter how concerning, do not trigger any duty to investigate and discover additional facts. To the extent that "actual knowledge of the breach" rests on facts not contained in the disclosures, the defendant would have to prove that the plaintiff was aware of those additional facts. By contrast, under a constructive knowledge standard, the defendant would need to prove only that the facts in the plaintiff's possession (as a result of mandated disclosures or otherwise) were sufficient to trigger a duty to inquire into additional facts suggesting imprudence.[3]

[3] In this case, the court of appeals held that the mandated disclosures themselves contained all of the essential information upon which respondent's breach of fiduciary duty claims rest. Pet. App. 16a. The thrust of Sulyma's claims is that petitioners

2. *Section 1113(2)'s repealed constructive knowledge provision does not suggest that participants lack actual knowledge of disclosures provided to them.*

The court of appeals also believed that its purely subjective definition of actual knowledge was compelled because Section 1113 initially contained a "constructive knowledge" provision that Congress later repealed. Pet. App. 6a-7a. That inference is unwarranted. The repealed provision did not impose a generally applicable constructive knowledge standard. It created a narrowly targeted constructive knowledge standard only for information contained in reports filed with the Secretary of the Department of Labor.

When Congress enacted ERISA in 1974, Section 1113 specified two different conditions under which the limitations period would be limited to three years:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

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over-allocated his retirement assets to alternative investments such as hedge funds and private equity, in the range of 26% to 36%. J.A. 114 ¶ 242, 119-120 ¶ 258. Those facts were repeatedly disclosed in the Summary Plan Descriptions, QDIA Notices, and Annual Disclosures that the plan administrators were required by law to make available to Sulyma. Thus, Sulyma did not need to know any additional facts outside of the four corners of the disclosures in order to have actual knowledge "of the breach or violation" under Section 1113(2). The court of appeals accordingly "agree[d] that [petitioners'] evidence demonstrates that [respondent] had sufficient information available to him" as a result of the disclosures "to know about the allegedly imprudent investments." Pet. App. 16a.

> * * * three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) 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).[4] Thus, what the court of appeals characterized as a "constructive knowledge" provision did not generally impose a three-year limitations period any time a participant might have constructive knowledge of a breach, but instead imputed constructive knowledge in the single specific circumstance of a report filed with the Secretary of Labor.

Contrary to the court of appeals' assumption, Congress's provision that plan participants would have constructive knowledge of information that was not provided to them, but was instead placed on file with a *third* party, does not suggest that Congress understood plan participants to lack actual knowledge of mandated plan disclosures that they *actually received*. If anything, the repealed constructive knowledge provision indicates that Congress did not understand knowledge of information in the direct possession of a plan participant to be anything other than "actual knowledge." And because it is illogical to suppose that Congress intended a three-year limitations period to apply when information is disclosed in reports filed with the Labor Secretary, but only a longer six-year statute of repose where the same information is provided directly to a plan participant,

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[4] Congress repealed the constructive knowledge provision in 1987, leaving only the actual knowledge requirement. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330.

the only reasonable conclusion is that Congress understood the latter to convey "actual knowledge."

II. A PURELY SUBJECTIVE RULE WOULD DISRUPT ERISA'S CAREFUL BALANCE OF COMPETING POLICIES BY IMPOSING UNDUE BURDENS ON PLAN FIDUCIARIES.

The Ninth Circuit's construction of Section 1113(2) will undermine the balance that Congress struck between protecting employee rights and avoiding undue burdens on employers and plan fiduciaries. That construction will increase the already massive burden that plan administrators face as a result of class-action litigation alleging fiduciary breach. It will routinely double the limitations period even where plan disclosures clearly detail the facts underlying the class claims. And it will vastly increase the costs and burdensomeness of that litigation by requiring individualized determinations of every plaintiff's subjective state of mind—i.e., what documents a plaintiff will acknowledge reading, and when. This Court has rightly hesitated to impose such significant burdens unless they are justified by a compelling ERISA objective—which is not the case here. In contrast, holding that participants "ha[ve] actual knowledge" of information made known to them in required disclosures furthers the policies underlying the disclosure requirements and imposes no unfairness on individual participants.

A. Section 1113(2) should be construed in a manner that preserves its important role in avoiding undue burdens on employers.

ERISA reflects a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan

and the encouragement of the creation of such plans." *Conkright*, 559 U.S. at 517 (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004)). Congress purposely avoided establishing "a system that is so complex" or burdensome "that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). And Congress made sure that employers who do establish benefit plans would be subject to "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002).

Section 1113(2)'s three-year limitations period plays a vital role in maintaining the balance between protecting employees' rights and avoiding undue burdens on employers. ERISA's substantive fiduciary duties, broad remedies for participants and beneficiaries, and "extensive" disclosure requirements impose significant costs on plan administrators and employers. *Gobeille* v. *Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 944 (2016); *Gerosa* v. *Savasta & Co*., 329 F.3d 317, 328 (2d Cir. 2003). Section 1113(2) mitigates these burdens by providing employers with greater repose (or narrower exposure to liability) when mandatory disclosures ensure that plan participants are sufficiently well-informed to have actual knowledge of an alleged breach. Congress thus provided that full and effective disclosure would protect employers by shortening the time in which suits may be brought.

But under the Ninth Circuit's construction, no amount of disclosure by plan fiduciaries can ever ensure that plan participants will possess "actual knowledge"

of the facts disclosed by the plan. Section 1113(2) will no longer mitigate the burden of ERISA's disclosure requirements and remedial provisions. Participants plainly benefit from fully compliant disclosures. To effectuate the balance that Congress sought to achieve, compliance with the disclosure requirements should also inure to the employer's benefit by conveying knowledge of the information contained in the disclosures and enabling the employer to invoke Section 1113(2)'s shorter limitations period.

B. A purely subjective interpretation of Section 1113(2) will impose significant costs on plan fiduciaries.

The Ninth Circuit's construction of Section 1113(2) will impose onerous burdens on plan fiduciaries. Fiduciary-breach claims can threaten potential damages exposure in the hundreds of millions of dollars and substantial litigation costs, especially when such suits are brought as class actions. If plaintiffs are able to avoid the three-year limitations period by claiming not to have read mandated disclosures, plan fiduciaries will face even greater potential exposure and costs.

1. Section 1113(2) and ERISA-mandated disclosures play a particularly important role in the context of defined contribution retirement plans such as 401(k) plans. Defined contribution plans have largely supplanted defined benefit plans in the last 20 years; according to the Department of Labor, there were 656,241 defined contribution retirement plans in the United States as of 2016, covering more than 100 million total participants, with combined assets of nearly $6 trillion. U.S. Dep't of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2016*

Form 5500 Annual Reports at 3 (Dec. 2018). The amount of benefits ultimately received by enrollees in such plans depends in part on the success of plan fiduciaries' investment strategies, making those strategies particularly susceptible to second-guessing when investment funds do not perform as well as plan participants would like, or when fees are higher than expected. It is therefore no surprise that fiduciary-breach suits based on 401(k) plans, like Sulyma's, have surged recently, with more than 100 such suits filed in 2016 and 2017. See George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, at 2 (Center for Retirement Research at Boston College 2018).[5]

Fund performance, administrative fees, and the types of assets held by the fund are required by regulation to be disclosed. 29 C.F.R. § 2550.404a-5. As a result, claims of fiduciary breach in the context of defined contribution plans often rest on facts that have been disclosed to plan participants. In a typical claim, plan participants allege that the fiduciary's chosen investments have performed poorly relative to various benchmark comparators, or that the plan's funds are not sufficiently diversified. Mellman et al., *supra*, at 2-3. Both investment allocation and the investments' relative performance are disclosed to plan participants. Here, for instance, Sulyma's core allegation is that petitioners acted imprudently by allocating 26% to 36% of his retirement assets to alternative investments such as hedge funds and private equity. Information about that allocation was conveyed to Sulyma in multiple disclosures. Plan

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

participants also often allege that a plan's associated administrative fees are excessive. Once again, such fees are required to be disclosed, and so the facts underlying excessive-fee claims of breach will often be entirely ascertainable on the face of ERISA-mandated disclosures.

Plaintiffs who assert such claims should be held to have "had actual knowledge of the breach" when ERISA-mandated disclosures convey the facts upon which the plaintiffs' allegations rest. See, *e.g.*, *Young*, 550 F. Supp. 2d at 419 (plaintiff had actual knowledge of the breach because the fact that investments were undiversified was evident from disclosures); *Reeves*, 2005 WL 2347242, at *5-6 (similar). But under the Ninth Circuit's construction, plan participants may wait longer than three years to see whether a particular investment allocation works to their benefit, and then only later "cry[] foul" while "disavow[ing] knowledge of the [alleged] error." *Reeves*, 2005 WL 2347242, at *5. And in all events, defendants will be able to prevail on a three-year limitations defense only by proving the plaintiff read and remembers the disclosures.

As result, ERISA fiduciaries will face increased damages exposure, and in particular, may face damages calculated based on six years, rather than three years, of investment performance despite disclosure of the relevant facts. While the method of calculating damages varies based on the plaintiff's claims, in many cases the resulting additional damages exposure could be significant. See *Donovan* v. *Bierwirth*, 754 F. 2d 1049, 1056 (2d Cir. 1985) (a measure of damages is to compare what the plan actually earned on the chosen investment with what it would have earned absent the breach). Damages awards and settlements involving claims for fidu-

ciary breach in managing large employers' plans fiduciary breaches often amount to tens of millions of dollars. Marcia S. Wagner, *Excessive-fee litigation in retirement plan market moving downstream*, Investment News (Nov. 22, 2017) (describing settlements of $50-60 million)[6]; Greg Iacurci, *10 big settlements in 401(k) excessive-fee lawsuits*, Investment News (July 13, 2017).[7] If plan administrators are routinely subject to the six-year limitations period, their damages exposure is likely to rise as well.

2. The Ninth Circuit's requirement that defendants must prove that plaintiffs have actually read and remember plan disclosures to invoke the three-year statute of limitations will also impose significant litigation burdens on plan administrators. Fiduciary breach claims are often brought as class actions: ERISA class action settlements totaled nearly $1 billion in 2017. See Cort Olsen, *ERISA class action settlements reach almost $1 billion*, Employee Benefit Advisor (Jan. 17, 2018).[8]

The Ninth Circuit's construction of Section 1113(2) threatens a vast increase in the burden and uncertainty associated with ERISA class actions alleging a breach of fiduciary duty. To be sure, ERISA defendants will contend that the Ninth Circuit's purely subjective test for determining whether a plaintiff "had actual knowledge"

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[6] https://www.investmentnews.com/article/20171122/BLOG09/171129963/excessive-fee-litigation-in-retirement-plan-market-moving-downstream.

[7] https://www.investmentnews.com/gallery/20170713/FREE/7-13009999/PH/10-big-settlements-in-401-k-excessive-fee-lawsuits.

[8] https://www.employeebenefitadviser.com/news/erisa-class-action-settlements-reach-almost-1-billion.

within the meaning of Section 1113(2), precludes class action treatment because whether any plaintiff's claim can go forward will depend on the idiosyncratic evidence (both direct and circumstantial) that bears on the individual plaintiff's state of mind. But there is no guarantee that trial courts will agree. See *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (the need for individualized determination "weighs against class certification" but does not "automatically foreclose" it.) And if they do not, defendants may well be forced into abandoning meritorious statute-of-limitations defenses because it will be too expensive and burdensome to undertake the plaintiff-by-plaintiff trench warfare that would be required to establish the defense.

Holding that plan participants "ha[ve] actual knowledge" of the information conveyed to them in disclosures made pursuant to ERISA would avoid these consequences. Statute-of-limitations defenses would not typically create individualized factual issues, because plan fiduciaries usually make disclosures in the same way and at the same time to every plan participant. A defendant therefore could satisfy the actual-knowledge requirement as to every class member by establishing when the putative class members were provided with, or specifically directed to, documents disclosing all the material facts relevant to their claim. Individualized determinations would be required only in circumstances where the plan disclosures were found insufficient to provide actual knowledge of the facts regarding the alleged breach or were provided to different participants at different times. Such an approach would benefit plaintiffs and defendants, as it would provide the certainty and uniformity necessary for all parties to rationally assess litigation risk.

But under the Ninth Circuit's construction of actual knowledge, uncertainty will reign. Every case will pose the question whether individual class members read and understood the disclosures and will require a judgment about whether and how a class action can proceed in light of the need for such individualized inquiry, exacerbating the burden and expense of ERISA litigation.

C. No countervailing congressional objective justifies the increased burdens imposed by the purely subjective construction of Section 1113(2).

Each incremental increase in the burdens on employers and plan administrators imposed by ERISA litigation threatens to harm plan participants in the long run, as employers may reduce litigation risk by choosing investments that ultimately serve participants less well, or may even decide not to institute plans in the first place. See *Conkright*, 559 U.S. at 517. This Court has consequently been reluctant to impose added burdens on plan administrators and employers unless doing so is justified by a substantial ERISA objective. See, *e.g.*, *Mertens*, 508 U.S. at 262 ("not all" questions of ERISA's scope are to be resolved "in favor of potential plaintiffs"); *Gobeille*, 136 S. Ct. at 945 (finding state disclosure requirements preempted in part because it would impose additional "wasteful administrative costs" on plan administrators). The Ninth Circuit's construction of Section 1113(2) serves no such objective.

ERISA's objective of protecting employee rights will not be undermined by holding plaintiffs to have actual knowledge of information conveyed to them in ERISA-mandated, compliant disclosures provided to them in accordance with applicable regulations. Those disclosures

are designed to be read: they are required to convey critical information in concise, clear terms. And to the extent that reviewing the mandatory disclosures does not itself 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 he is aware of additional facts beyond those disclosed. See pp. 37, *supra*.

It is hardly unfair to conduct the Section 1113(2) inquiry on the premise that a plaintiff has actual knowledge of facts that are at his fingertips because ERISA required the plan administrator to provide those facts to him. A plaintiff who claims not to have read the disclosures is in effect asserting that he has made a deliberate choice not to access information that Congress intended him to have and required fiduciaries to assume the burden of providing—and claiming that he should be rewarded for that choice with a longer limitations period. See pp. 31-33, *supra*. That tack undermines the very premise of the disclosure framework: ERISA's extensive disclosure requirements cannot serve their purpose of enabling participants to enforce their rights if participants routinely refuse to read them. To reward participants who disregard mandated plan disclosures by permitting them to avoid summary judgment and potentially obtain a longer limitations period undermines the policies animating ERISA's disclosure provisions and its three-year limitations period. Indeed, it turns the purpose of the disclosure regime on its head to argue, as respondent does, that a plan participant who reads the information has three years to file suit but a participant who ignores the disclosures gets six years to file.

* * *

Section 1113(2)'s three-year limitations period plays a vital role in ensuring that ERISA's extensive fiduciary duties and disclosure requirements do not unduly burden employers and plan administrators. In imposing rigorous disclosure requirements on plan fiduciaries, Congress empowered plan participants to police their own rights. At the same time, Congress required participants who have actual knowledge of the facts underlying a claimed breach—including those who have gained that knowledge through mandated disclosures—to sue within three years. Construing Section 1113(2) to allow plaintiffs to avoid Section 1113(2)'s three-year statute of limitations by refusing to read (or claiming they do not remember) information disclosed to them upends the balanced framework that Congress created in ERISA, and perversely rewards participants who ignore the very disclosures intended to ensure those participants are fully informed of their rights. 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,

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

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

Counsel for Petitioners

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