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 OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and regulations

Other Authorities

INTRODUCTION

For claims alleging a breach of fiduciary duty, ERISA generally imposes a limitations period of six years from "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1). But there is an exception. In a subset of cases—where "the plaintiff had actual knowledge of the breach or violation" more than three years before filing suit—a claim is time-barred even if it is filed within the six-year period. *Id.* § 1113(2).

The court below held that section 1113(2)'s "actual knowledge" exception means what it says: It applies only when the plaintiff was *actually aware* of the breach more than three years before filing suit. A defendant seeking to dismiss an otherwise timely claim by invoking section 1113(2) must therefore establish that the plaintiff was actually aware of the relevant facts more than three years prior. If it cannot do so, the general six-year bar governs.

This straightforward reading of the phrase "actual knowledge" is correct. Because ERISA does not define the phrase, its ordinary meaning applies. The ordinary meaning of "actual" is "existing in fact or reality." And "knowledge" means "the state or fact of knowing," or "familiarity, awareness, or understanding gained through experience or study." To have "actual knowledge" of something, then, is to have real awareness of it.

Under this widely accepted meaning, if someone receives a book as a gift and reads it, we would say that she has actual knowledge of the book's contents. But if she does not read it, she does not have actual knowledge. And the same is true if she is instead told how to locate the book at the library and she does not do so. By extension, if she is sent a letter saying how to obtain information about something and she does not obtain it, she does not have actual knowledge of whatever information might

have been accessible to her. Even if she *should have* tracked down the information, if she does not actually do so, she does not actually know what it says. Or to put the point in legal terms: She might be charged with having *constructive* knowledge, but no one would say that she has *actual* knowledge.

This ordinary understanding of actual knowledge is all that is needed to resolve the question presented. The petitioners advance a novel definition of actual knowledge that cannot be squared with its ordinary meaning. Rather than ask what a plaintiff actually knew, they urge the Court to construe the phrase so that it "take[s] as a given" that a plan participant has actual knowledge of every word of every document whose disclosure is mandated by ERISA the instant that it has "been disclosed to him in the manner that ERISA contemplates." Pet. Br. 17, 37. And that is true "regardless of whether he actually read"—or even saw—"the disclosures." *Id.* at 22.

What the petitioners are essentially arguing is that plan participants *should have* acquired actual knowledge of information in the disclosures, so they may be charged with having such knowledge. But that is an argument for constructive knowledge, not actual knowledge. Whereas other ERISA limitations periods start the three-year clock when the plaintiff "acquired or *should have acquired* actual knowledge," Congress declined to include similar language in section 1113(2). *See* 29 U.S.C. §§ 1303(e), 1370(f)(2)(A), 1451(f) (emphasis added). Section 1113(2) *used to* include a constructive-knowledge trigger, but Congress removed that language in 1987. These deliberate legislative choices must be given effect.

So too must section 1113(2)'s use of the word "actual." The petitioners' interpretation unavoidably reads that word out of the statute. Their main textual argument—

that the word "knowledge" is related to "disclosure," because "'disclose' means to 'make known,'" Pet. Br. 25—offers no account of the word "actual." It is at most an argument for reading the word "knowledge" to include ERISA-mandated disclosures (disclosures that exist to protect plan participants, not fiduciaries). And although it is true that the term "knowledge," standing alone, can mean something less than actual awareness depending on the context, Congress added an explicit modifier here—"actual"—thereby instructing courts not to impute knowledge as a matter of law to someone who does not personally have it.

The petitioners' position would not only rewrite the statutory text, but would also lead to strange results. As the petitioners conceded below, on their reading, a plan participant would have "actual knowledge" of any ERISA disclosure mailed to her house—even if she lies comatose in a hospital bed. Not even a "should have acquired actual knowledge" standard would compel that bizarre result.

The petitioners' position is ultimately driven not by the words of the statute but by a freestanding policy argument: that applying section 1113(2) as written might permit plan participants to make an "end run" around the limitations period by "turning a blind eye" to information about their plans. *Id.* at 33, 36. Even assuming that such a policy concern could authorize judicial revision of the plain text, there is no basis for doing so here. Section 1113(1)'s general six-year period—not a distorted interpretation of section 1113(2)—already protects against this concern. It applies irrespective of whether a participant read the disclosures. And participants have ample incentive to read disclosures as it is. So this Court should have no hesitation following the usual rule that the statute means what it says, and affirming the judgment below on that basis.

STATEMENT

I. Statutory background

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," which requires fiduciaries to 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." 29 U.S.C. § 1104(a)(1).

For nearly 50 years, ERISA has included a specific statute of limitations for breach-of-fiduciary-duty claims. Whereas most statutes of limitations run from when a claim accrues, this provision is different. It establishes a general cutoff of six years from "the date of the last act which constituted the breach or violation" (absent "fraud or concealment"), while providing a shorter period for when the plaintiff had "actual knowledge of the breach or violation" more than three years before filing suit. 29 U.S.C. § 1113(1), (2). That subset of cases is time-barred regardless of whether the general six-year period is met.

Other ERISA limitations periods, by contrast, do not demand actual knowledge. They set six years as the floor, and allow that period to be extended to three years from when "the plaintiff acquired or *should have acquired* actual knowledge." *See id.* § 1451(f) (emphasis added); *see also id.* § 1303(e); *id.* § 1370(f)(2)(A) (same).

When Congress first enacted section 1113(2) in 1974, it was similar to these other provisions in that it too included a constructive-knowledge trigger. The three-year period began running when the plaintiff either had "actual knowledge of the breach or violation" or "could

reasonably be expected to have obtained knowledge" of it 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 statute to remove the constructive-knowledge provision. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330. Thus, for the last 32 years, actual knowledge has been necessary to trigger section 1113(2).

II. Factual background

The petitioners' imprudent investments. This case involves the 401(k) plan and retirement plan selected by fiduciaries at Intel. 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).

Each plan is designed to funnel participants into a particular investment. 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. J.A. 57, 112. As for the retirement plan, it is designed so that the vast majority of participants could invest only in the so-called "diversified fund." J.A. 112. By 2015, more than $3.5 billion of the 401(k) plan's assets were in TDPs and nearly $6 billion of the retirement plan's assets were in the diversified fund. J.A. 29–30, 71.

After the financial crisis of 2008, Intel managed these two retirement funds very differently than its peers.[1]

[1] Technically speaking, we are being imprecise when we say "Intel" here. The petitioners consist of Intel's investment committee (which manages and controls the assets of the plans), administrative (continued …)

While most managers of such funds devote only a sliver of the portfolio (if any) to investments like hedge funds and private equity, Intel adopted a different approach. From 2011 to 2015, Intel increased hedge-fund investments in TDPs by 1,300%. J.A. 27. Over a similar period, it increased the diversified fund's investments in hedge funds, private equity, and commodities more than tenfold. J.A. 27–28, 64 ($214 million in 2008 versus $2.4 billion in 2013). Intel made these changes 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." J.A. 98.

As a result of these increases, investments in hedge fund and private equity made up a disproportionately large percentage of the assets in these funds. In 2014, for instance, "the Intel 2030 TDP had approximately 21% of assets allocated to hedge funds and 5% to commodities." J.A. 69. 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. J.A. 68–70. The diversified fund held an even greater portion of its assets in such investments—nearly 37% by 2013. J.A. 64–65.

Exactly how Intel reached these outlier decisions is not yet clear. Nor is it clear how much consideration it gave to other ways of managing plan assets. What is clear from the complaint, however, is that Intel's decision to adopt a hedge-fund-heavy allocation model diverged widely from prevailing practices and caused participants to pay more in fees for subpar performance, resulting in a significant loss of investment income. J.A. 71–75 (alleging that, had the petitioners "selected widely-accepted index

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committee (which makes disclosures to plan participants), and finance committee (which oversees the other two committees). For the sake of simplicity, we refer to the petitioners, collectively, as "Intel."

funds for the Intel TDPs or commercially available TDFs managed by Fidelity or Vanguard"—as the overwhelming majority of other plan fiduciaries did—participants would now be expected to have "hundreds of millions of dollars in additional retirement savings" by their retirement).

What the plaintiff knew. Christopher Sulyma worked at Intel from 2010 to 2012. J.A. 32, 171, 212. After joining the company, he was automatically enrolled in its 401(k) plan and the retirement plan, where he was required to invest in the diversified fund. For his 401(k), Intel said that the default TDP was the way to go because financial experts would "invest, monitor, and rebalance [his] investments so [he wouldn't] have to." J.A. 143, 160, 351. Having little financial expertise, he chose to keep the default and was placed into the 2045 TDP. J.A. 32.

Sulyma received quarterly account statements by mail. These statements (which ERISA requires, *see* 29 U.S.C. § 1025) informed him that his TDP asset allocation was around 63% stocks, 16% bonds, and 21% "short-term/other," with little variation from quarter to quarter. J.A. 112; *see* J.A. 372, 375; J.A. 377, 380; J.A. 382, 385; J.A. 387, 390; J.A. 392, 395; J.A. 397, 400; J.A. 402, 405; J.A. 408, 411; J.A. 414, 417. The statements said that the "short-term/other" investments "can add stability to [the] portfolio," and they "include certificates of deposit (CDs), Treasury Bills and Money Market Instruments." J.A. 376; *see* J.A. 377–418 (same). The statements for his diversified fund similarly said only that it was invested in 40% stocks, 34% bonds, and 26% "short-term/other." J.A. 411, 417. None of these statements said anything about hedge funds, private equity, or commodities—even though they accounted for nearly all "short-term/other" investments. Nor did they say how much had been charged in fees.

Rather than include this information in the account statements mailed to Sulyma, Intel put it in documents posted online. These documents primarily consisted of what Intel calls "fund fact sheets." *See* J.A. 277–340; J.A. 354–71; J.A. 419–25. The statements did not refer to these fact sheets, and they are not required by ERISA. Only two ERISA-mandated disclosures cited by Intel (at 9–10) mention hedge funds and private equity. The first is the 2012 Summary Plan Description (or SPD), at page 11, and it says nothing about the percentage *allocated* to those investments. *See* J.A. 227. (The 2010 and 2011 SPDs, for their part, do not even say that much. *See* J.A. 215–23.) The second is the 2011 Qualified Default Investment Alternative (or QDIA) notice, at page 9. J.A. 236.

Intel did not directly send Sulyma a copy of the QDIA notice or any of the fact sheets. It instead included the following sentence in the account statements that it mailed to him, saying that he that could go online to access unspecified additional information: "To get up-to-date information about your account, call the Fidelity Service Center at 888-401-7377 or log on [NetBenefits] at http://www.401k.com." J.A. 372; *see also* J.A. 374 ("To access performance information on the investment options available in your Plan – log onto NetBenefits at www.401k.com or call your plan's toll-free number.").

Nor did any of the emails that Intel sent to Sulyma directly provide this information. One email, for example, sent in May 2012, specifically told him: "No action is required on your part." J.A. 152. It said that the email was being sent only because federal law "requires an annual notice to let you know your accrued pension benefit is available for your review," and that he could review the notice by visiting the "Fidelity NetBenefits Web site, www.netbenefits.com," and then "[c]lick[ing] on your

pension plan," and that he could "be directed to the Pension Summary page" from there. *Id*; *see also* J.A. 149 (email saying that Sulyma could access the "Annual QDIA Notice," but that he would "need to log on to NetBenefits and then open the document QDIA Notice" to do so).

Although Sulyma set up an online account and visited the website periodically to check his balance, he testified that he did not specifically access the 2012 SPD, the 2011 QDIA notice, or the relevant fact sheets. J.A. 174, 182–83, 193, 197, 212–13. He further testified that he did not know that his plans were heavily invested in hedge funds and private equity, much less that the investments were imprudent. J.A. 201–09, 212–13. Intel cites no evidence that he accessed these documents in the relevant period (despite having a log of all of his website visits) and thus would have known that over a quarter of his plan assets were in hedge funds, private equity, and commodities. It wasn't until 2015—when news reports shed light on Intel's imprudent investing, and Sulyma consulted with financial experts—that he learned facts indicating that Intel may have breached its fiduciary duties by imprudently investing his retirement assets. J.A. 212–14.

III. Procedural background

District court proceedings. Sulyma filed this case in 2015. His complaint alleges that the petitioners breached their fiduciary duties in several different 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 petitioners adopted asset-allocation models that radically departed from prevailing standards. *Third*, the petitioners failed to adequately disclose the imprudent-investment strategy to participants.

The complaint was filed within ERISA's general six-year limitations period. Yet Intel moved to dismiss the claims as untimely under section 1113(2), contending that Sulyma had "actual knowledge of the facts that constitute the alleged breach" by October 2012. Dist. Ct. ECF No. 103, at 6. That is so, Intel claimed, because a participant has "actual knowledge of facts contained in materials" so long as they are "made available to him"—"regardless of whether" he actually saw them. *Id.* at 6. "How information is made available to a plan participant," Intel added, "does not matter." *Id.* at 7. Thus, Intel made a Russian-nesting-doll-like argument that Sulyma had actual knowledge because the 2012 SPD was provided to him, and it in turn referenced fact sheets that were posted online. *Id.* at 8.

The district court converted the motion to dismiss into a summary-judgment motion and ordered discovery on the question of Sulyma's actual knowledge. Discovery made clear that there was a material dispute of fact as to what he actually knew. The court recognized that "Sulyma never saw the Fund Facts Sheets," and did not "recall receiving or review[ing]" the SPDs. Pet. App. 24a. It therefore decided the motion on the assumption that "he never looked at those documents to begin with." *Id.* The court further recognized that the documents that Sulyma actually read—the statements he received in the mail—"say nothing about investments in private equity or hedge funds," Pet. App. 24a–25a, and that even Intel admitted that they "did not disclose the allocation of Sulyma's investments 'well,'" Pet. App. 39a.

Nevertheless, the district court agreed with Intel that it "should still find Sulyma had 'actual knowledge' of the asset allocation under a 'totality of the information' theory, taking into account the disclosures on the 12 Fund Facts Sheets." Pet. App. 40a. In other words, the court

held that it could "attribute actual knowledge" to him based on the documents "made available" online, which put him on "notice of how his investments were allocated." Pet. App. 24a, 34a. The court did so even as it held that constructive knowledge was insufficient under section 1113(2), and that even "willful blindness" is not "a substitute for actual knowledge." Pet. App. 31a.

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-of-fiduciary-duty claim, 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.* Taking the two 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," not just that certain "facts were available to the plaintiff." Pet. App. 13a–14a.

In reaching this conclusion, the court rejected the Sixth Circuit's contrary view. In a 2010 case, the Sixth Circuit reasoned that when "a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." *Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 571 (6th Cir. 2010). The Ninth Circuit "respectfully

disagree[d] with that analysis," for it would "characterize the plaintiff described in *Brown* as having constructive knowledge only." Pet. App. 14a. The court noted that, even if there were "strong policy reasons" for Congress to have adopted a constructive-knowledge standard, there are equally "strong policy reasons" for doing what it did: requiring actual knowledge. *Id.* "[W]eighing the policy merits of different knowledge standards," Judge Wallace explained, "was for Congress to undertake when it enacted, and then amended, section 1113, not for this court. Our task is not to make policy decisions, but to interpret the statute as enacted." Pet. App. 15a.

Having done so, the court then applied the law to the facts and found that Intel was not entitled to summary judgment. 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. "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—that he was "unaware that the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity," and did "not recall seeing any documents during [his] employment at Intel that alerted [him] to the fact that [his] retirement monies were significantly invested in hedge funds or private equity." Pet. App. 16a–17a. The court observed that Sulyma "testified that he was unaware of documents making these disclosures when specifically deposed on this point." Pet. App. 17a. These statements, the court explained, "created a dispute of material fact" that "only a fact-finder could" resolve. *Id.*

SUMMARY OF ARGUMENT

I.A. Statutory interpretation starts with the text, and the text here is clear. To have "actual knowledge" of a fact, in law as in life, means to *actually know* that fact. That is the ordinary meaning of the phrase, and it accords with both common parlance and legal usage. If someone *should know* something, but they don't, they might be said to have constructive knowledge. But they don't have actual knowledge. And section 1113(2), by its plain terms, requires "actual knowledge," not constructive knowledge.

B. Context, structure, and history confirm that the statute means what it says. Section 1113(2) differs from several other ERISA limitations provisions in two key respects. The other provisions look to when the plaintiff "acquired *or should have acquired* actual knowledge." *See* 29 U.S.C. §§ 1303(e)(6), 1370(f)(2)(A), 1451(f) (emphasis added). Not so for section 1113(2). And these provisions allow constructive knowledge for a good reason: Unlike section 1113, they are structured so that the six-year period is the floor, and not the ceiling. It thus makes perfect sense for Congress to have insisted on actual knowledge only when the six-year period would be shortened. Section 1113(2)'s history, moreover, provides additional confirmation. Until 1987, the statute included a constructive-knowledge trigger. But Congress amended the statute to remove that trigger—leaving no doubt that "actual knowledge" is necessary.

C. Once the phrase "actual knowledge" is given its ordinary meaning, its application to this case becomes straightforward. The question is one for the factfinder. And on this record, there is a material dispute of fact as to whether Sulyma actually saw and read—and therefore had "actual knowledge" of—all the information contained in the disclosures made available to him online.

II. Intel's interpretation of section 1113(2) cannot be squared with its plain text (to say nothing of its history and structure). Intel contends that the phrase "actual knowledge" is ambiguous, and that the best reading of it here is a contextual one that looks to ERISA's disclosure regime. Under that reading, Intel says that "the Section 1113(2) inquiry should take as a given that the plaintiff has actual knowledge of information contained in mandated disclosures." Pet. Br. 37. A "contrary reading," says Intel, "flies in the face of [ERISA's] policies." Pet. Br. 3.

This argument is triply flawed.

A. *First*, "actual knowledge" is not ambiguous, and Intel's attempts to show otherwise are unpersuasive. Intel devotes just a single paragraph to this effort (at 23). But none of the cases it cites reveals any ambiguity. Several of the cases discuss the concept of "willful blindness," most commonly found in criminal cases. That concept, however, is distinct from "actual knowledge." And even if it were appropriate to import the concept as a method of proving actual knowledge here, it would still offer no support for Intel's position. The other cases are even further afield.

B. *Second*, even if the phrase were ambiguous, Intel's reading would not be a plausible interpretation. Intel does not mention the most relevant statutory context: the other ERISA limitations provisions. Instead, Intel's appeal to context is essentially an elaborate argument for reading the word "knowledge" to include constructive knowledge, and constructive knowledge to include information in mandated disclosures. But section 1113(2) says "actual" knowledge. Intel would read that word out of the statute.

C. *Finally*, Intel's heavy emphasis on policy cannot make up for these shortcomings. Intel's policy arguments are overblown and misguided, and they offer no basis for rewriting the words that Congress wrote into law.

ARGUMENT

I. Section 1113(2)'s "actual knowledge" provision looks to whether a person actually knows the facts constituting the breach—not whether ERISA disclosures were made available to them.

"Under ERISA, the victim of an alleged fiduciary breach normally has six years to bring her claim, though this period may be shortened to three years when the victim had actual knowledge of the breach or violation." *Zirnhelt v. Mich. Consol. Gas Co.*, 526 F.3d 282, 288 (6th Cir. 2008) (Sutton, J.) (quotation marks omitted). Under the shorter limitations period, a breach-of-fiduciary-duty claim becomes time-barred "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).

The question presented concerns the meaning of "actual knowledge." Must a plaintiff be "actually aware" of the facts constituting the breach or violation, as the court of appeals held? Pet. App. 13a. Or should the phrase instead be "construed to encompass more than that," as Intel contends, such that the three-year clock may be triggered "regardless of whether [the plaintiff] actually" knows of the breach or violation? Pet. Br. 22.

A. By its terms, section 1113(2) requires "actual knowledge" of the breach—not constructive knowledge—and "actual" means actual.

Because this is a statutory-interpretation question, answering it "begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). And when the text "is unambiguous and the statutory scheme is coherent and consistent—as is the case here—the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (alterations omitted). The Court "must enforce plain and unambiguous statutory language according to its terms."

Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010). In "analyzing the statutory language," moreover, this Court generally "assum[es] that the ordinary meaning of that language accurately expresses the legislative purpose." *See id.* (interpreting ERISA); *see also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013).

ERISA does not define the term "actual knowledge," so its ordinary meaning governs. The ordinary meaning of "actual" is "existing in fact or reality." *Webster's Third New International Dictionary* (1971); *see also American Heritage Dictionary* (5th ed. 2011) ("existing in reality"). And "knowledge" means "the state or fact of knowing," or "familiarity, awareness, or understanding gained through experience or study." *American Heritage Dictionary*. Putting the two together: to have "actual knowledge" of something is to have real awareness of it. So, for example, "if a person reads a deed or contract, by that fact he has actual knowledge of its contents. If, on the other hand, he has never seen or read the paper," he is not actually aware of its contents and lacks actual knowledge. *Colby v. Riggs Nat'l Bank*, 92 F.2d 183, 194 (D.C. Cir. 1937). By the same token, if someone receives a book as a present and does not read it, he does not have "actual knowledge" of what the book is about. Nor does he have such actual knowledge if he is instead told how to locate the book in the stacks of the public library and does not do so. And if he receives an email with a link to an article that he does not see or does not open, no one would say that he has "actual knowledge" of the article's contents because he received the email.

This settled, ordinary understanding of "actual knowledge" accords with its legal understanding. As a term of art, the word "knowledge," standing alone, can "mean[] different things in different contexts," including constructive knowledge. *United States v. Spinney*, 65

F.3d 231, 236–37 (1st Cir. 1995); *cf. Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) (noting that the legal term "possession," unmodified, can encompass actual and constructive possession); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644–48 (2010) (holding the same for "discovery"). But when "knowledge" is modified by the word "actual," as it is in section 1113(2), the phrase takes on a narrower, fixed meaning: It refers to "positive, in contrast to imputed or inferred, knowledge of a fact," *Black's Law Dictionary* 873 (6th ed. 1990); and "direct and clear knowledge, as distinguished from constructive knowledge." *Black's Law Dictionary* 950 (9th ed. 2009).

As these legal-dictionary descriptions indicate, actual knowledge is defined in contradistinction to constructive knowledge. Whereas actual knowledge must exist *in fact*, constructive knowledge may be "attributed *by law*." *Id.* (emphasis added). Constructive knowledge has thus long been understood by courts as "a lesser standard meaning 'knowledge that one using reasonable care or diligence *should have*'"—regardless of whether the person *actually* has such knowledge. *United States v. Myers*, 772 F.3d 213, 220 (5th Cir. 2014) (quoting *Black's Law Dictionary*); *see Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014); *Colby*, 92 F.2d at 194 ("[T]here is a marked distinction between actual knowledge and constructive or implied knowledge. The former consists in express information of a fact. The latter is in the nature of a legal inference.").

In view of this distinction, the courts of appeals have recognized (and Intel does not dispute) that section 1113(2)'s "actual knowledge" requirement "must be distinguished from 'constructive' knowledge," "inquiry notice," or any other form of "imputed knowledge"—none of which "triggers the three-year limit of § 1113(2)." *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 678–79, 683 (7th

Cir. 2014); *see, e.g.*, *L.I Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n, Inc.*, 710 F.3d 57, 67 (2d Cir. 2013); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992); *Brock v. Nellis*, 809 F.2d 753, 754–55 (11th Cir. 1987). Because section 1113(2) "speaks solely in terms of *actual*, not constructive[] knowledge," its use of that term is unambiguous: "only actual knowledge will do." *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990).

This Court has recognized as much. In *Merck*, it held that the word "discovery," as used in the limitations statute for securities-fraud claims, 29 U.S.C. § 1658(b)(1), covers both actual and constructive discovery. 559 U.S. at 644–48. In reaching that conclusion, the Court contrasted the statute with section 1113(2), which the Court cited as an example of a limitations period that looks only to "*actual knowledge*"—that is, to "those facts the plaintiff actually knew," and not "also those facts a reasonably diligent plaintiff would have known." *Id.* at 647–48. The Court even added emphasis to section 1113(2)'s use of the phrase "actual knowledge" to underscore that Congress had not included a similar modifier for securities-fraud claims. *See id.* at 647. This Court's opinion in *Merck* thus recognizes that section 1113(2) means what it says: it considers only "those facts the plaintiff actually knew." *Id.* at 648.

B. Context, structure, and history confirm that "actual knowledge" means actual knowledge.

Although Congress sometimes uses words in ways that deviate from their plain meaning, nothing in the statute's surrounding text, structure, or history "suggests anything other than the ordinary meaning of" actual knowledge. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 228 (2014). To the contrary, looking past the plain text of

section 1113 only confirms that actual knowledge indeed means actual knowledge: ERISA's other limitations provisions, as well as the history of section 1113(2), leave no doubt that Congress's decision to require actual knowledge—in the ordinary sense—was deliberate.

As the Seventh Circuit has observed, "[m]ost statutes of limitations run from the time a claim accrues," making section 1113(2) somewhat "exceptional." *Fish*, 749 F.3d at 679 n.3. Even within ERISA, section 1113(2) is unusual in requiring actual knowledge. "Other ERISA limitations do not demand as much." *Gluck*, 960 F.2d at 116. Section 1451(f), for example, which governs withdrawal-liability claims, provides that an action "may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired *or should have acquired* actual knowledge of the existence of such cause of action." 29 U.S.C. § 1451(f) (emphasis added). And sections 1303(e) and 1370(f), which govern claims by the Pension Benefit Guaranty Corporation and claims challenging termination of single-employer plans, respectively, use the same formulation. *See id.* § 1303(e)(6); *id.* § 1370(f)(2)(A).

These provisions differ from section 1113(2) in two important respects. *First*, they allow the three-year clock to be triggered when the plaintiff "should have acquired actual knowledge." This language confirms that the term "actual knowledge," by itself, cannot include knowledge that the plaintiff *should have* acquired, but did not *in fact* acquire, for then the words "should have acquired" would be superfluous. As the Third Circuit put it (in an opinion joined by then-Judge Alito): "Congress knew how to require constructive knowledge; it required it in sections 1303 and 1370" (as well as 1451)—but not in section 1113. *Gluck*, 960 F.2d at 1176; *see also Caputo v. Pfizer, Inc.*,

267 F.3d 181, 194 (2d Cir. 2001) (explaining that these other provisions show that "when the Legislature intends to incorporate a constructive knowledge requirement into an ERISA statute of limitations, it ordinarily does so explicitly"). So there is no reason to "think that Congress' failure to call for it in section 1113 was accidental." *Gluck*, 960 F.2d at 1176.

Second, section 1113(2) takes "the earlier of" the two limitations periods, whereas these other limitations provisions take "the later" period. This difference helps explain why Congress felt comfortable insisting on actual knowledge in section 1113(2): because the general six-year period serves as a backstop that "protects the defendant from an interminable threat of liability." *See Cal. Pub. Employees' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2049–50 (2017); *see also Merck*, 559 U.S. at 650 (explaining that the existence of a statute of repose ensures that giving the shorter limitations period its proper interpretation will not "subject defendants to liability for acts taken long ago"); *Gluck*, 960 F.2d at 1177 ("A defendant is protected both by [section 1113's] absolute six-year bar, and by the three-year limit, which prevents plaintiffs who know their rights from pausing too long in pressing their claims."). Not so for these other limitations provisions. They *start* at six years, and may be extended depending on when the plaintiff acquired or should have acquired actual knowledge. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 198 (1997) (interpreting section 1451(f) in this manner). Allowing constructive knowledge in that scenario—but not for section 1113(2)—thus makes perfect sense as a matter of legislative design.

Reading section 1113 as it is written is also in keeping with its history. The statute used to more closely resemble

the other ERISA limitations provisions, in that it too allowed for knowledge to imputed as a matter of law. As the court explained below, the statute "provided that an action could not be commenced more than three years after the earliest date 'on which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary under this title.'" Pet. App. 7a. But "Congress repealed the constructive knowledge provision in 1987, leaving only the actual knowledge requirement." *Id.* This congressional decision further confirms that, after 1987, "knowledge of *facts* cannot be attributed to plaintiffs who have no actual knowledge of them." *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005); *see also* Pet. App. 13a ("This amendment strongly suggests that Congress intended for only an actual knowledge standard to apply."); *Caputo*, 267 F.3d at 194 (concluding same).

C. Because receiving information on how to access a document does not itself constitute "actual knowledge" of the document's contents, the judgment below is correct.

The court of appeals' reading of the statute is thus correct as a matter of plain meaning, context, structure, and history. As used in section 1113(2), "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." Pet. App. 13a (emphasis added). Likewise correct is the court's holding that, "[t]o prevail on a statute of limitations defense on a [breach-of-fiduciary-duty] claim" like the one asserted here, "the defendant must show that there is no dispute of material fact that the plaintiff was actually aware that the defendant acted imprudently." Pet. App. 13a–14a.

Intel contests these holdings as a matter of law, but it does not contest the court of appeals' application of them. And rightly so: If "actual knowledge" means actual knowledge, it is a question for the factfinder and cannot be determined at summary judgment on the record in this case. The complaint alleges that the petitioners breached their fiduciary duties in at least three ways: (1) by placing a large portion of plan assets into costly and high-risk hedge-fund and private-equity investments, without properly considering the risks; (2) by adopting asset-allocation models that radically departed from prevailing standards; and (3) by failing to adequately disclose the imprudent-investment strategy to participants.

The record shows that Sulyma did not have "actual knowledge of the[se] breach[es]" more than three years before filing suit, 29 U.S.C. § 1113(2)—or at the very least, that there's a genuine factual dispute as to whether he did. The account statements he received by mail informed him that about 26% of his diversified fund and 21% of his TDP were invested in "short-term/other" investments, that these investments would "add stability to [the] portfolio," and that the investments "include certificates of deposit (CDs), Treasury Bills and Money Market Instruments." J.A. 376; *see* J.A. 377–418 (same). But the statements did not mention hedge funds, private equity, or commodities. Although that information could be accessed online if a participant were to take the initiative to navigate the website, locate the relevant documents, and read them in full to learn what they said, Sulyma testified that he did not see or read the documents. J.A. 174, 182–83, 193, 197, 212–13. And some of these documents, like the 212 SPD, mentioned hedge funds and private equity but omitted their amounts. J.A. 227. It was not until 2015 that he learned of facts indicating that his retirement assets were imprudently invested. J.A. 212–14.

Construing the facts in the light most favorable to Sulyma, a reasonable factfinder could easily find that he lacked "actual knowledge of the breach or violation" three years before filing suit. As the district court correctly recognized (even as it incorrectly "attribute[d] actual knowledge" to him based on documents "made available" online), Sulyma testified that he "never looked at those documents," and his account statements "sa[id] nothing about investment in private equity or hedge funds." Pet. App. 24a–25a. So even assuming that the premise of the question presented were correct—that "all of the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint"—the Ninth Circuit's judgment is correct and should be affirmed.[2] Because there is a factual dispute

[2] As explained in Sulyma's brief in opposition, the premise of the question is false. Although the circuits have taken varying approaches to what constitutes actual knowledge "of the breach or violation," *see Edes*, 417 F.3d at 133 (summarizing cases), no circuit would hold that knowledge of the disclosures here, without more, equals knowledge of the alleged breach. Nor did the court of appeals below. Despite Intel's assertion to the contrary (at 37–38 n.3), the court held that, for imprudent-investment claims, there must be "actual knowledge both that those investments occurred, and that they were imprudent." Pet. App. 16a. That holding is correct, and no circuit holds otherwise. *See Caputo*, 267 F.3d at 193 ("[A plaintiff] must have knowledge of all facts necessary to constitute a claim."); *Gluck*, 960 F.2d at 1177 ("[A] plaintiff [must] have actual knowledge of all material facts necessary to understand that some claim exists."); *see also Fish*, 749 F.3d at 680–83 (holding that "actual knowledge of the procedures used or not used by the fiduciar[ies]" is often needed for imprudent-investment claims); *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985) ("The disclosure of a transaction that is not inherently a statutory breach of fiduciary duty … cannot communicate the existence of an underlying breach."). Intel does not attempt to show that this holding is wrong, nor did it do so in its petition. Instead, Intel asks the Court to assume that the disclosures provided "all of the (continued …)

about whether Sulyma was *actually aware* of that information, summary judgment is impermissible.

II. Intel's reading of section 1113(2)—that it "should take as a given" that plan participants have "actual knowledge" of any information in any disclosure made available to them—cannot be reconciled with the statute's plain text.

Unable to prevail under a straightforward reading of the statute, Intel takes a different tack. It does not contend that the Ninth Circuit got it wrong in holding that section 1113(2) requires "*actual* knowledge, rather than constructive knowledge." Pet. App. 13a. Nor does Intel attempt to prove that Sulyma had the requisite "actual knowledge" under the ordinary meaning of that phrase.

Instead, Intel seeks reversal by making two interpretative moves and an appeal to policy. Intel first claims (at 22) that "actual knowledge" is ambiguous and "can vary according to the statutory context." It then argues that the only context that matters here is ERISA's disclosure regime, because the word "disclose" is related to the word "knowledge." It therefore urges the Court to hold that employees have actual knowledge, as a matter of law, of any information in any disclosure made available to them under ERISA—even if they never actually knew the information because they did not see or read it. Intel further argues (at 40–49) that this construction is what Congress would have wanted because it achieves (in their

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relevant information" and, on that assumption, to interpret the meaning of "actual knowledge." Pet. Br. i. As a result, even if this Court were to decide the question in Intel's favor, that would not preclude Sulyma from arguing on remand that the disclosures do not contain "all of the relevant information" for his breach claim.

view) the right "balance" and protects fiduciaries who breach their obligations from "onerous burdens."

Intel is wrong across the board. *First*, the phrase "actual knowledge" is not ambiguous. *Second*, even if it were ambiguous, the interpretation urged by Intel is not plausible because it gives no meaning to the word "actual." *Third*, Intel's policy concerns are overblown, misguided, and irrelevant in any event.

A. Intel's one-paragraph attempt to create ambiguity in the term "actual knowledge" is utterly unpersuasive.

Intel begins its argument (at 22) in an odd place. After noting that ERISA does not define actual knowledge, Intel skips over "the most fundamental semantic rule of interpretation": the plain-meaning canon. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). Intel provides no analysis whatsoever of the "plain" or "ordinary" meaning of the phrase (never once using either of those words). The closest it comes to doing so is a brief, begrudging acknowledgment that the phrase "can connote subjective awareness of a particular fact." Pet. Br. 22. But rather than call this what it is—the ordinary definition—Intel refers to it as simply a definition that exists at "a high level of generality." It then asserts that the phrase "can be, and often has been, construed to encompass more than that." *Id.*

In support of this bid for ambiguity, Intel does not offer any competing definition of "actual knowledge," let alone a plausible one. It instead cites a smattering of cases—contained in a single paragraph on page 23—as the sole authority for the proposition on which its entire argument rests: that actual knowledge "may, depending on the context, be satisfied by circumstances that do not

establish purely subjective cognition of a particular fact." Pet. Br. 24. Given the centrality of these cases to Intel's argument, they are worth a careful examination.

Willful blindness. The first three cases discuss the doctrine of "willful blindness," which "is well established in criminal law" as a way to prove that "a defendant acted knowingly." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). None of these cases, however, involves a statute requiring "actual knowledge." And, as Congress has repeatedly made clear, actual knowledge and willful blindness are distinct concepts. For example, even in civil statutes, Congress often defines "knowing" to mean (1) having "actual knowledge" *or* (2) taking "action to avoid such actual knowledge" (or otherwise acting with "deliberate ignorance" of such knowledge)—the latter of which encapsulates the definition of willful blindness. *See, e.g.*, 21 U.S.C. § 335a(b)(2)(B); 12 U.S.C. §§ 1701q-1, 1723i, 1735f-15; 15 U.S.C. § 1717a; 17 U.S.C. § 1401(c)(6)(C); 31 U.S.C. §§ 3729(b)(1), 3801(a)(5); 42 U.S.C. §§ 1437z-1, 3537a, 3545(m). These statutory definitions underscore that the two terms are not identical; taking action to *avoid* actual knowledge is not the same as having it.

This Court has made a similar point. In *Global-Tech*, the Court applied the doctrine for the first time in a civil context, while interpreting the phrase "actively induces infringement of a patent." 563 U.S. at 760, 768. The Court described willful blindness as *almost like*—but not the same as—actual knowledge. The Court explained that the doctrine has been justified on the theory that "defendants who behave in this manner are just as culpable as those who have actual knowledge," and that "persons who know enough to blind themselves to direct proof of critical facts *in effect* have actual knowledge of those facts." *Id.* at 769. The Court reasoned that these rationales for establishing

culpability for criminal wrongdoing are just as applicable when a defendant has been accused of civil wrongdoing.

The Court further held that willful blindness has "an appropriately limited scope that surpasses recklessness and negligence" by imposing two requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* "Under this formulation," the Court explained, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can *almost be said* to have actually known the critical facts." *Id.* (emphasis added). Thus, however appropriate willful blindness might be as a means of establishing proof that a defendant acted knowingly, it is not the equivalent of actual knowledge, nor is it incorporated into the definition of that term.

At any rate, even if the doctrine could be used as a way of proving whether a *plaintiff* had *actual* knowledge, it still would not aid the petitioners. They ask this Court to hold that a person has actual knowledge—*as a matter of law*—of any ERISA disclosure made available to them. But willful blindness requires proof of "active efforts" to "avoid knowing" the facts. *Id.* at 770. So even if "willful blindness ha[d] a place in the analysis" of section 1113(2), "it would almost certainly present a genuine issue of material fact to be resolved by the finder of fact at trial." *Fish*, 749 F.3d at 685. "[T]he ostrich instruction on willful blindness describes an inference that a jury *may* make, not a rule of law that *must* be applied even where the party denies actual knowledge," *id.*—as Intel's own cases recognize. *See United States v. Zayyad*, 741 F.3d 452, 463 (4th Cir. 2014) ("A jury may rely upon willful blindness 'when the defendant asserts a lack of guilty knowledge but

the evidence supports an inference of deliberate ignorance.'"). The doctrine "allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him." *Global-Tech*, 563 U.S. at 769 n.9 (citation omitted).

This might explain why Intel tries to couch its rule in similar terms—by using active verbs to describe inaction. So, in Intel's telling, plan participants who fail to read every line of every document sent by way of an emailed URL are not said to be simply careless, or even reckless. Rather, they are characterized as "act[ing] to defeat" actual knowledge to "manufacture" application of the general limitations period "by manipulating the state of their own subjective knowledge," and "purposely choos[ing]" "to remain ignorant" of the disclosures' details, thus "deliberately opt[ing] out of ERISA's disclosure framework." Pet. Br. 18–19, 32–33, 35–36.

But the only thing active about Intel's proposed rule is its effort to portray it as such.[3] Its rule does not require participants to take *any* action. Just the opposite: Intel's whole theory (at 37) is that "the Section 1113(2) inquiry should take as a given that the plaintiff has actual knowledge of information contained in mandated disclosures"—and even information *referenced* in those disclosures (like the fact sheets, which are not mandated). This means that the rule necessarily kicks in the instant a disclosure is made—irrespective of what the recipient

[3] These assertions are particularly audacious because the communications that Intel sends to participants reassure them that "[n]o action is required on your part," J.A. 152, and that selecting a TDF means that the participant won't have to "monitor" it, J.A. 143, 351. Intel's argument, then, is that a participant who takes Intel at its word is necessarily engaged in a deliberate effort to avoid the truth.

actually does with it. And sure enough, at oral argument below, counsel for Intel conceded that its rule would require that actual knowledge be assigned even to someone who was given access to a disclosure while in a coma. CA9 ECF No. 43, at 19:32-20:15 (Oct. 18, 2018), https://perma.cc/8V8F-GK29. Needless to say, whatever else that rule might have to show for it, it is anything but willful blindness—and anything but actual knowledge.[4]

A 1902 Missouri case. Intel also dusts off *Kugel v. Knuckles*, 69 S.W. 595 (Mo. Ct. App. 1902), a 117-year-old decision of an intermediate state court that only four cases have ever cited. That Intel feels the need to press this case into service speaks volumes. Even indulging the unlikely assumption that Congress had *Kugel* in mind when passing ERISA in 1974, that case does not cast doubt on the meaning of "actual knowledge." The court in *Kugel* considered whether to reverse a factual finding that the plaintiffs had actual notice under Missouri property law. Applying "principles of proof," the court held that there was "ample support for the finding of actual notice" in the record—specifically, "the testimony and admissions of the active plaintiff"; testimony that the plaintiffs were orally notified of the key fact; evidence that "[t]he deed obtained by one of the plaintiffs" also "referred expressly" to this fact; and evidence that the plaintiffs themselves had prepared a document with the key information, which "furthermore gave [them] full notice." *Id.* at 596. Based on this evidence, the court concluded that the factfinder was permitted to "draw[] the inference" that the plaintiffs

[4] In trying to distinguish its proposed rule from a theory of constructive knowledge, Intel openly embraces the doctrine of willful blindness, saying (at 35) that its rule is "far more akin to the doctrine of willful blindness than to constructive knowledge." But, for the reasons just noted, that is out of the frying pan and into the fryer.

were on actual notice. *Id.* This conclusion lends no support to either to the notion that actual knowledge is ambiguous or to Intel's proposed interpretation of that term.

The case does, however, helpfully demonstrate that actual knowledge (no less than actual notice) "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *see also Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 122 (2d Cir. 2017) ("Actual knowledge may be proven or disproven by direct evidence, circumstantial evidence, or a combination of the two."). But the "amenability to circumstantial evidence of actual knowledge should not be viewed as creating a constructive knowledge standard." *Nomura*, 873 F.3d at 122. There is a difference between allowing something to be considered as *evidence* of actual knowledge (as in *Kugel*) and treating it as conferring actual knowledge *as a matter of law* (as Intel asserts). While ERISA's disclosures might be relevant to the question of actual knowledge, they do not themselves constitute it.

Implied actual knowledge. Next up is *Poffenberger v. Risser*, 431 A.2d 677, 681 (Md. 1981), which discussed something it called "implied" actual notice. *Poffenberger* "defined implied actual knowledge as that knowledge that would in all probability have resulted from a reasonably diligent investigation pursued upon awareness of circumstances that would cause a reasonable person to investigate." *Pennwalt Corp. v. Nasios*, 550 A.2d 1155, 1160 (Md. 1988) (summarizing *Poffenberger*). The same court, in subsequent cases, has referred to this by its more natural name: "the inquiry notice rule." *Id.* at 1163.

Poffenberger is not remotely helpful to Intel. For one thing, the term "implied actual knowledge," as far as we

can tell, has never appeared in a published federal appellate decision. For another, section 1113(2) doesn't use those words, and there is no basis to read the term "actual knowledge" to contain an implied "implied." Nor is there any reason to think that Congress intended to incorporate such an oxymoronic concept when it enacted the statute in 1974. In all events, this label is just another, more confusing way of describing inquiry notice. And Intel itself tacitly concedes (at 34–35) that "inquiry notice" is a form of constructive knowledge that is insufficient to trigger section 1113(2).[5]

Forgotten actual knowledge. Finally, there is *People v. Barker*, 96 P.3d 507 (Cal. 2004)—the last case relied on by Intel for its claim that actual knowledge is ambiguous. That case has no bearing on this one. It involved a sex-offender-registration law that "impose[d] a duty upon all registrants, once they have received and understood advisement of the duty to register, to remember and fulfill that legal obligation." *Id.* at 510. In keeping with the California Supreme Court's rule that it "must adopt the construction that is most consistent with the apparent legislative purpose," *id.*, the court said that it did "not believe the Legislature intended that a defendant could successfully evade this duty by claiming that 'I totally forgot about it.'" *Id.* at 514. That holding is irrelevant here. The statute there did not use the words "actual knowledge," and the court did not apply a textual analysis. And even if "a person cannot be said to *know* something if he or she has forgotten it," *id.* at 515, the text of section

[5] Although the term "implied actual knowledge" did make its way into *Black's Law Dictionary* beginning in 1999, the definition of the term is the same as that for inquiry notice. And regardless, it is the meaning of the term when Congress enacted the statute that governs. *See New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019).

1113(2) does not ask whether someone *currently* has actual knowledge. It is triggered upon "the *earliest date* on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2) (emphasis added).

In short, none of these cases supports the notion that "actual knowledge" is ambiguous. To the contrary, the phrase has a widely accepted meaning, and that is how Congress used it in section 1113(2). This Court should reject Intel's "attempt to create ambiguity where the statute's text and structure suggest none." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008).

B. Intel has no plausible interpretation of the word "actual."

Even if there were some marginal ambiguity in the phrase "actual knowledge" (for example, with respect to the permissibility of a willful-blindness jury instruction to establish a defendant's culpability), Intel's reading should still be rejected because it does not "comport with any known usage of the term." *See Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015). Intel does not offer a plausible interpretation of "actual knowledge" because it does not have a plausible interpretation of "actual." Simply put, Intel "offer[s] no account of what function that language would serve on [its] proposed interpretation." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (rejecting an interpretation of ERISA as atextual).

Intel maintains (at 24, and throughout) that a contextual reading of "actual knowledge" is required, and that the "disclosure requirements provide the necessary context." But "[w]hile it is true that statutory language must be read in context and with a view to its place in a larger statutory scheme, it is similarly canonical that courts must read a statute to give effect to all provisions

and avoid rendering any part 'inoperative or superfluous, void or insignificant.'" *U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 976–77 (11th Cir. 2014) (citation omitted; quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). Intel's interpretation contravenes this basic rule.

Intel's contextual argument relies almost exclusively on the word "knowledge." Intel contends that, because a disclosure is designed to impart knowledge, "Congress thus contemplated that disclosures made pursuant to the statute would ensure that participants have knowledge of the substance of those disclosures." Pet. Br. 25–26. Hence, Intel argues that the word "knowledge," as used in section 1113(2), should be read to include disclosures.

If that were all the statute said, Intel might have a point. The contextual, policy-based argument it spends pages trying to construct might make a fairly persuasive case for interpreting "knowledge" to include constructive knowledge, and constructive knowledge to include the information in ERISA-mandated disclosures. And that argument (at least for mandated disclosures like SPDs) would find support in the cases. *See Scharff v. Raytheon Co. Short-Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009) ("At least four circuits have held that plan participants who have been provided with an SPD are charged with constructive knowledge of [its] contents").[6]

But the statute doesn't just say knowledge; it says actual knowledge. Intel's interpretation "ignores the

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[6] *Cf. Cent. States, Se. & Sw. Areas Pension Fund v. Miss. Warehouse Corp.*, 853 F. Supp. 1053, 1059–60 (N.D. Ill. 1994) (holding that section 1451's three-year period, which starts when the plaintiff "acquired or should have acquired actual knowledge," was triggered by documents "made available" to the plaintiff, who "should have known" their contents, even though "actual knowledge is unclear").

modifier preceding that term." *Hunter Wise*, 749 F.3d at 979; *see, e.g.*, Pet. Br. 17 (arguing that "individuals who possess knowledge of a potential claim should be required to file within three years"). Indeed, in its textual analysis, Intel attempts to define the modifier out of the statute, saying (at 27) that "[t]o 'have' something means to 'be in possession of'" it, so "[t]o 'ha[ve] actual knowledge' of a fact" means "to possess knowledge of it." Intel then swaps out the word knowledge for disclosures, and voila—to have actual knowledge is to possess disclosures. This construction, Intel says (at 27), "makes perfect sense."

It does not. Again, the knowledge "must be *actual*," and Intel's rule "is by any definition constructive, rather than actual." *Hunter Wise*, 749 F.3d at 979. Intel would have this Court place "myopic focus" on one word "at the expense of the other language," *see id.*—to treat the word "actual" as a "stray mark[] on a page." *See Stapleton*, 137 S. Ct. at 1659. This Court's "practice, however, is to 'give effect, if possible, to every clause and word of a statute.'" *Id.*; *see Hunter Wise*, 749 F.3d at 979 ("If 'actual delivery' means anything, it means something other than simply 'delivery,' for we must attach meaning to Congress's use of the modifier 'actual.'"). Thus, far from being the "only sensible reading" of section 1113(2), as Intel proclaims (at 21), its reading "runs aground on the so-called surplusage canon," *see Stapleton*, 137 S. Ct. at 1659—"one of the most basic interpretive canons," *Corley*, 556 U.S. at 314.

To the extent that Intel tries to give some content to the word "actual" by suggesting that its rule could be limited to documents in a plaintiff's "actual" possession, that construction would be no more plausible. *See* Pet. Br. 27 (arguing that the phrase "had actual knowledge" in section 1113(2) "refers back to ERISA's requirement that fiduciaries ensure that plan participants 'actual[ly]

recei[ve]' the knowledge-conferring disclosure materials" (quoting 29 C.F.R. § 2520.104b-1(c))); *id.* at 26 (arguing that "the information made known in the disclosures must in fact come into the possession of plan participants"). This construction would be implausible for three reasons. One: Adopting such a contorted construction would not be a permissible reading of "actual knowledge" because "actual" modifies *knowledge*, not something else. Two: It would still be a theory of constructive knowledge (albeit a more limited one) because it would impute knowledge based on what a person actually possesses, not what they actually know. After all, a law student can buy the right casebook, but she will have to do the reading to actually learn what the cases say. Three: Even under this more limited construction, there would be no basis to impute actual knowledge here. Sulyma did not actually possess the disclosures made available to him because he didn't visit the specific webpages where they were located (meaning that he had, at most, *constructive* possession).[7]

Nor are these the only problems with Intel's rule. The documents on which Intel most heavily relies are the fact sheets. But why? Its question presented is limited to "statutorily mandated disclosures," as is the logic of its

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[7] Intel claims (at 34) that its interpretation does not incorporate a theory of constructive knowledge because "[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." But what Intel is describing is inquiry notice. Constructive knowledge is broader. It encompasses any "knowledge that one using reasonable care or diligence should have." *Black's Law Dictionary* (9th ed. 2009). In any event, as the facts of this case illustrate, Intel's theory would still require participants to take a series of additional steps to access information that is not actually in their possession (by going to a website, for example, creating a user name and password, navigating the site, and clicking through to find the relevant documents).

"contextual" theory, and Intel admits that the fact sheets are not "required by ERISA." Pet. Br. i, 11. To the extent that Intel is now urging a theory that goes beyond the mandated disclosures, it is unclear where the theory ends, what else might be included, and what the textual (or even contextual) justification would possibly be.

C. Intel's misplaced policy arguments offer no basis to ignore the plain text.

"Faced with so many obstacles in the text and structure" of the statute, Intel asks the Court "to move quickly on to policy." *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017). All of Intel's remaining arguments are either overtly about policy (*see, e.g.*, Pet. Br. 40–49) or else disguised policy arguments framed in terms of legislative "purpose" (*see, e.g.*, Pet. Br. 28–33). But they are policy arguments just the same. And they provide no license for ignoring the statutory text.

Intel complains, for example (at 40–49), that following the text will impose "onerous burdens on plan fiduciaries." But section 1113(2) "reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the trust they hold," by ensuring that "those who violate that trust" may not "easily find refuge in a time bar." *Brock*, 809 F.2d at 755. "To the extent defendants argue that this approach extends the limitations period too long, the response is that the six-year limit in § 1113(1) remains applicable to protect defendants from stale claims." *Fish*, 749 F.3d at 688. Whereas six years is the *floor* for many other ERISA limitations, it is the ceiling in this context because section 1113(1) operates akin to a statute of repose (at least for cases not involving fraud or concealment). As such, it provides "certainty and reliability" to fiduciaries, *ANZ*, 137 S. Ct. at 2055, and thus delivers exactly what Intel

claims to desire (at 41): a "predictable set of liabilities" for those who violate their obligations.

Intel also says that applying the statute as written will "perversely reward" plan participants who fail to read the disclosures with "a longer limitations period than plaintiffs who act in the manner ERISA contemplates by reviewing the documents they receive." Pet. Br. 18–19; *see id.* at 29–33. Intel made a similar version of this argument in its petition for certiorari, claiming that adherence to the text will "discourage[]" plan participants "from timely reviewing the disclosures provided by the plan, knowing that doing so will insulate them from a limitations defense." Pet. 20.

These policy concerns are greatly exaggerated. For starters, participants already have significant incentives to read their ERISA disclosures. Not only does the six-year period apply irrespective of whether a participant read any ERISA disclosures, but the disclosures convey important information about how their retirement assets are invested, and how those investments are doing. No rational person will "refuse to read" important documents about their retirement investments solely in the hope that, three to six years later, they can try to figure out whether the investments were imprudent and caused him harm, and then sue to redress that harm if so. *See* Pet. Br. 48. *Cf. Bay Area Laundry*, 522 U.S. at 204–05 (holding that "policy concerns . . . do not warrant an extraordinary reading" of an ERISA limitations period, and finding that "significant incentives," in any event, "will, in the usual case, induce plan sponsors to act promptly").

Nor is it accurate to say that some participants will be granted a "longer limitations period" by enforcing section 1113(2) according to its terms. *See* Pet. Br. 19. The *same* period applies to *all* plaintiffs in breach-of-fiduciary-duty

cases—six years, unless they had "actual knowledge of the breach or violation" more than three years before filing suit. 29 U.S.C. § 1113(2). The only difference is that one plaintiff might have obtained actual knowledge earlier than another plaintiff. And *that* is what matters for section 1113(2). The purpose of section 1113(2) isn't to encourage participants to read ERISA disclosures (which exist for *their* benefit, not to immunize fiduciaries). Nor is it to encourage participants to acquire actual knowledge of a breach or violation. Its purpose, rather, is to encourage those who *actually have* such knowledge to file suit within three years of obtaining it. Were it otherwise, Congress would have added the same language it added to other ERISA limitations provisions ("acquired or should have acquired actual knowledge"). 29 U.S.C. §§ 1303(e), 1370(f)(2)(A), 1451(f). It did not do so.

Intel makes another incentives-based policy point. It asserts that "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." Pet. Br. 18, *see id.* at 29–31. Intel says that plaintiffs will do this "routinely," depriving section 1113(2) of "any meaningful practical effect in many cases." Pet. Br. 31, 40. The intimation here is that employees will lie—and will lie "as a matter of course"—thereby rendering section 1113(2) a "virtual nullity." *Id.* at 21, 29.

This is unfounded. There is simply no reason to think that plaintiffs will lie under oath about whether they read or accessed documents—much less do so en masse. Plan participants can generally be counted on to tell the truth about what they knew and when they knew it, particularly in a declaration submitted under penalty of perjury. No evidence exists of an epidemic of ERISA plaintiffs lying

about seeing or reading disclosures, and there is no basis for assuming that this case will suddenly give rise to one. Moreover, an untruthful denial can often be contradicted by evidence in the defendant's possession—for example, evidence that the plaintiff accessed or downloaded the key disclosures. And there of course remains in every case the ultimate arbiter of credibility: the factfinder.[8]

A broader point. What these policy arguments have in common is that they sound in the same complaint—that fiduciaries cannot "ensure" actual knowledge in certain cases. Pet. Br. 41. This is an argument that section 1113(2) "improperly plac[es] the running of the limitations period in the control of the plaintiff." *See Bay Area Laundry*, 522 U.S. at 204 (quotation marks omitted). "But that is an unavoidable consequence of the scheme Congress adopted." *Id.* By requiring "actual knowledge"—and eliminating the constructive-knowledge provision in 1987—Congress made clear that the three-year exception would not be triggered until the plaintiff obtained actual knowledge of the breach or violation.

Intel's contrary, fiduciary-focused rule does not find support in the policies of ERISA's disclosure regime. That regime exists to benefit *participants*. It does not serve to allow fiduciaries who violate their obligations to get out from under the general six-year period, or to immunize themselves from liability in certain cases. And even if Intel's rule might, as a theoretical matter, supply some marginal additional motivation for some plan

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[8] In any event, section 1113(2) "govern[s] much more than" imprudent-investment claims. *See Bay Area Laundry*, 522 U.S. at 204 (making analogous point about section 1451(f)). So even assuming that it would have reduced applicability for those claims were the Court to reject the petitioners' rule, section 1113(2) "retains vitality in many other cases." *See id.*

participants to read their disclosures, that is no reason to adopt it. The Court should "not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law," and instead "presume more modestly instead that the legislature says what it means and means what it says." *Henson*, 137 S. Ct. at 1725 (brackets, citation, and ellipses omitted).

Finally, Intel makes an administrability argument. It says (at 47) that "[e]very case" subject to section 1113(2) will involve a fact-intensive inquiry into whether a plaintiff had actual knowledge. Intel is mistaken. If a claim is filed within three years of the alleged breach or violation—including a breach of the "continuing duty to monitor trust investments and remove imprudent ones," *Tibble*, 135 S. Ct. at 1828—the claim is necessarily timely. A plaintiff cannot have actual knowledge of a breach before it occurs. Conversely, if the claim is filed more than six years after the last act constituting the breach or violation, the claim is necessarily *un*timely (absent fraud or concealment). It is only if the claim is filed in between these two periods that there might be a question.

But even within that slimmer set of cases, the concern about administrability is overstated. For many kinds of claims (like most imprudent-investment claims), the facts constituting the breach or violation will include facts not found in the mandated disclosures themselves. In that scenario, Intel's rule would have no effect. Intel concedes (at 36) that "the defendant would have to prove that the plaintiff was aware of those additional facts." By contrast, for other kinds of claims (like claims alleging theft from an employee's account, say), the act itself will constitute the violation. In that scenario, actual knowledge will often be uncontested—for example, when the plaintiff observed the breach. *See, e.g.*, *Blanton v. Anzalone*, 760 F.2d 989

(9th Cir. 1985). Only for the narrow category of claims that fall in the middle—and that are filed in the three-to-six-year window—might it matter whether the plaintiff actually read the disclosures. And even then, the plaintiff would have to testify under oath that she did not read (or recall reading) the disclosures and did not otherwise know the relevant information, with no clear evidence to the contrary. That is a vanishingly small category of cases.

Rejecting Intel's rule, therefore, will not "severely complicate the litigation of ERISA cases," or cause "uncertainty [to] reign." Pet. Br. 3, 47. Intel offers no examples—nor any other evidence—in support of its assertions. Nor does Intel cite a single appellate decision in the 45 years since section 1113(2) was enacted in which its rule would have made a difference. *See* BIO 12. That is telling. Just one circuit has adopted its rule, doing so in dicta in 2010. *See Brown*, 622 F.3d at 571. There is no evidence of courts in the other circuits (or in the Sixth Circuit before 2010) sending out distress signals about the difficulty administering section 1113's "actual knowledge" requirement. Intel has given no reason to think this is likely to change going forward.

And if it does change, the solution must come from Congress, not the courts. This Court's role is "to apply, not amend, the work of the People's representatives." *Henson*, 137 S. Ct. at 1726. If Congress one day becomes concerned that the actual-knowledge standard is too demanding, or finds merit in Intel's policy concerns, 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.

CONCLUSION

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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