No. 18-1116

IN THE

Supreme Court of the United States

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, ET AL.,

Petitioners,

v.

CHRISTOPHER M. SULYMA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case presents an important question on which the courts of appeals have divided: whether an ERISA plaintiff "ha[s] actual knowledge" of an alleged breach of fiduciary duty, thereby triggering ERISA's three-year limitations period, when he has received disclosures containing all the information relevant to the alleged violation, but he has chosen not to read them, or does not remember doing so. 29 U.S.C. 1113(2). The Ninth Circuit held that a plaintiff could overcome Section 1113(2)'s statute of limitations under those circumstances. That ruling will enable plaintiffs in the Ninth Circuit to avoid the three-year limitations period even when a plan fiduciary, consistent with the statutory framework, has provided all the information necessary to inform participants of their claims. A plaintiff need only assert that he has not read the disclosures, or does not *remember* reading them, to create an issue of fact that defeats summary judgment regarding the applicability of the three-year limitations period and requires a defendant to disprove the assertion at trial.

In reaching its erroneous and counterintuitive result, the Ninth Circuit expressly disagreed with the Sixth Circuit's contrary holding in *Brown* v. *Owens Corning Investment Review Committee*, 622 F.3d 564, 566 (6th Cir. 2010). The decision below thus creates significant uncertainty and undermines the uniform national framework that is critical to the sound administration of the thousands of ERISA suits filed each year. In light of the number of suits filed and the prevalence of breach of fiduciary duty claims, the question presented could affect millions of employees enrolled in ERISA-covered plans, not to mention thousands of employers and plan

fiduciaries who may now be subjected to conflicting rules in different circuits. The question is therefore certain to recur frequently. This Court's review is warranted.

Respondent's arguments against certiorari lack merit. Although respondent concedes, as he must, that the courts of appeals are divided on whether failing to read, or recall reading, the plan disclosures can preclude a finding of actual knowledge, respondent contends this case does not present an opportunity to resolve that disagreement. Respondent supports this argument by asserting that the Ninth Circuit held that the disclosures available to respondent did not provide sufficient information about the alleged breach of fiduciary duty. That argument is refuted by the court's opinion, which unambiguously held that the sole question on summary judgment was whether respondent lacked the requisite actual knowledge because he claimed he had not read, or did not recall reading, the disclosures he received. Pet. App. 18a. Respondent's other arguments are similarly unpersuasive. The Sixth Circuit's statement of the contrary rule was not dicta, and the Ninth Circuit's decision is likely to have significant adverse consequences, as it provides a roadmap for plaintiffs to avoid the three-year limitations period and invites suits in the Ninth Circuit.

I. This case squarely presents the question whether a plaintiff's actual knowledge of the breach or violation is defeated solely by the plaintiff's own failure to read or to recall having read information provided to him.

Respondent's principal argument in opposing certiorari (Opp. 8) is that this case does not present an opportunity to decide the question presented. Respondent contends that the court of appeals held that he lacked knowledge that the investments at issue were "imprudent" not only because he failed to read (or remember) the contents of the documents provided to him, but also because the documents he received would not have informed him of the facts necessary to determine imprudence even if he had read them. *Id.*

That argument is easily refuted. Although Ninth Circuit precedent holds that "actual knowledge" requires both knowledge of the investments in question and knowledge of their imprudence, Pet. App. 12a, here the court held that respondent raised an issue of fact regarding actual knowledge solely because he claimed that had not read, or could not recall having read, the documents disclosing the allegedly imprudent investments—and therefore he lacked knowledge of the investments themselves. *Id*. at 16a, 18a. In the critical passage in its decision, the Ninth Circuit stated, "[w]e agree that [petitioners'] evidence demonstrates that [respondent] had sufficient information available to him to know about the allegedly imprudent investments before October 29, 2012," outside the three-year statute of limitations window. *Id*. at 16a. Thus, contrary to respondent's contention (Opp. 8-9), the court decided the case on

the premise that the relevant disclosures contained sufficient information to confer actual knowledge—had respondent only read them.

The court nevertheless concluded that petitioners' disclosure of adequate information, and respondent's receipt of it, was "insufficient" to bar respondent's claim at the summary judgement stage because respondent had testified in his deposition that he did not know about the investments at all: 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 that he 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 (emphases added). And the court held that respondent's testimony was sufficient to create an issue of fact as to knowledge:

> These statements [by respondent] created a dispute of material fact that precluded summary judgment on these claims. On this record, only a fact-finder could have determined that Sulyma had the requisite actual knowledge of the breach for Section 1113(2) to bar the action.

Id. at 17a.

Thus, it could not be clearer that the court found summary judgment improper *not* because of any potential inadequacy in petitioners' disclosures, but because of respondent's statements that he "did not recall" and "was unaware of" the fact that his funds had been invested in hedge funds and private equity. Although the fact that the investments had been made was "available" to respondent, *id.*, the court concluded that "the

phrase 'actual knowledge' means the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff." *Id.* at 13a.

Had the Ninth Circuit's holding turned on whether the plan disclosures provided adequate information about imprudence, as respondent contends, one would expect to see some analysis of that question in the decision. But the Ninth Circuit did not even advert to the possibility that the disclosure documents, had respondent read them, would have been insufficient to make him aware of the alleged breach. To the contrary, the court "agree[d] that [respondent] had sufficient information available to him to know about the allegedly imprudent investments" more than three years before filing his suit. *Id.* at 16a; see also *id.* at 3a. Nowhere did the court of appeals question that the disclosures were sufficient to alert respondent to his claims.[1] *Id*. at 40a; see *id*. at 16a.

In sum, this case squarely presents the question whether a plaintiff's claimed failure to read or inability to recall reading the information provided to him can potentially defeat a claim of "actual knowledge" for purposes of Section 1113(2). This Court can decide that question without addressing any "highly factbound"

[1] Respondent's novel gloss on the reasoning of the decision below is further refuted by the court of appeals' identical analysis of respondent's derivative claims. There again, the court noted that, "as with Sulyma's first and third claims" as to primary liability, the issue was whether Sulyma had "actual knowledge of the breach," which depended on whether "Sulyma in fact never looked at the documents Intel provided." *Id.* 17a-18a.

(Opp. 10) issue concerning the sufficiency of the disclosures themselves, as the courts below found the disclosures to be adequate. Pet. App. 40a; see *id*. at 16a.

II. This case presents an important question on which the courts of appeals are divided.

A. There is a clear circuit conflict on the question presented. In *Brown*, the Sixth Circuit held that "[w]hen 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." 622 F.3d at 571. As the Ninth Circuit observed, "this understanding of actual knowledge conflicts with" the decision below. Pet. App. 14a; see Pet. 13-16.

Respondent does not dispute the conflict's existence, but instead attempts to minimize both the nature of the circuit conflict and its importance in this case. Respondent first contends (Opp. 10), recapitulating his arguments about the question presented, that the circuit conflict is "not implicated here." That contention lacks merit for the reasons stated above. The Ninth Circuit held that respondent "had sufficient information available to him to know about" the alleged breach. Pet. App. 16a. In the Sixth Circuit, respondent's "failure to read the documents" would not have "shield[ed] [him] from having actual knowledge of the documents' terms." *Brown*, 622 F.3d at 571.

Respondent next attempts to sidestep (Opp. 11) the circuit conflict by characterizing the relevant part of the Sixth Circuit's holding as "four sentences of dicta." To the contrary, the language quoted above demonstrates

that the Sixth Circuit stated its conclusion that access to plan documents containing the relevant information provides the requisite actual knowledge in general terms, reflecting the court's intent that this rule would govern future cases. The court then analyzed at length the reasons for adopting the rule, concluding that "failure to read the documents" should not shield plaintiffs from having actual knowledge. 622 F.3d at 571 (citing several supportive cases, including a First Circuit opinion, and explaining why plaintiffs' attempt to distinguish those cases was unavailing).

Respondent relies on the fact that the Sixth Circuit's holding that the plaintiffs in that case had "actual knowledge" sufficient to trigger the three-year limitations period rested on two grounds, only the second of which implicates the "actual knowledge" rule relevant here: (1) plaintiffs knew that "someone had the power to take steps to protect their Plan investments;" and (2) "[m]oreover, at least some participants were provided with access to the [summary plan descriptions] which *clearly* identified" the Plan Administrator and the Named Fiduciary. *Id.* at 571. But the latter conclusion cannot be characterized as dicta, as both rationales were integral to the Sixth Circuit's holding that the plaintiffs' claims were untimely. See *id.* at 572 ("The [summary plan descriptions] and other Plan communications thus gave the Plaintiffs actual knowledge."); cf. *Surefoot LC* v. *Sure Foot Corp*., 531 F.3d 1236, 1242-1243 (10th Cir. 2008) ("Alternative rationales … providing as they do further grounds for the Court's disposition, ordinarily cannot be written off as dicta.").

Respondent's characterizations aside, it is clear that other courts have understood *Brown* as announcing a

rule that governs the meaning of "actual knowledge" under Section 1113(2). District courts in the Sixth Circuit have applied *Brown*'s rule as binding precedent. *Bernaola* v. *Checksmart Fin. LLC*, 322 F. Supp. 3d 830, 836 (S.D. Ohio 2018) (quoting *Brown* and relying on its rule to conclude that plaintiff had actual knowledge upon receiving plan documents); *Dublin Eye Assocs., P.C.* v. *Massachusetts Mut. Life Ins. Co*., No. 5:11-CV-128-KSF, 2014 WL 694852, at *4 (E.D. Ky. Feb. 21, 2014). Numerous other courts around the country have also treated *Brown* as announcing the governing rule in the Sixth Circuit, and they have followed it as persuasive authority. See, *e.g.*, *Enneking* v. *Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1284 n.33 (D. Kan. 2012); *Lorenz* v. *Safeway, Inc.*, 241 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017); *In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06-6213 MMM, 2015 WL 10433713, at *22 (C.D. Cal. Nov. 24, 2015); see also *Rosen* v. *Prudential Ret. Ins. & Annuity Co.*, 718 F. App'x 3, 7 (2d Cir. 2017).

In sum, *Brown* has established an interpretive paradigm with nationwide persuasive effect—one that now stands in direct conflict with the Ninth Circuit's rule.

B. The question presented is important and has far-reaching consequences. Thousands of ERISA suits are brought each year, see Pet. 21-22, and timeliness is a critical threshold issue in many of them. By creating disuniformity and adopting a fact-specific, unpredictable rule that incentivizes claims of ignorance, the Ninth Circuit's decision is sure to have a significant disruptive effect on the ERISA landscape. This Court should grant review to protect the "efficiency, predictability, and uniformity" that ERISA requires for the effective administration of the employee benefit plans. *Conkright* v. *Frommert*, 559 U.S. 506, 517-518 (2010).

Respondent attempts to minimize (Opp. 12) the importance of the question presented by asserting that it has not arisen with any frequency. But that misses the point. The Ninth Circuit's decision matters *going forward*, because it provides plaintiffs with an unprecedented roadmap to avoid Section 1113(2)'s limitations period. If the Ninth Circuit's opinion is allowed to stand, plaintiffs can simply claim that they did not read—or merely do not recall reading—the relevant plan documents and thereby attempt to evade the three-year limitations period. Such claims are certain to proliferate unless this Court intervenes.

III. The Ninth Circuit's decision is incorrect.

This Court's review is also warranted because the decision below is incorrect. The Ninth Circuit's analysis is at odds with Section 1113 and the overall statutory scheme.

A. Section 1113(2) provides that a plaintiff alleging a breach of fiduciary duty must bring suit within three years of the date on which he "had actual knowledge of the breach or violation." 29 U.S.C. 1113(2). Interpreting "actual knowledge" to encompass situations in which the plaintiff "had" or possessed the facts that form the basis for a claim furthers Congress's evident purpose in using knowledge to trigger the limitations period—namely, to discourage plaintiffs from sleeping on their rights once they possess the knowledge necessary to bring a claim. See Pet. 17, 18-19. That construction also furthers Congress's intent in imposing the extensive disclosure obligations required of ERISA plan fiduciaries. Those disclosures are meant to "enable [plan participants] to know whether the plan [is] financially sound and being administered as intended," and to "police

their plans." H.R. Rep. No. 93-533, at 11 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4649. Congress could hardly have "intended * * * to excuse willful blindness by a plaintiff" who has received extensive plan disclosures. *Edes* v. *Verizon Communications, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005).

B. Respondent nonetheless contends (Opp. 13-14) that finding actual knowledge in these circumstances would in effect impose a constructive knowledge standard. That is not so. The concept of actual knowledge is broad enough to encompass situations in which the plaintiff possesses the necessary information without any need for further inquiry. See, *e.g.*, *Knowledge*, Black's Law Dictionary 950 (9th ed. 2009) (recognizing this understanding of actual knowledge as distinct from constructive knowledge). Under the "actual knowledge" standard that should apply in the statute-of-limitations context, a plaintiff is not expected to inquire further to learn additional facts or to draw reasonable inferences, as would be required under a "constructive knowledge" standard. Rather, he is simply held responsible for the factual information already in his possession.[2]

Respondent also argues (Opp. 14) that the Ninth Circuit's decision is supported by Congress's repeal of a subsection of Section 1113 that used constructive

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[2] Respondent's book and library analogies (Opp. 13) are inapposite. Regardless of whether being given a book confers knowledge of the book's contents in a colloquial sense, that scenario does not shed light on how "actual knowledge" should be construed in the context of a statutory framework that mandates extensive disclosures precisely so that plan participants can protect their rights, and that uses actual knowledge to trigger a shortened limitations period.

knowledge to trigger the limitations period in the narrow circumstance of a report filed with the Secretary of Labor but not provided to plan participants. 29 U.S.C. 1113(a)(2)(B) (1974). But as discussed in the petition (at 19-20), that repealed provision did not impose a general constructive knowledge standard. If anything, it cuts against, rather than in favor of, respondent's argument. It indicates that Congress did not understand knowledge of information in the direct possession of a plan participant to be "constructive" knowledge. Otherwise, there would have been no need to make information in possession of a *third* party "constructive" knowledge. And because it is illogical to suppose that Congress intended a three-year limitations period where information is contained in reports filed with the Labor Secretary, but only a longer statute of repose where the same information is provided directly to a plan participant, the only reasonable conclusion is that Congress understood the latter to convey "actual knowledge."

C. Finally, allowing plaintiffs to so easily avoid the three-year limitations period set out in Section 1113(2) would effectively eviscerate that provision. Congress established *both* a six-year statute of repose under Section 1113(1) and a three-year limitations period whenever a plaintiff gained "actual knowledge of the breach or violation" under Section 1113(2). By making the limitations defense dependent on what each plaintiff will admit that he knew or read, the Ninth Circuit's rule would render the three-year limitation period easily avoidable—which could not have been Congress's intent. See Pet. 20-21. Respondent dismisses (Opp. 14) this point as a mere "policy argument." But construing Section

1113(2) in light of the recognition that Congress, in establishing a two-pronged limitations framework, cannot have intended one of those prongs to be easily circumvented, is not making policy; it is construing the statute in a manner consistent with Congress's intent. See, *e.g.*, *Paroline* v. *United States*, 572 U.S. 434, 457 (2014).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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