

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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INTEL CORPORATION INVESTMENT                    )  
POLICY COMMITTEE, ET AL.,                        )  
  Petitioners,                        )  
  v.                                        ) No. 18-1116  
CHRISTOPHER M. SULYMA,                            )  
  Respondent.                        )  
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Pages: 1 through 73  
Place: Washington, D.C.  
Date: December 4, 2019

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3 INTEL CORPORATION INVESTMENT )

4 POLICY COMMITTEE, ET AL., )

5 Petitioners, )

6 v. ) No. 18-1116

7 CHRISTOPHER M. SULYMA, )

8 Respondent. )

9 - - - - -

10 Washington, D.C.

11 Wednesday, December 4, 2019

12

13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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25 amicus curiae, supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 18-1116,  
5 Intel Corporation Investment Policy Committee  
6 versus Sulyma.

7 Mr. Verrilli.

8 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. VERRILLI: Mr. Chief Justice, and  
11 may it please the Court:

12 Section 1113(2) of ERISA requires that  
13 claims for breach of fiduciary duty be brought  
14 within three years of when the plaintiff first  
15 had actual knowledge of the breach. In 2015,  
16 the Respondent, Sulyma, sued, claiming that his  
17 retirement plans imprudently overinvested in  
18 hedge funds and commodities. But more than  
19 three years before that suit was filed, Sulyma  
20 received plan disclosures that apprised him of  
21 the precise investment allocations he later  
22 claimed were imprudent.

23 The Ninth Circuit held that those  
24 disclosures would not trigger the three-year bar  
25 because Sulyma testified that he had not read

1       them and Intel, therefore, had not established  
2       that he had subjective awareness of what was  
3       disclosed. The Ninth Circuit was wrong to read  
4       the statute to require proof of subjective  
5       awareness.

6                       Under Section 1113(2), plan  
7       participants have actual knowledge of facts that  
8       are actually given to them in mandatory ERISA  
9       disclosures. That reading respects ERISA's text  
10      and the statutory emphasis on -- the structural  
11      emphasis in the statute on robust disclosure by  
12      plan fiduciaries and private policing by plan  
13      participants.

14                      The Ninth Circuit's reading upends  
15      that balance. It effectively doubles from three  
16      to six years the period in which plaintiffs can  
17      exploit hindsight bias to second-guess  
18      investments, even when plans have fully  
19      disclosed the basis for those investments, and  
20      it introduces arbitrariness and intractable  
21      proof problems.

22                      Now one way to bring the correct  
23      interpretation of Section 1 -- 1113(2) into  
24      focus is by considering the provision as it was  
25      originally enacted in 1974, and that's

1 reproduced at pages 38 and 39 of the Blue Brief.

2           The original statute provided that the  
3 three-year limitations period would be triggered  
4 either when a plaintiff had actual knowledge of  
5 the breach or when the plan filed with the  
6 Department of Labor a report that included facts  
7 from which a participant could reasonably learn  
8 of the facts of the breach.

9           Now, if you read the statute in the  
10 way that the Ninth Circuit read it, it doesn't  
11 make any sense as it was originally enacted  
12 because the three-year period would be triggered  
13 in a situation in which the plan disclosed to  
14 the Department of Labor the facts that establish  
15 the breach but not when the -- when the plan  
16 disclosed to the plan participants themselves in  
17 mandatory disclosures the very same facts that  
18 would trigger it if provided to the Department  
19 of Labor.

20           That just doesn't make any sense of  
21 the statute. Our reading, in contrast, makes  
22 perfect sense of the statute. And if I could, I  
23 -- I will start with the text and -- and, I  
24 think, try to take a minute and explain why  
25 we've got a perfectly reasonable linguistic

1 understanding of Section 1113(2).

2           And it's this: A plaintiff has actual  
3 knowledge of facts actually provided to him in  
4 mandatory disclosures because, when the  
5 plaintiff receives the disclosure, he has, in  
6 the word of the statute's past tense "had," but  
7 he has in his possession a body -- the body of  
8 knowledge contained in the disclosures. He  
9 possesses that knowledge. And that's the  
10 knowledge he actually has.

11           JUSTICE KAVANAUGH: Most people don't  
12 read them.

13           MR. VERRILLI: You know, I -- I -- I  
14 --

15           JUSTICE KAVANAUGH: Or many. Many  
16 people don't read them. So how do you have  
17 actual knowledge if you haven't read it?

18           MR. VERRILLI: So I -- you know, Your  
19 Honor, I don't know that that's correct. I  
20 think, actually, with respect to these --

21           JUSTICE KAVANAUGH: Well, suppose --

22           MR. VERRILLI: -- kinds of documents  
23 --

24           JUSTICE KAVANAUGH: -- for the group  
25 of people who don't read them, how can you say

1 that they have actual knowledge if they haven't  
2 read something?

3 MR. VERRILLI: So I -- I think the  
4 reason is because the -- the phrase "actual  
5 knowledge" in this context in particular, but,  
6 frankly, in any context, isn't limited to  
7 subjective awareness in the way that the Ninth  
8 Circuit limited it, and I think that the willful  
9 blindness doctrine demonstrates that. We --

10 JUSTICE GINSBURG: But, Mr. Verrilli,  
11 we do have the six-year outer limit, and then  
12 there's a special shorter limit if you have  
13 actual knowledge. And it's hard to read the  
14 word "actual" to mean something other than yes,  
15 I, in fact, know.

16 And as Justice Kavanaugh pointed out,  
17 there are many people who don't read these  
18 mailings. I must say I don't read all the  
19 mailings that I get about my investments.

20 (Laughter.)

21 MR. VERRILLI: So I think, with  
22 respect to what "actual knowledge" means in this  
23 statute, it's important to think about it in  
24 context, and it's really -- the idea of taking  
25 the phrase "actual knowledge" and treating it in



1 this context as though it means the same thing  
2 in the other contexts in which it's used is a  
3 mistake.

4 This is really a unicorn when it comes  
5 to statutes of limitations. This is the only  
6 place in the United States Code that we could  
7 find the phrase "actual knowledge" used in the  
8 statute of limitations. And our friends on the  
9 other side haven't identified any state statute  
10 of limitations that uses the phrase "actual  
11 knowledge" either.

12 CHIEF JUSTICE ROBERTS: Mr. Verrilli,  
13 I -- I think you were about to push back on --  
14 on Justice Kavanaugh's assertion that people  
15 don't read these. Do you have any -- any -- is  
16 there any reason for us to assume the opposite  
17 of what I gather is a common personal  
18 experience?

19 MR. VERRILLI: So I -- look --  
20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: I won't -- I  
22 won't ask for a show of hands, but --  
23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: -- do you have  
25 any reason to suppose that many people or --

1 MR. VERRILLI: Yes. Yes, I do. I  
2 mean, this is --

3 CHIEF JUSTICE ROBERTS: What -- what  
4 is that?

5 MR. VERRILLI: It's -- well, I -- I do  
6 think that this is important information. For  
7 many people, this information, how their  
8 retirement plans are going to be -- how their  
9 retirement funds are going to be invested, is  
10 very important. Many people's --

11 CHIEF JUSTICE ROBERTS: Well, I'm sure  
12 -- I'm sure -- I mean --

13 MR. VERRILLI: -- economic security  
14 depends on this.

15 CHIEF JUSTICE ROBERTS: -- the -- the  
16 fact is important, but whether people think the  
17 information is important, I think -- I'm just  
18 not -- well, I'd be surprised.

19 I mean, it's one of those things, the  
20 more and more disclosures that are required, the  
21 less and less likely it is that people are going  
22 to look at them. And -- and it seems to me that  
23 your argument depends upon the assumption that  
24 these are actually going to be read so that we  
25 would dispense with the requirement of showing

1 that they were actually read because we assume  
2 that they were most often actually read. And I  
3 just don't think that's an accurate assumption.

4 MR. VERRILLI: I don't think I -- I  
5 don't think our argument does depend on that  
6 assumption. I think that the -- Congress set  
7 this system up in 1974. It made clear that the  
8 disclosure regime was a very important part of  
9 the regulatory -- of the regulatory program.

10 And the point, as Congress said in  
11 1974, of these robust disclosures was to give  
12 plan participants the information they would  
13 need to police their rights. And so, when  
14 Congress enacted -- that's what the Senate  
15 report says in 1974 repeatedly. And, of course,  
16 in 1974, Congress also granted a private right  
17 of action to plan participants to sue for breach  
18 of fiduciary duty.

19 So I do think the system was set up on  
20 the understanding that this was important  
21 information and it had to be conveyed to plan  
22 participants according to the statute and its  
23 implementing regulations in a manner that was  
24 readily comprehensible so that the average plan  
25 participant could understand it and could take

1 action as necessary to police his or her rights.

2 So I do think that the -- that the  
3 understanding that Congress is operating under  
4 here is that people do read these -- do read  
5 these disclosures when they come. And if one  
6 looks at the -- for example, the email that  
7 Mr. Sulyma got, and you can see this at page, I  
8 think, 149 of the Joint Appendix with respect to  
9 the qualified default investment alternative  
10 disclosure, he gets an email that says -- the  
11 heading says important information about your  
12 retirement plan.

13 And it contains a link. And the link  
14 says -- it says you should read the document in  
15 this link. And if you click on the link, it  
16 takes you not to some big giant document but to  
17 an eight- or ten-page document that describes  
18 the investments in the various target fund  
19 plans.

20 And if one looks at page 236 of the  
21 Joint Appendix, one will see that for  
22 Mr. Sulyma's plan, it specifically says the  
23 target asset allocation in this fund is  
24 10 percent bond funds and short-term  
25 investments, 60 percent equity funds, 25 percent

1 hedge funds, and 5 percent commodities.

2 That's the precise thing he says is a  
3 breach of fiduciary duty and -- I mean -- and  
4 the precise thing that he says was a breach of  
5 fiduciary duty and it's disclosed to him right  
6 there in this document.

7 JUSTICE KAGAN: But, Mr. Verrilli,  
8 what role does willful blindness play in your  
9 argument? Are you claiming that anybody who  
10 doesn't read these documents is being willfully  
11 blind?

12 MR. VERRILLI: No.

13 JUSTICE KAGAN: Or is there a  
14 different argument that you're making?

15 MR. VERRILLI: No. I'm -- we're  
16 making a different argument, and it -- and it --  
17 and it's why I said, Mr. Chief Justice, that I  
18 thought our argument didn't depend on the  
19 empirical assumption that people -- everyone  
20 actually reads these -- these documents when  
21 they get them.

22 Willful blindness is -- is not  
23 constructive knowledge. Willful blindness is a  
24 form of actual knowledge. And that's how this  
25 Court addressed it in Global-Tech. In

1 Global-Tech, of course, the Court struggled in  
2 the patent inducement context to decide first  
3 whether the inducement cause of action required  
4 proof of actual knowledge or proof of  
5 constructive knowledge. It concluded it  
6 required proof of actual knowledge.

7           And then the Court went on to say:  
8 But actual knowledge can be satisfied by proof  
9 of willful blindness. And what that  
10 demonstrates is that there are situations in  
11 which the actual knowledge standard can be  
12 satisfied by imputing knowledge, even a -- in a  
13 situation where it can't be proved.

14           JUSTICE KAGAN: Who would have thought  
15 --

16           JUSTICE GINSBURG: But you say this is  
17 not -- this is not willful, though?

18           MR. VERRILLI: No, we're not saying  
19 that. We're using it by analogy to demonstrate  
20 the point that the outer bound of actual  
21 knowledge is not subjective awareness, which is  
22 the standard that the Ninth Circuit adopted;  
23 that there are circumstances in which the Court,  
24 as -- as -- by operation of law, will recognize  
25 that something other than subjective awareness

1 can satisfy an actual knowledge standard.

2 JUSTICE KAGAN: I guess I would have  
3 thought about it a little bit differently, not  
4 that the willful blindness is satisfying the  
5 actual knowledge inquiry but, rather, that,  
6 because you've been willfully blind, because  
7 you've deliberately ignored some piece of  
8 evidence, we will treat it as if you actually  
9 knew.

10 But -- but, still, the willful  
11 blindness is a -- is a different thing. It's  
12 just that given your intent, we're going to  
13 treat it as one and the same.

14 MR. VERRILLI: Well, but I think the  
15 -- the way I would -- the way I would give that  
16 a little bit of a different nuance, Your Honor,  
17 is that I think with respect to willful  
18 blindness, what you're saying is, even a  
19 situation where it's not possible to prove that  
20 a defendant -- and it's usually a criminal  
21 defendant or a defendant in some kind of  
22 enforcement action -- has the subjective  
23 awareness necessary to satisfy an actual  
24 knowledge standard, you're going to impute that  
25 subjective awareness to the defendant. It's an

1 imputation.

2 JUSTICE KAGAN: Correct, because of  
3 their bad intent, shall we say.

4 MR. VERRILLI: Right. And so --

5 JUSTICE KAGAN: Because of their  
6 saying I'm purposefully not going to know this.

7 MR. VERRILLI: Right.

8 JUSTICE KAGAN: But, here, you're  
9 saying not everybody --

10 MR. VERRILLI: But --

11 JUSTICE KAGAN: -- who has actual  
12 knowledge --

13 MR. VERRILLI: -- I think this gets --

14 JUSTICE KAGAN: -- is willfully blind  
15 in that way.

16 MR. VERRILLI: That's -- that's  
17 correct, but I think that -- but we're not --  
18 what we're saying is that by analogy, once you  
19 think here about the context, because what's  
20 happened with this actual knowledge standard, as  
21 I said, this is the only statute of limitations  
22 we can find in which it exists.

23 It's -- the overwhelming number of  
24 situations in which it exists are the ones that  
25 we've been talking about here, situations in



1 which you're trying to ascertain the level of  
2 culpability in a criminal action or an  
3 enforcement action.

4           So you're transplanting it into a  
5 totally different environment here. And then  
6 not only that, but normally, in statutes of  
7 limitations, when -- when there's a knowledge  
8 element in a statute of limitations, it's  
9 something that works to the benefit of the  
10 plaintiff.

11           In a typical statute of limitations,  
12 you'd say the statute runs six years from a  
13 certain act or occurrence, but it will be either  
14 the later of that or three years after the  
15 plaintiff has or should have had knowledge.

16           Here, the knowledge requirement is --  
17 is operating for a totally different reason.  
18 It's in the statute to protect the interests of  
19 the defendant. It takes the six-year period of  
20 repose and cuts it in half when a plaintiff has  
21 actual knowledge.

22           And I submit that, therefore, the  
23 right way to think about this is by thinking  
24 about this in terms of the interest that this  
25 provision is in the statute to advance. And the

1 interest that it's in the statute to advance, it  
2 seems to me, are per -- synch up perfectly with  
3 the disclosure requirements that the -- that the  
4 statute imposes on plan fiduciaries.

5 JUSTICE GINSBURG: If the statute had  
6 said "should have had knowledge," you would  
7 plainly prevail, but it doesn't say "should have  
8 had knowledge." It says "actual knowledge."

9 And you're reading the word "actual"  
10 out of the statute.

11 MR. VERRILLI: I disagree with that  
12 characterization. We think the word "actual"  
13 does real and substantial work in our reading of  
14 the statute. We're not arguing that you should  
15 read this language as though it were a broad  
16 constructive knowledge standard.

17 A broad constructive knowledge  
18 standard would be a knew or should have known  
19 standard. And if it were a broad constructive  
20 knowledge standard, then the disclosure of the  
21 information to the plan participant -- even if  
22 the information disclosed itself wouldn't  
23 establish the facts of a -- of a breach of  
24 fiduciary duty, if it put the plan participant  
25 on notice such that a -- a reasonable person

1 would inquire further, that would be a  
2 constructive knowledge, a should have known  
3 standard.

4 JUSTICE ALITO: Does an entity like  
5 your client have the ability to determine  
6 whether someone to whom one of these emails with  
7 the link is sent has opened up the link?

8 MR. VERRILLI: So we -- with respect  
9 to this, you know, in this case, no. Generally,  
10 it's difficult.

11 JUSTICE ALITO: But you could do that,  
12 certainly Intel would have the ability to do  
13 that, wouldn't it?

14 MR. VERRILLI: It could, I think, yes.  
15 I think it would be very difficult and  
16 time-consuming. And I don't think it would  
17 change the issue because I think, even if we  
18 could establish that the -- that the plan  
19 participant clicked on the link, then -- then  
20 the argument is going to be the same argument.

21 It's going to be, yeah, I clicked on  
22 it, but I didn't read it, or I read it, but I  
23 didn't remember it, and, therefore, I don't have  
24 the subjective awareness that the Ninth Circuit  
25 said is required.

1           And so I -- I don't think -- I mean, I  
2 understand why you might think that that's a  
3 solution, Your Honor, but I -- but I don't think  
4 it is. I think it just shifts the problem over  
5 a little bit, but it's the -- it's the exact  
6 same problem.

7           And I think it points up why the right  
8 way to read this statute. Now we are -- we are  
9 arguing for an imputation of knowledge, not an  
10 empirical assumption. We are doing that. But  
11 we're doing that because we think that is the  
12 most sensible way to synch up what the statute  
13 has done here, which is to impose a very robust  
14 disclosure, set of disclosure obligations, for  
15 the purpose of giving plan participants the  
16 ability to police their rights.

17           JUSTICE KAVANAUGH: Why isn't the --

18           MR. VERRILLI: And --

19           JUSTICE KAVANAUGH: -- way -- sorry --  
20 why isn't the way to think about this that, as  
21 you say, this is an unusual provision, and you  
22 make a lot of strong policy arguments, but, for  
23 whatever reason, in the amendment of the  
24 statute, it just came out in -- as actual  
25 knowledge, and it's an unusual statute, but we

1 stick to the words of the statute, and Congress  
2 can, of course, fix it to bring it in line with  
3 the other constructive knowledge statutes if  
4 Congress so chooses, but we shouldn't rewrite it  
5 ourselves.

6 What -- what's wrong with thinking  
7 about this that way?

8 MR. VERRILLI: Well, Your Honor, in --  
9 in *Yates*, the Court concluded that Fish was not  
10 a tangible object, even though, in ordinary  
11 English, it's obviously a tangible object. You  
12 can hold it in your hand.

13 In *Brown & Williamson*, the Court  
14 concluded that nicotine was not a drug for  
15 purposes of the -- of the Food, Drug and  
16 Cosmetic Act, even though, in common  
17 understanding, it can --

18 JUSTICE KAVANAUGH: But if we start  
19 rewriting --

20 MR. VERRILLI: -- obviously be a drug.

21 JUSTICE KAVANAUGH: -- if --

22 MR. VERRILLI: And so I -- what I  
23 guess I would say is that I don't think it's  
24 rewriting the statute at all. It's taking a --  
25 what it's doing is reading those words in

1 context in order to make sense of the statute as  
2 a whole, which was exactly the analysis in Yates  
3 and Brown & Williamson and last term in Jackson  
4 with respect to what the word "defendant" means  
5 and in King against Burwell. And it's that --  
6 that -- all we're urging is the Court apply that  
7 same weight.

8 Don't take the words in isolation and  
9 just look them up in the dictionary. And  
10 particularly don't do it here because this --  
11 this actual knowledge standard that my friends  
12 on the other side are transplanting here, what  
13 they're transplanting is a body of -- of law  
14 that applies in a totally different context that  
15 doesn't have anything to do with a regime of  
16 disclosure on a statute of limitations.

17 It's about assessing personal  
18 culpability in the criminal and enforcement  
19 context. And in this context, I think that  
20 you've got to read these words in conjunction  
21 with --

22 JUSTICE KAVANAUGH: But, if we -- if  
23 we were to say what you want us to say here,  
24 actual knowledge is, in effect, a form of  
25 constructive knowledge, that could open up all

1 sorts of problems in other statutes down the  
2 road that we can't even foresee here where the  
3 argument would be the constructive knowledge is  
4 enough to satisfy a knowledge requirement at  
5 this point.

6 MR. VERRILLI: I don't -- I don't  
7 think so for two reasons, Your Honor. First,  
8 we're not asking you to adopt a constructive  
9 knowledge standard. We're asking you to  
10 interpret the words "actual knowledge" to  
11 include the information, the knowledge that is  
12 transmitted to, the information that is made  
13 known to the plan participants through --

14 JUSTICE KAVANAUGH: That sounds like  
15 --

16 MR. VERRILLI: -- its disclosures.

17 JUSTICE KAVANAUGH: -- constructive  
18 knowledge to me.

19 MR. VERRILLI: I don't think so, Your  
20 Honor, in the same way that you -- you might say  
21 the same thing about willful blindness being  
22 constructive knowledge. But -- but I think it's  
23 -- it is -- it is an imputation, to be sure, but  
24 it's an imputation with -- that's legitimately  
25 within the meaning of the words "actual

1 knowledge."

2           And the other thing I would point out,  
3 Your Honor, is that, you know, until the Ninth  
4 Circuit ruled in this case, the rule that  
5 everybody's been living under, ERISA, is our  
6 rule. This is the way the courts had uniformly  
7 interpreted it until the Ninth Circuit in this  
8 case and everybody understood that that's the  
9 way the statute operated.

10           And -- and so the -- in the -- so, in  
11 that sense, I don't think that the problem that  
12 Your Honor -- if the problem that Your Honor has  
13 identified is a problem, you would have seen it  
14 already.

15           JUSTICE GINSBURG: Are you -- are you  
16 relying on court -- other court of appeals  
17 decisions that says "actual knowledge" means you  
18 had access to the information, the information  
19 was available to you? Have -- what courts have  
20 held that?

21           MR. VERRILLI: So the -- the -- the --  
22 the Eighth Circuit decision that created the  
23 conflict and -- and -- and that this case  
24 created the conflict with, held that when you've  
25 received the information, you have actual -- you



1 have it. I mean, the statute says had actual  
2 knowledge. So --

3 JUSTICE GINSBURG: But are there other  
4 -- so we have the Eighth Circuit and the Ninth  
5 Circuit.

6 MR. VERRILLI: And the -- the Second  
7 Circuit interpreted the language "had actual  
8 knowledge" in a different context. We discuss  
9 this in our brief. So it's not a precise  
10 holding on this issue. But it interpreted it in  
11 a way that we've interpreted it in a -- in a  
12 related ERISA statute of limitations context.

13 And then you have the consensus in the  
14 district courts, which actually have got to  
15 grapple with this issue as a practical matter in  
16 case after case after case. They've all come to  
17 the conclusion that you should read the actual  
18 knowledge standard to be satisfied when you can  
19 demonstrate that the -- that the plan  
20 participant has --

21 JUSTICE GINSBURG: How -- how many  
22 district courts?

23 MR. VERRILLI: So I think there are --  
24 I don't know the exact number off the top of my  
25 head, but I think it's at least a half a dozen

1 or so, maybe more than that, that have grappled  
2 with it and they've all come to that conclusion.

3 And so -- and I think there's a reason  
4 for that, because it's -- it's an understanding  
5 that the way this system is supposed to work is  
6 that plan par -- plan participants are supposed  
7 to be apprised of the information they need to,  
8 in the words of the Senate report of 1974,  
9 police their rights.

10 And the way -- and they're given an  
11 express private right of action in ERISA to  
12 police their rights. And so --

13 JUSTICE SOTOMAYOR: It is difficult to  
14 imagine a half dozen out of 98, 99 district  
15 courts as establishing a firm pattern, but put  
16 that aside.

17 You were -- not you, but I think  
18 whoever handled this case below -- was asked  
19 whether a comatose person who received an email  
20 with this plan disclosure, would that person  
21 have actual knowledge? Could you answer that  
22 question?

23 And let's put aside the comatose  
24 person. Is there an obligation on plan  
25 participants to actually open emails?

1                   MR. VERRILLI: There's no legal  
2 obligation to do that. And with respect to some  
3 --

4                   JUSTICE SOTOMAYOR: So how -- I know  
5 plenty of people who never open emails or only  
6 open emails from certain individuals or in  
7 certain situations. So, under your theory of  
8 the case, those people, the knowledge is imputed  
9 merely because they received the email?

10                  MR. VERRILLI: So let me take the  
11 comatose person first, that I think in extreme  
12 cases like that, the way the law would handle it  
13 is the way the law always handles it, through  
14 the doctrine of equitable tolling. In a  
15 situation like that, I can't imagine that  
16 equitable tolling wouldn't apply in that kind of  
17 an extreme case.

18                  Now I will say --

19                  JUSTICE SOTOMAYOR: How about -- how  
20 about handling it through the language of the  
21 statute, actual knowledge? That person doesn't  
22 have actual knowledge.

23                  MR. VERRILLI: Well, I think but then  
24 the -- the problem with reading it that way is  
25 you create a situation in which there can never

1 be summary judgment in one of these cases with  
2 respect to the three-year statute of  
3 limitations, and so you're imposing very  
4 substantial burdens on --

5 JUSTICE SOTOMAYOR: No, no, no --

6 MR. VERRILLI: -- virtually everyone  
7 else.

8 JUSTICE SOTOMAYOR: -- there's --  
9 there's plenty of emails that I get that require  
10 me to say that I've read the terms and  
11 conditions.

12 MR. VERRILLI: Yes, Your Honor, but I  
13 think that what the -- what the plaintiff --  
14 Your Honor wouldn't do this, but what a  
15 plaintiff would do in that situation, I think,  
16 would say yes, I clicked on the box, but I  
17 didn't actually read them, so I didn't actually  
18 have knowledge.

19 And I do think that points up  
20 something about the argument my friends on the  
21 other side make. They do say on page 1 of their  
22 brief, well, if you read it, you have actual  
23 knowledge.

24 But you don't actually have -- proof  
25 of you read it doesn't establish subjective

1 awareness.

2 JUSTICE BREYER: Well, there's always  
3 a possibility that a plaintiff under oath will  
4 tell the truth.

5 MR. VERRILLI: Of course. Of course,  
6 that's right, Your Honor, but --

7 JUSTICE BREYER: And so he'll say, I  
8 read it. And his attorney will say if you read  
9 it and you say you didn't, you're in trouble.

10 MR. VERRILLI: That's correct, Your  
11 Honor.

12 JUSTICE BREYER: All right. So what's  
13 the problem?

14 MR. VERRILLI: But even in the best of  
15 circumstances, the -- the -- people's ability to  
16 recollect whether they read things four or five  
17 and six years earlier, I think, is going to be,  
18 you know, quite --

19 JUSTICE BREYER: Well, if they didn't  
20 read it -- I mean, you've been -- you've heard  
21 the argument. I mean, if they didn't -- if they  
22 didn't read it, I mean, why -- why -- why should  
23 they? I mean, these are ordinary workers across  
24 the country. They don't read everything. And  
25 if they didn't read it, then they didn't read

1 it. Then it's six years they have. Why -- why  
2 is that a problem?

3 MR. VERRILLI: Well, I think it's a  
4 problem for -- for -- I can think of at least  
5 three reasons why it's a problem. You're going  
6 to -- you're -- you're taking the period in  
7 which a plan is subject to hindsight bias with  
8 respect to its investment decisions and doubling  
9 it from three years to six years, which means  
10 not only are the plans going to be vulnerable to  
11 litigation over that whole six-year period, but  
12 the amount of damages could be considerably  
13 higher.

14 And I would think, if anything, in a  
15 case where you're talking about breach of  
16 fiduciary duty, what you'd want is an  
17 intervention sooner rather than later to get to  
18 -- to -- to cure the breach. So that seems to  
19 me a very substantial problem and a problem that  
20 inures to the detriment of plan participants, of  
21 course, because those are costs to the plan and  
22 those -- and that kind of excessive liability  
23 can discourage the creations of plans in the  
24 first place, which is why this Court has always  
25 said you -- you have to approach ERISA in a

1 balanced manner. And that kind of balance is  
2 what we're advocating for here.

3 Second, I think it will introduce an  
4 element of randomness and inadministrability to  
5 the statute because it's always -- virtually  
6 always -- maybe there's going to be the rare  
7 case that Your Honor hypothesized where the --  
8 where the -- the plaintiff testifies, yes, I did  
9 read it; yes, I did remember it. But, in most  
10 cases, it's going to be inferences from  
11 circumstantial evidence. And I think it's going  
12 to be some courts going one way based on  
13 inferences from circumstantial evidence, other  
14 courts going a different way based on inferences  
15 -- inferences from the same kind of --

16 JUSTICE KAVANAUGH: Mr. Verrilli, you  
17 seem to --

18 JUSTICE GINSBURG: What would the  
19 circumstantial evidence be?

20 MR. VERRILLI: Well, I -- you know, I  
21 suppose it would be evidence like we had in this  
22 case, that -- that -- that the plaintiff visited  
23 the website 68 times and clicked on 1,000 links  
24 and -- and clicked on -- in particular on a link  
25 that said that he was going to attend a seminar

1 explaining the investment options, which he then  
2 said he didn't attend. I mean -- but I think  
3 that's what -- you're just going to have random  
4 results in district court.

5 And I think with respect to a statute  
6 of limitations, one thing that one would want is  
7 consistent application so that --

8 JUSTICE GORSUCH: Mr. Verrilli, we  
9 have -- we have consistent application. We have  
10 a backstop of six years, as Justice Ginsburg's  
11 pointed out. And these are very good policy  
12 arguments for maybe making that shorter, but  
13 those aren't our -- that's not our province.  
14 That belongs across the street.

15 So I guess I'm wondering, what -- what  
16 cut do these policy arguments have? You're not  
17 suggesting that an irrational Congress -- only  
18 an irrational Congress could -- could come up  
19 with a scheme in which six years is the  
20 backstop, such that it's -- you know, it would  
21 be beyond the pale to imagine a Congress --

22 MR. VERRILLI: Well, I would --

23 JUSTICE GORSUCH: -- that could come  
24 up with a scheme that would require --

25 MR. VERRILLI: May I answer?



1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. VERRILLI: Thank you.

3 So, Justice Gorsuch, what I -- with  
4 respect to that, I think that you have to impart  
5 the rationality to Congress also with respect to  
6 the three years, that it's in there for a  
7 reason.

8 JUSTICE GORSUCH: Uh-huh.

9 MR. VERRILLI: The reason is to  
10 protect plans when they have --

11 JUSTICE GORSUCH: Well, both sides  
12 agree that there's a reason for it. They just  
13 disagree what that reason is.

14 MR. VERRILLI: Well, I -- but I think  
15 -- respectfully, what I would suggest is --

16 JUSTICE GORSUCH: All right.

17 MR. VERRILLI: -- we're -- we're  
18 suggesting a real reason that makes sense in  
19 light of the disclosure obligations. They're  
20 coming a hair's breadth within reading it out of  
21 the statute.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Wessler.

1                   ORAL ARGUMENT OF MATTHEW W.H. WESSLER  
2                   ON BEHALF OF THE RESPONDENT

3                   MR. WESSLER: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5                   When Congress said that a plaintiff  
6 must have actual knowledge, it meant what we all  
7 understand that phrase to mean, that the  
8 plaintiff himself must have real awareness. The  
9 ordinary definition of "actual knowledge"  
10 controls here because it accords with the  
11 fundamental rule that statutory interpretation  
12 begins and often ends with the plain meaning of  
13 the text.

14                  Congress chose to require actual  
15 knowledge, not constructive knowledge, before  
16 the general six-year limitations period for  
17 breach of fiduciary duty claims will be cut in  
18 half, and that deliberate decision must be  
19 honored.

20                  Now a common-sense distinction I think  
21 is all that's necessary to resolve this case,  
22 but there are important reasons, as I think I  
23 heard just -- just now, for why Congress would  
24 have made the choice to require actual knowledge  
25 here.

1           Setting the bar high before the  
2 six-year limitations period will be cut in half  
3 reflects what I think is a basic real-world  
4 fact. Most people don't read these complicated  
5 financial disclosures cover to cover.

6           If you open the Joint Appendix to  
7 almost any page, you can see why. These  
8 documents are chock-a-block full of dense  
9 financial market projections, asset allocations,  
10 and other jargon. People with busy lives and  
11 with little or no financial investment  
12 experience or training are not poring over these  
13 disclosures line by line to splice back every  
14 statement on the possibility that it might  
15 contain the -- the kernel of breach under ERISA.

16           I think it's actually just to the  
17 contrary. Because fiduciaries owe an unyielding  
18 duty to act in participants' best interests,  
19 most people trust that their fiduciaries are not  
20 breaching their obligations.

21           Given that real-world understanding, I  
22 think it's perfectly sensible that Congress  
23 decided not to start the three-year clock  
24 running the moment a participant receives these  
25 disclosures.

1           And -- and I want to emphasize this, I  
2 think it's all the more true because a general  
3 six-year period does provide a concrete cutoff  
4 for most breach of fiduciary duty claims, and  
5 that six-year cutoff is among the shortest  
6 general limitations period in ERISA.

7           With Section 1113, Congress set an  
8 important balance. Although there's a high bar  
9 to trigger the three-year exception, fiduciaries  
10 can count on six years being the outside limit.  
11 And there's almost no other limitations  
12 provision in ERISA that provides this level of  
13 protection for defendants.

14           JUSTICE ALITO: Well, what would --

15           JUSTICE GINSBURG: But the problem is  
16 how easy one can say I didn't read it. Is it  
17 your position that that's enough? If the  
18 plaintiff says, I didn't read it, the court has  
19 to accept that? I mean, how -- how can the  
20 veracity of that statement be tested?

21           MR. WESSLER: Well, I -- I think that  
22 there are a number of ways. I do think that a  
23 plaintiff -- if a plaintiff did not read a  
24 statement, that is likely enough to survive  
25 summary judgment and -- and -- and take this

1 question to a fact finder in the same way,  
2 Justice Ginsburg, that all sorts of  
3 fact-specific questions that come up in the  
4 context of statutes of limitations are not  
5 amenable to summary judgment.

6 But, of course, as was surfaced in the  
7 first half of this argument, it is entirely  
8 possible that circumstantial evidence would  
9 prove that a plaintiff either read or knew of a  
10 particular fact.

11 JUSTICE GINSBURG: What -- what would  
12 the -- what would the circumstantial evidence  
13 be?

14 MR. WESSLER: This case, I think,  
15 provides a useful illustration. In this case,  
16 there were pages of -- of -- of printouts of --  
17 of websites that the plaintiff had visited.

18 Now he testified, I didn't go to the  
19 specific pages that contained what you say is  
20 the relevant information. And throughout the  
21 entire course of this litigation, up through  
22 now, the -- the defendants were never able to  
23 come forward with specific page views to  
24 contradict that testimony.

25 JUSTICE ALITO: But your position is,

1 even with all that evidence, your client would  
2 not be subject to summary judgment, right?

3 MR. WESSLER: I -- I think there would  
4 be a disputed issue of fact at that point that  
5 would reach -- would have to go to a fact  
6 finder, that's correct. But, again, I don't  
7 think that's any different from the way fact  
8 issues come up in the context of statutes of  
9 limitations.

10 JUSTICE ALITO: Well, you make --  
11 everything that you've said makes a good policy  
12 argument for saying let's just have a six-year  
13 period because people don't read these things  
14 and they're -- they're hard to understand.

15 But why would Congress add to the  
16 six-year statute of repose this requirement of  
17 actual knowledge, which is very unusual in -- in  
18 statutes of limitations and will almost always  
19 prevent summary judgment? It will almost always  
20 raise a difficult factual question that requires  
21 the district court to make a credibility  
22 determination.

23 MR. WESSLER: Sure.

24 JUSTICE ALITO: Why would that be --

25 MR. WESSLER: Sure.

1 JUSTICE ALITO: -- why would Congress  
2 think that's worthwhile?

3 MR. WESSLER: So, of course, we don't  
4 know because there is no relevant legislative  
5 history that cuts one way or the other on this  
6 question. But, I mean, I think it's worth  
7 emphasizing that this statute covers a broad  
8 range of different kinds of breach of fiduciary  
9 duty claims.

10 It includes, for instance,  
11 co-fiduciary claims, right, a claim in which a  
12 co-fiduciary knows that there has been a breach  
13 of a -- of a -- of -- of another fiduciary's  
14 duty of prudence to the participants or to the  
15 plan.

16 And this three-year period triggers  
17 and incentivizes that co-fiduciary to come  
18 forward and bring a claim to minimize the losses  
19 to the plan. That's an example of -- of -- of a  
20 kind of claim that would be subject to this  
21 three-year exception and wouldn't require any  
22 kind of, you know, fact dispute about what the  
23 co-fiduciary knew because they were involved in  
24 the decision-making.

25 The same is true, Your Honor, for --

1 for claims that arise when one party is subject  
2 to the transaction that forms the basis of the  
3 breach, right? There's a whole range of  
4 prohibited transactions where the transaction  
5 itself is the breach and a party who is --  
6 someone who is a party to that transaction has  
7 knowledge.

8 JUSTICE ALITO: But, in -- in all  
9 those cases, the potential plaintiff would have  
10 reason to know, right? So, if the test were  
11 reason to know, it would be easily satisfied.

12 MR. WESSLER: Well --

13 JUSTICE ALITO: You wouldn't need to  
14 require actual knowledge.

15 MR. WESSLER: -- yeah, I mean, I think  
16 that -- that is entirely possible that Congress  
17 could have drafted this statute in a different  
18 way, but it chose to draft this -- this statute  
19 in this way, and I think that deliberate choice  
20 deserves and is entitled to -- to respect and it  
21 must be honored by -- by -- by this Court  
22 because it used the plain text actual knowledge,  
23 which I think, as we all sort of understand, is  
24 -- is defined in contradistinction to a -- a  
25 rule that would allow a court to imply or impute



1 knowledge to a person who does not themselves  
2 personally --

3 JUSTICE KAGAN: Mr. Wessler --

4 MR. WESSLER: -- have it.

5 JUSTICE KAGAN: -- suppose a -- a  
6 plaintiff says, you know, I -- I did read it. I  
7 just didn't understand it. Does that always get  
8 --

9 MR. WESSLER: Yes. I -- I --

10 JUSTICE KAGAN: -- past summary  
11 judgment?

12 MR. WESSLER: -- don't think reading  
13 is sufficient to establish knowledge.

14 Now, as this case comes to the Court,  
15 though, the Petitioners have asked the Court to  
16 assume that, had one just read all the relevant  
17 disclosures in this case, that reading would  
18 have imparted the necessary knowledge to know  
19 that there was a breach.

20 And so I don't think that the Court  
21 needs to reach this question of how much did you  
22 need to read or how much did you need to  
23 understand.

24 JUSTICE KAGAN: But your view is if --  
25 if somebody said just I -- I didn't -- I didn't

1 get it?

2 MR. WESSLER: I -- I -- I think that's  
3 -- that's insufficient to meet this high bar.  
4 So I don't think that if -- if -- I don't think  
5 that you could come in and say I just read it  
6 and that would be enough. If you didn't  
7 understand it, you didn't know it.

8 But, again, as -- as -- as the -- as  
9 the question has been presented to the Court,  
10 the only issue is whether "actual knowledge"  
11 means you knew it or you can -- a court can  
12 conclude as a matter of law that, even though  
13 someone didn't read it, they, nevertheless, have  
14 actual knowledge.

15 JUSTICE KAVANAUGH: Do you --

16 JUSTICE ALITO: What if they -- they  
17 knew, yeah, I read it and I saw where they were  
18 investing, but I didn't really understand the  
19 nature of these companies they were investing  
20 in? Would that be enough?

21 MR. WESSLER: I don't think so, Your  
22 Honor. I think that it depends on the --

23 JUSTICE ALITO: So then this is  
24 meaningless, the actual knowledge is  
25 meaningless?

1           MR. WESSLER:  Oh -- oh, not at all.  
2           It -- it absolutely depends on the nature of the  
3           -- of the kind of breach claim that is at issue  
4           in the case.  Again, this statute covers a broad  
5           range of different kinds of claims; in addition  
6           to the co-fiduciary claims I explained earlier,  
7           take the fact pattern that this Court had in  
8           LaRue, which was a -- which was a -- an account  
9           liquidation delay breach of fiduciary duty  
10          claim.

11                 A participant calls up the fiduciary  
12          and says:  Please liquidate the assets from my  
13          account tomorrow.  A fiduciary fails to  
14          liquidate the assets, and there's a resulting  
15          loss.  Well, the -- the -- the participant in  
16          that case has actual knowledge that there's been  
17          a breach, and the three-year clock is ticking.

18                 But what Congress didn't want to have  
19          happen is exactly what the Petitioners are  
20          asking this Court to do, which is to allow  
21          fiduciaries to stick into these documents  
22          sentences, paragraphs, that will never be read  
23          and, as a result, have this three-year exception  
24          ticking before anybody really knows --

25                 JUSTICE KAGAN:  How about --

1 MR. WESSLER: -- what's going on.

2 JUSTICE KAGAN: -- Mr. Wessler, just  
3 coming back to the circumstances of this case or  
4 -- or the context of this case, how about a  
5 person who says, I read it, I thought I  
6 understood it, I didn't -- what I didn't really  
7 get was that it could be the foundation of an  
8 ERISA claim?

9 MR. WESSLER: Right. So there is  
10 this, I think, separate question that is not in  
11 front of the Court right now, which is, Justice  
12 Kagan, what you've identified, how much do you  
13 need to know that there's been a breach of  
14 ERISA.

15 Now I think the Ninth Circuit  
16 articulated the correct standard in this case.  
17 But this Court is not being asked in this case  
18 to decide that question because, as -- again, as  
19 I said, as the Petitioners have framed this  
20 question, they've asked the Court to assume that  
21 all the relevant information was contained in  
22 the disclosures and that, had a participant read  
23 those disclosures, they would have the necessary  
24 knowledge.

25 JUSTICE GINSBURG: You styled this

1 case a class action. How does the Court  
2 determine who are the members of the court --  
3 members of the class? That is, some will have  
4 read the disclosures, some will have not.

5 How does the Court determine who is  
6 properly within the class of non-readers? Does  
7 every plan participant have to come into court  
8 and -- and say, I read it or I didn't read it?

9 MR. WESSLER: Sure. So, I mean, what  
10 I think Your Honor is asking is a good question,  
11 which is whether and when individualized issues  
12 that might relate to the statute of limitations  
13 could affect class certification, and I think  
14 Rule 23 has mechanisms that are designed  
15 precisely to assist courts in making those  
16 decisions.

17 But I think that's a Rule 23 question,  
18 not a question about how we interpret the plain  
19 words of -- of -- of this statute.

20 JUSTICE KAGAN: It is a little bit  
21 like be careful what you wish for, isn't it?

22 MR. WESSLER: I -- I -- I understand.  
23 But I think you can find rafts of cases where  
24 courts are struggling with individualized  
25 statutes of limitations issues in all sorts of

1 contexts.

2 I mean, this -- this question, what  
3 does an individual know and when, doesn't just  
4 come up in this context. It comes up in all  
5 sorts of limitations periods questions,  
6 equitable tolling, actual knowledge in a statute  
7 that says actually knew or should have known,  
8 where what's at issue is an individual's actual  
9 knowledge.

10 And courts have developed methods to  
11 determine whether, for instance, the named  
12 plaintiff is adequate or typical or whether  
13 those individualized issues might affect the --

14 JUSTICE BREYER: Is there anything  
15 here --

16 JUSTICE KAVANAUGH: It's not like --

17 JUSTICE BREYER: -- look, the way I  
18 listen to this theory is there is nothing,  
19 virtually nothing a fund can do to make certain  
20 that a member, or someone who has interest in  
21 it, the worker, actually does know about a bad  
22 investment decision, which is a big class of  
23 things, not the ones you brought up.

24 MR. WESSLER: Sure.

25 JUSTICE BREYER: Nothing. They can

1 put someone on the lawn shouting. I shudder to  
2 think about the telephone calls: You must  
3 listen to the -- you know, not even that will  
4 work. Thank goodness.

5 But -- but, therefore, it used to be  
6 that were this legislation in a Senate  
7 committee, there would be a report, and the  
8 report would be this particular provision is  
9 likely to make a difference in the cases you  
10 mentioned, but it is not likely to make much  
11 difference in cases of bad investment decisions  
12 and there we intend a six-year statute of  
13 limitations.

14 So my question is -- you've probably  
15 looked into this, maybe not any more, but I'd  
16 hoped you'd looked into it, and is there  
17 anything in that history that says that that's  
18 what we want, we want six-year statutes of  
19 limitations for bad investment decisions, but  
20 we'll take three-year statutes where he was, for  
21 example, and then you have the six examples you  
22 gave. Is there anything?

23 MR. WESSLER: No. We have --

24 JUSTICE BREYER: No?

25 MR. WESSLER: I mean, no one has been

1 able to find -- I mean, I --

2 JUSTICE BREYER: Yeah, yeah.

3 MR. WESSLER: -- I wish I could tell  
4 you a different answer, but I can't. There --  
5 there's nothing in the history that suggests one  
6 way or the other what Congress had in mind  
7 specifically when it adopted this framework.

8 But I will say I think that the 1987  
9 amendments, which, you know, you heard a little  
10 bit about during the first half of the argument,  
11 indicate pretty strongly that Congress wanted to  
12 remove the one mechanism it had in place in this  
13 statute to start the clock running for a broader  
14 set of claims, which is the constructive  
15 knowledge trigger.

16 JUSTICE KAGAN: Well, what about  
17 Mr. Verrilli's argument that that would have  
18 seemed -- in the original version, would have  
19 seemed a bit insane, right? If -- if -- if the  
20 secretary knows, you can't sue, but if you have  
21 gotten the disclosure --

22 MR. WESSLER: Right.

23 JUSTICE KAGAN: -- then you -- then --

24 MR. WESSLER: Right. So I -- sorry.

25 JUSTICE KAGAN: No, go ahead. Got it.



1           MR. WESSLER: So I think that is a  
2 nice and perhaps clever theory, but it's  
3 demonstrably wrong, and here's why: If you look  
4 at the original version of ERISA, 29 U.S.C. 1021  
5 of the 1974 act, and it's this provision that  
6 governed those disclosures that needed to be  
7 sent to participants and those disclosures that  
8 needed to be sent to the Department of Labor, it  
9 was in effect all the way up through the 1987  
10 amendments, those documents that were required  
11 to be sent to participants, including the SPD  
12 and a statement of the plan's assets and  
13 liabilities, were among -- were all among the  
14 documents that were also being sent to the  
15 Department of Labor.

16           So, under the pre-amendment version,  
17 even if you kind of think maybe Congress was  
18 doing something funky with actual knowledge,  
19 participants were, in fact, charged with  
20 constructive knowledge of all the documents that  
21 ERISA required fiduciaries to send to them in  
22 exactly the same way as the Department of Labor  
23 was -- had constructive knowledge of the  
24 documents that were being provided to it.

25           So there's no gap between the

1 constructive knowledge trigger for those  
2 documents provided to participants and those  
3 that are provided to the Department of Labor.

4           And I think, you know, what we can  
5 see, given that, is that, you know, although  
6 there's no legislative history, we do have this  
7 D.C. Circuit opinion called Fink, which the  
8 court issued about a year before the 1987  
9 amendments, and -- and what they said -- what  
10 the court said in Fink is, look, these documents  
11 that are being filed with the Department of  
12 Labor, they're complex, they're complicated,  
13 it's even hard for the Department to -- to -- to  
14 get on top of everything that's going on here.  
15 To have the clock running on this three-year  
16 exception based just on the filing of these  
17 documents doesn't seem to us to make very good  
18 sense.

19           And shortly after that opinion, what  
20 happens? Congress amends the statute to take  
21 out that constructive knowledge trigger.

22           JUSTICE ALITO: Everything that was --  
23 everything that was sent to the Department of  
24 Labor was also sent to the participants. Was  
25 anything sent to the Department of Labor that

1 wasn't sent to the participants?

2 MR. WESSLER: Yes, the universe of  
3 documents that went to the Department of Labor  
4 was broader than those documents that were being  
5 sent to participants, but what the participants  
6 were getting was also being sent to the  
7 Department of Labor.

8 JUSTICE ALITO: Well, if -- if what  
9 was sent to the Department of Labor was broader,  
10 then I don't know what's left of your argument,  
11 because the participants would be out of court  
12 based on things that were sent to the Department  
13 of Labor but never sent to them.

14 MR. WESSLER: I -- I agree. I think  
15 on the -- on the old version -- I don't agree  
16 that that's the end for us, but I agree that  
17 under the old version of this statute,  
18 participants were -- were being charged with  
19 knowledge of documents that they themselves were  
20 not receiving.

21 But I don't take the Petitioners here  
22 to be arguing that the fact that the Department  
23 of Labor was getting more documents suggests  
24 that the -- the language that Congress used when  
25 it -- or what had in mind when it used "actual

1 knowledge" was something other than the ordinary  
2 meaning of that term.

3 I think the argument in their view is  
4 how -- how would it make sense if the  
5 participants were getting documents and didn't  
6 have any constructive knowledge being assessed  
7 against them based on those documents. That, I  
8 think, does -- is not borne out based on the  
9 original version of the statute that was in  
10 place up through the amendments.

11 I think just to return to -- to the  
12 one kind of final point I'd like to make, which  
13 is that when you boil it down, the Petitioners'  
14 argument amounts to a theory that "actual  
15 knowledge" really means implied actual  
16 knowledge. A court can imply something even if  
17 an individual personally doesn't have it.

18 But that's about as oxymoronic as it  
19 sounds. And Section 1113 doesn't contain an  
20 implied "implied." And reading that term into  
21 the statute here would essentially do the exact  
22 opposite of what Congress deliberately chose to  
23 do when it eliminated any constructive knowledge  
24 trigger in 1987.

25 JUSTICE KAGAN: What would you do with

1 cases of willful blindness? I mean, suppose  
2 somebody says, you know, I am specifically not  
3 going to read this because I want to keep my  
4 three-year statute of limitations?

5 MR. WESSLER: Right. So, I mean, just  
6 to be clear, willful blindness, all it is, is a  
7 jury instruction. So it doesn't permit a court  
8 to impute as a matter of law anything about an  
9 individual's knowledge. It's the ostrich  
10 instruction. You know, you stuck your head in  
11 the sand and a jury gets to decide as a -- as  
12 the fact finder -- although, here, it would be a  
13 judge because we're in ERISA -- you know,  
14 whether -- whose credibility -- who's credible  
15 and what that actually means.

16 But I will say Congress knows how to  
17 adopt willful blindness into a knowledge  
18 statute. It has done so on many occasions. It  
19 writes a statute, it says you either have actual  
20 knowledge of a fact or you took action to avoid  
21 obtaining such knowledge. There are dozens of  
22 statutes that look like that.

23 Congress has not done that here.

24 JUSTICE GORSUCH: Tell me what --

25 JUSTICE KAGAN: So that person still

1 has the six-year statute?

2 MR. WESSLER: I mean, willful  
3 blindness has never been imported into ERISA,  
4 and -- and I don't think there's any statutory  
5 basis to do so here, Justice Kagan. As yourself  
6 -- as you pointed out earlier, willful blindness  
7 itself is not the same as actual knowledge. And  
8 I think that's what this Court said --

9 JUSTICE GORSUCH: Well, but, counsel  
10 --

11 MR. WESSLER: -- in Global-Tech.

12 JUSTICE GORSUCH: -- you started this  
13 by -- by acknowledging that often it is a jury  
14 instruction. And -- and my understanding is  
15 similar, that it's -- it can be evidence --

16 MR. WESSLER: Yes.

17 JUSTICE GORSUCH: -- of actual  
18 knowledge.

19 MR. WESSLER: Yes.

20 JUSTICE GORSUCH: Right? That if  
21 someone protests too much that they have  
22 failed -- that they don't know anything about  
23 it, I was -- I had my head stuck in the sand  
24 over here, a reasonable juror can say I just  
25 don't believe that and I want to -- that's

1 actually evidence that you knew what was going  
2 on.

3 And -- and you're not suggesting that  
4 that kind of use of willful blindness is  
5 impermissible here, are you?

6 MR. WESSLER: I -- I -- I think that  
7 -- just -- just to back up, since we're in  
8 ERISA, you know, you're -- you wouldn't be in  
9 front of a jury.

10 JUSTICE GORSUCH: Of course.

11 MR. WESSLER: You would have --

12 JUSTICE GORSUCH: Of course.

13 MR. WESSLER: -- a judge making this  
14 fact-finding decision, and I think absolutely,  
15 at that stage, credibility plays an enormous  
16 role and -- and likely will play an enormous  
17 role in whether somebody was -- was either not  
18 being accurate when they said they didn't read  
19 something or that they didn't understand it.

20 And I think that's precisely the way  
21 that these statutes of limitations issues get  
22 resolved when they pass through the summary  
23 judgment stage to -- to reach a fact finder.

24 JUSTICE KAGAN: But I guess what I'd  
25 -- my fault for not expressing the question

1 clearly enough, but does one get past the  
2 summary judgment stage if it's clear that one  
3 was being willfully blind?

4 MR. WESSLER: I -- I still think that  
5 there's a -- yes, because I still think there's  
6 a credibility issue in play, and willful  
7 blindness itself is a fact-finding tool. It's a  
8 -- it's a -- it's -- it's an instruction to the  
9 fact finder to draw inferences about an  
10 individual's behavior or conduct.

11 JUSTICE KAVANAUGH: Can I follow up on  
12 one question Justice Ginsburg asked, which --  
13 and read you something in the reply brief? The  
14 reply brief says "the need for individualized  
15 timing determinations should preclude class  
16 certification in virtually every case." And I  
17 just want to give you a chance to respond to  
18 that.

19 MR. WESSLER: If I may. I mean, we --  
20 we don't agree with that characterization. And  
21 it may be that in certain cases individualized  
22 issues will pose difficulties for certifying  
23 classes. You can find that across the range of  
24 statutes of limitations issues when they arise  
25 at the Rule 23 stage. But to say as a -- as a



1 matter of -- that it's a categorical rule that  
2 that would be true is, I think, inaccurate and  
3 -- and would -- would, I think, undermine the  
4 point of Rule 23 itself.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Guarneri.

9 ORAL ARGUMENT OF MATTHEW GUARNIERI  
10 FOR THE UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING THE RESPONDENT

12 MR. GUARNIERI: Thank you, Mr. Chief  
13 Justice, and may it please the Court:

14 This case can begin and end with the  
15 plain language of Section 1113(2). The  
16 three-year limitations period in Section 1113(2)  
17 begins to run only when the plaintiff has actual  
18 knowledge of the breach or violation. To have  
19 actual knowledge, the plaintiff's knowledge must  
20 exist as a matter of fact. Knowledge that is  
21 imputed or implied to the plaintiff as a matter  
22 of law does not suffice. That is what "actual"  
23 means in this context. If that standard is not  
24 met, then the default six-year period in  
25 Section 1113(1) governs the timeliness of the

1 plaintiff's claims.

2           Now Petitioners argue that in applying  
3 Section 1113(2), a court should presume that the  
4 plaintiff has actual knowledge of the contents  
5 of the ERISA disclosures that the plaintiff  
6 receives at the precise moment that the  
7 plaintiff receives them, even if the plaintiff  
8 indisputably never read those disclosures.

9           That approach cannot be squared with  
10 the language of the statute. In ordinary  
11 English, no one would say that a person has  
12 actual knowledge of the contents of a document  
13 that the person has never read. So too here,  
14 the three-year period begins to run only when a  
15 plaintiff is, in fact, aware of the relevant  
16 information. Constructive knowledge is not  
17 sufficient.

18           CHIEF JUSTICE ROBERTS: How far do you  
19 go with the requirement of actual knowledge?  
20 The question that was asked earlier, do you have  
21 to understand what the words mean? Or --

22           MR. GUARNIERI: Yes, we think you do,  
23 Mr. Chief Justice.

24           CHIEF JUSTICE ROBERTS: So even if  
25 it's in -- you'd say you have actual knowledge

1 of the significance of the information, even  
2 though you don't know what a leveraged,  
3 diversified, you know, hedge, whatever is?

4 MR. GUARNIERI: As a general matter,  
5 the statute requires knowledge, and we think  
6 knowledge connotes that there has to be some  
7 degree of comprehension.

8 Now, as Mr. Wessler alluded to  
9 earlier, there is a distinct question not  
10 presented here, which is, you know, what do you  
11 need to have actual knowledge of, what does it  
12 mean to have actual knowledge of the breach or  
13 violation?

14 But at least with respect to the  
15 question here, I mean, the statute requires  
16 actual knowledge. And we think that means you  
17 have to sort of actually be aware of the  
18 relevant information.

19 One can imagine, to -- to take a  
20 simple example, one can imagine a circumstance  
21 in which the -- the plan participant does not  
22 speak English and receives disclosures that are  
23 written in English.

24 And in that case, I think it would be  
25 silly to say that the -- the plan participant,

1       nonetheless, should be conclusively presumed to  
2       have actual knowledge of the contents of  
3       disclosures that, by hypothesis, that plaintiff  
4       would not have understood even if she had read  
5       them.

6                   JUSTICE SOTOMAYOR:  I -- I'd like to  
7       follow through on the Justice -- the Chief  
8       Justice's question.  I am reading it, actual  
9       knowledge of the breach or violation.  Let's  
10      assume someone read it.  Go through Justice  
11      Kagan's question, earlier questions.

12                   Someone read it and says:  I didn't  
13      understand it was a breach.  I didn't understand  
14      it was a violation.

15                   MR. GUARNIERI:  If -- if you do not  
16      understand --

17                   JUSTICE SOTOMAYOR:  I read the facts.  
18      I read it.  I saw it.  I saw exactly what was  
19      here, the distribution of investment here.

20                   MR. GUARNIERI:  Well, if -- if you do  
21      not understand the disclosures that you have  
22      received, we do not think that as a matter of  
23      ordinary English you can be said to have actual  
24      knowledge of the contents of those disclosures.

25                   Now, stepping back, as a general

1 matter, with respect to that separate question  
2 that I alluded to earlier, what is the breach or  
3 violation, you know, what is it that you have to  
4 have actual knowledge of, in -- every court to  
5 examine that has concluded that you do not need  
6 to have knowledge that it is a legal violation  
7 of ERISA. So we don't think the standard would  
8 go that far.

9 But, you know, if the -- if the  
10 testimony is, if the evidence is that the  
11 plaintiff says, you know, I -- I looked at that  
12 disclosure, but I -- I did not understand the  
13 import of the terms used in that -- in it,  
14 then --

15 JUSTICE SOTOMAYOR: That's a --

16 MR. GUARNIERI: -- you -- you have not  
17 met --

18 JUSTICE SOTOMAYOR: -- line that --

19 MR. GUARNIERI: -- the actual knowledge  
20 standard.

21 JUSTICE SOTOMAYOR: I'm having -- that  
22 line is what I don't understand.

23 MR. GUARNIERI: But, in any event, the  
24 conclusive legal presumption of actual knowledge  
25 that Petitioners are seeking in this case is

1 nothing like that.

2 The rule that Petitioners are  
3 advocating here would impute to every plan  
4 participant actual knowledge of the contents of  
5 all of the mandatory ERISA disclosures that the  
6 -- that the plaintiff receives.

7 JUSTICE KAGAN: Mr. Guarnieri, I mean,  
8 if we're going to be a textualist, it's -- it's  
9 actual knowledge of the breach or the violation.  
10 It's not actual knowledge of the contents of the  
11 disclosure statement. So that would suggest  
12 that your position has to go even further, that  
13 you have to have actual knowledge of the breach,  
14 meaning that you need to know that, you know,  
15 whatever investment allocation it was, in fact,  
16 breached ERISA.

17 MR. GUARNIERI: Well, I -- I don't  
18 think that that's correct, Justice Kagan. We  
19 don't think you actually have to know that it  
20 was a legal violation of ERISA. We think in  
21 that respect, the Ninth Circuit got this  
22 basically right in its articulation of the  
23 standard.

24 The -- the idea is that the plaintiff  
25 has to have actual knowledge of the essential

1 nature of the breach or violation.

2 JUSTICE KAGAN: So that makes sense.

3 MR. GUARNIERI: So it's generally --

4 JUSTICE KAGAN: I guess I'm just  
5 pointing out that that's not -- I mean, if  
6 you're really taking the text seriously, I think  
7 you would come out in a different place.

8 MR. GUARNIERI: Well, we are trying to  
9 take the text quite seriously and we do think  
10 Congress used precise language in -- in this  
11 particular limitations provision, which requires  
12 actual knowledge as opposed to simply knowledge.

13 But, you know, to know that there's a  
14 breach, I think, in this context, for example,  
15 in a -- in a duty of prudence, if the -- if the  
16 claim is that the fiduciary violated the duty of  
17 prudence, then the plaintiff would need to know  
18 that what the fiduciary did was imprudent but  
19 not necessarily that what the fiduciary did  
20 violated ERISA.

21 And the same would be true for claims  
22 sounding in the duty of loyalty or prohibited  
23 transactions. You need to know sort of the  
24 essential nature of the wrongdoing but not that  
25 it violated ERISA.

1 JUSTICE ALITO: But, look, you have a  
2 strong textual argument. There's no question  
3 about that.

4 But even putting aside the issue of  
5 whether the potential plaintiff has to know that  
6 it was a breach, even assuming that all the  
7 plaintiff has to know are the facts constituting  
8 the breach, why would Congress think it was  
9 worthwhile to put this actual knowledge  
10 requirement in? Why not just have the six-year  
11 period in recognition of the fact that a lot of  
12 people, maybe most people, maybe nearly  
13 everybody, doesn't read these things, doesn't  
14 understand them. Why is it worth the effort?

15 MR. GUARNIERI: Well, Justice Alito, I  
16 think the statute reflects the following  
17 intuition. I mean, the -- the -- the six-year  
18 provision really is the backstop. So, in  
19 general, you have six years from the breach or  
20 violation in order to bring suit.

21 The three-year provision only comes  
22 into play if the plaintiff acquires actual  
23 knowledge of the breach or violation, in years  
24 1, 2, or 3, because after that point, the  
25 six-year period will expire before the



1 three-year period.

2 JUSTICE ALITO: Yeah, I under --

3 MR. GUARNIERI: So, basically, the  
4 information is --

5 JUSTICE ALITO: -- I understand that.  
6 But -- but, you know, putting aside the -- the  
7 -- the super honest plaintiff who is an expert  
8 on investments and actually did read it and  
9 actually did understand it and testifies, yeah,  
10 okay, you got me, I did it, what else is this  
11 going to achieve?

12 MR. GUARNIERI: The idea is that the  
13 plaintiff who does happen to acquire actual  
14 knowledge of the relevant information within  
15 those first three years can be expected to bring  
16 suit within three years and does not need the  
17 full six-year period in which to bring suit.  
18 And --

19 JUSTICE KAVANAUGH: I think Mr. --  
20 keep going.

21 MR. GUARNIERI: There are -- there are  
22 reasons that Congress would not have wanted a  
23 plaintiff in those circumstances. The plaintiff  
24 who really does have actual knowledge to delay  
25 bringing suit, delay bringing -- many of these

1 suits are brought for the benefit of the plan as  
2 a whole, and a delay of a substantial period of  
3 time -- of time can redound to the disadvantage  
4 of other plan participants who would have been  
5 better served had the suit been brought earlier.

6 JUSTICE KAVANAUGH: I think --

7 MR. GUARNIERI: That's the basic logic  
8 of having the two standards in the statute.

9 JUSTICE KAVANAUGH: I think Mr.  
10 Verrilli's point, though, is that it's  
11 impossible to prove actual knowledge under the  
12 answers that have been given here, and,  
13 therefore, you end up with a de facto six-year  
14 statute of limitations, which is very unusual, a  
15 long period of time, going to cause a lot of  
16 negative consequences, he says, and, therefore,  
17 that context means that we must be reading  
18 actual knowledge wrong. So --

19 MR. GUARNIER: Well --

20 JUSTICE KAVANAUGH: -- how do you  
21 respond to that?

22 MR. GUARNIERI: -- of course, we -- we  
23 disagree with Mr. Verrilli's articulation of the  
24 policy balance that's at issue here.

25 But just to take the question on

1 directly, there are many reported decisions  
2 applying the actual knowledge standard to find a  
3 suit is time barred even under the correct  
4 understanding of the statute, meaning the  
5 knowledge must, in fact, be actual and not  
6 merely imputed to the plaintiff as a matter of  
7 law.

8 Now --

9 JUSTICE ALITO: Well, give me an  
10 example where that could be done on summary  
11 judgment, a real-world, realistic example of  
12 where that could be done on summary judgment.

13 MR. GUARNIERI: Well, for example, I  
14 mean, a common fact pattern is that a plan  
15 participant will consult with another financial  
16 professional who will explain to the plan  
17 participant, you know, the investments that are  
18 in your retirement fund are imprudent for  
19 someone in your circumstances.

20 A conversation like that would give  
21 that plaintiff actual knowledge of the breach or  
22 violation if the claim is that the investment  
23 was imprudent. So -- and that's not fanciful.  
24 There are cases like that.

25 So it's -- it's not the case that

1 rejecting the rule that Petitioners advocate  
2 here would make the three-year limitations  
3 period a nullity. It does have real force and  
4 effect, and it has had real force and effect in  
5 the many circuits that have adopted the correct  
6 interpretation of the statute.

7 And on that point, I'd like to address  
8 one claim that Mr. Verrilli had earlier --

9 JUSTICE KAVANAUGH: Can you -- can you  
10 make sure to address Justice Ginsburg's class  
11 certification question before you finish?

12 MR. GUARNIERI: Sure. Well, I  
13 entirely agree with Mr. Wessler's answer on that  
14 question. I mean, in general, the fact that you  
15 may have an individualized limitations defense  
16 with respect to some members of a putative class  
17 would not necessarily foreclose certification of  
18 that class, I mean, in the same way you might  
19 have a -- a -- a release and settlement defense  
20 with respect to some plaintiffs or not -- and  
21 not others. The injuries may be different for  
22 members of the class.

23 CHIEF JUSTICE ROBERTS: Well, except  
24 --

25 MR. GUARNIERI: The fact that there

1 are --

2 CHIEF JUSTICE ROBERTS: -- if you  
3 think that the actual knowledge issue would be  
4 satisfied, or requirement, in most cases. In  
5 other words, there -- there'll be few members of  
6 a purported class action because most people are  
7 not going to have actual knowledge.

8 MR. GUARNIERI: Well, I -- I think in  
9 general, the Rule 23 question would be whether  
10 the -- the -- the injuries asserted by the  
11 plaintiffs are amenable to class-wide treatment.  
12 And the fact that there is a defense that might  
13 be applicable to some but not other members of  
14 their class would not necessarily preclude class  
15 certification.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Verrilli, five minutes.

19 REBUTTAL ARGUMENT OF DONALD B.

20 VERRILLI, JR. ON BEHALF OF THE PETITIONERS

21 MR. VERRILLI: Thank you, Mr. Chief  
22 Justice.

23 Three points: First, I'd like to  
24 return to the 1974 version of the statute and I  
25 -- and in particular to the question that

1 Justice Gorsuch asked me at -- at the end of my  
2 opening argument.

3 I think what we heard from my friends  
4 on the other side here is that -- there's two  
5 things. First, that the -- with respect to the  
6 1974 statute, the extreme anomaly that I  
7 identified is there, that it doesn't make any  
8 sense to think that the statute -- that Congress  
9 would have adopted a statute that said the  
10 three-year statute of limitations is going to be  
11 triggered based on the information provided to  
12 DOL but not on the information --

13 JUSTICE SOTOMAYOR: I'm sorry, Mr. --

14 MR. VERRILLI: -- provided to you.

15 JUSTICE SOTOMAYOR: -- Verrilli, I  
16 went back to that statute, and what it says:  
17 "On which a report from which he could  
18 reasonably be expected to have obtained  
19 knowledge of such brief."

20 I read that as potentially excluding  
21 those documents that only the secretary has. I  
22 think your -- your adversary was right, that the  
23 documents that the individual received could  
24 give them reasonably be expected to have  
25 obtained knowledge, but not necessarily those

1 that only the secretary receives.

2 MR. VERRILLI: So, Justice Sotomayor,  
3 I -- I understood my friend on the other side to  
4 say the opposite, which is to say that it would  
5 -- it wouldn't -- there was no need to have any  
6 -- any knowledge provision triggered by the  
7 disclosures that went to the individual because  
8 everything that went to the DOL was going to  
9 trigger the three years anyway.

10 And I think, if you think about that  
11 for a minute, that blows up their whole theory  
12 of the statute, because what they're saying is  
13 in 1974 Congress enacted a statute that was  
14 actually quite harsh, that the default was going  
15 to be a three-year statute of limitations if the  
16 information sufficient to show breach was sent  
17 to DOL whether you got it or not.

18 It would actually be the odd case that  
19 was the six years under that theory, not the  
20 normal case.

21 And -- and, of course, when Congress  
22 amended the statute in 1987, it did not change  
23 the words "had actual knowledge." So the  
24 meaning you're trying to ascertain is the  
25 meaning that those words had in 1974.

1           And so I -- I just think that their  
2 whole -- the whole theory, nobody reads as a --  
3 you know, that's all blown up by their -- what  
4 they said about what happened in 1974.

5           Now the second point, if I could, with  
6 respect to the -- the -- Justice Breyer, you  
7 asked about consequences and there was a robust  
8 discussion about the class action impact here.

9           I -- I do think what my friends on the  
10 other side are saying essentially is that --  
11 they didn't put it exactly this way, they spoke  
12 at a higher level of abstraction -- but,  
13 basically, what they're saying is here's what  
14 will happen in class actions. You'll just defer  
15 the question of whether there's a statute of  
16 limitations defense to the remedial phase.

17           And then you'll have trials at the  
18 remedial phase of a class action about whether  
19 every single one of the class members had this  
20 actual knowledge or not based on these kinds of  
21 circumstantial proof that we were talking about.  
22 Just think of what a catastrophe that's going to  
23 be in the class action context.

24           So, in the unlikely event that this  
25 Court disagrees with our position on the merits,



1 I would hope that there would be clarity here as  
2 to how this -- this reading will play out in a  
3 class action context, because that would be a  
4 staggering, enormous negative consequence.  
5 After all, it does put the cart before the horse  
6 because statute of limitations is a threshold  
7 defense. And so the idea that you would do it  
8 in that manner I think is just -- I -- it's a  
9 catastrophic problem.

10 And then, with respect to the  
11 discussion, the colloquy on willful blindness, I  
12 understand my friend's position that it's just a  
13 jury instruction that allows an inference of  
14 actual knowledge. But, respectfully, I don't  
15 think that's the way this Court described it in  
16 the Global-Tech decision.

17 The Court basically said, as I read  
18 Global-Tech, that -- that it's not -- that proof  
19 of willful blindness, proof of the circumstances  
20 that would allow you to establish willful  
21 blindness, is not proof of subjective awareness,  
22 but it's something that you might consider as  
23 being just as culpable or that -- or -- or that  
24 they, in effect, have actual knowledge but not  
25 that they actually have actual knowledge. It's

1 an imputation.

2 I -- I just think that's as clear as  
3 can be from what this Court said in Global-Tech.  
4 And so I think the question here is whether in  
5 this very different context, where, you know, as  
6 I said, these actual knowledge standards come  
7 virtually exclusively from criminal enforcement  
8 proceedings where you're trying to measure the  
9 individual defendant's culpability.

10 And, of course, there should be an  
11 inquiry in that situation into the specific  
12 state of mind of the defendant. That's what the  
13 whole culpability inquiry is about.

14 Here, you're talking about a statute  
15 of limitations. And in particular -- if I might  
16 finish -- a statute of limitations that's  
17 designed this three-year period to protect the  
18 interests of defendants. And so it's important  
19 to balance those interests when reading the  
20 statute.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 11:06 a.m., the case  
25 was submitted.)

## Official - Subject to Final Review

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