No. 18-1116

IN THE

Supreme Court of the United States

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, ET AL.,

Petitioners,

v.

CHRISTOPHER M. SULYMA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE AMERICAN RETIREMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 413(2) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that "[n]o action may be commenced … with respect to a fiduciary's breach of any responsibility … three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The question addressed by *amici* is whether a retirement plan's disclosure of information directly to plan participants establishes that those participants have "actual knowledge" of the information thus disclosed.

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INTEREST OF *AMICI CURIAE* [1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files *amicus* briefs in cases that raise issues important to manufacturers.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefits programs governed by ERISA. An important function of the Chamber is to

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[1] The parties consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of its industry's nearly 1 million employees, it advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed-income markets, and related products and services. It serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit http://www.sifma.org.

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 440 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing nearly 100 of the nation's largest employers that sponsor employee-benefit plans for their workers, retirees, and families. ERIC is the only national association that advocates exclusively for large employer plan sponsors on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC member companies are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies impacting their ability to sponsor benefit plans for their nationwide workforce, ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration and initiates litigation to protect ERISA preemption against state mandates.

The American Retirement Association ("ARA") is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system: the American Society of Pension Professionals and Actuaries; the National Association of Plan Advisors; the National Tax-Deferred Savings Association; the ASPPA College of Pension Actuaries; and the Plan Sponsor Council of America. ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

The NAM, the Chamber, SIFMA, the Council, ERIC, and ARA frequently participate as *amici curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans. Many of these organizations' members offer their employees the opportunity to participate in retirement plans similar to the plans at issue here. Nearly 85 percent of manufacturing workers have access to workplace retirement benefits, and 67 percent of manufacturing workers participate in a defined benefit or defined contribution retirement plan through their employer. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits* (Mar. 2018), https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.pdf. Employers offer actively managed investment options like those at issue here, in part to provide their employees the ability to choose what works best for them. Both the companies that sponsor those plans and the fiduciaries who administer them have significant interests in the legal standards that govern their exposure to potential litigation. *Amici* respectfully submit that affirmance could have a detrimental impact on employer-sponsored retirement plans; reversal, in contrast, will benefit both employers and employees by ensuring that any disputes regarding plan design or operation are commenced within a reasonable time following adequate disclosure of information.

SUMMARY OF THE ARGUMENT

Breach of fiduciary duty claims under the Employee Retirement Income Security Act of 1974 ("ERISA") ordinarily must be filed within six years of the alleged breach. 29 U.S.C. § 1113(1). If the plaintiff learns of the breach earlier, Section 413(2) of

ERISA shortens the limitations period to "three years after the earliest date on which the plaintiff had actual knowledge of the breach." *Id.* § 1113(2).

In an action challenging the prudence of a retirement plan's investment strategy, the three-year limitations period begins to run when the plaintiff has actual knowledge of "the mix of investments [the plaintiff] claims [is] imprudent." Pet. App. 16a. ERISA makes it easy for plan participants to learn this information: The statute requires plans to disclose investment options to them in simple-to-understand language that informs them of their rights and obligations. Congress adopted these disclosure requirements to "ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R. Rep. No. 93-533, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649).

The plan here made the required disclosures, and the plaintiff actually received them. The Ninth Circuit held, however, that the plaintiff could avoid the three-year statute of limitations simply by disclaiming that he read (or could recall having read) those disclosures. The decision breaks with the near-uniform, common-sense rule in numerous federal courts that disclosing information to plan participants gives those participants actual knowledge of the information disclosed. The decision below is wrong, it seriously undermines the important protections provided by the three-year limitations period, and it threatens to exacerbate the growing trend of meritless litigation against ERISA plans and plan fiduciaries. It should be reversed.

The central purpose of ERISA's disclosure requirements is to ensure that plan participants have actual knowledge of important information about their plans that their employers are required to disclose to them. Allowing plan participants to disclaim that knowledge even though they received the required disclosures renders the term "actual knowledge" meaningless in the context of ERISA's limitations period. While this term may mean different things in other contexts, here it must include required disclosures that Congress designed to inform plan participants about their plans.

The original codification of the limitations provisions provides further evidence that actual knowledge includes information in required disclosures, because Congress originally charged plan participants with knowledge of an even more indirect source of information—reports that are filed with the Secretary of Labor and never even sent to plan participants. As originally enacted, the statute provided that the limitations period to allege a breach of fiduciary duty in violation of ERISA could be triggered either by "actual knowledge" of the violation or "constructive knowledge" of information reported to the Secretary under ERISA's reporting rules. The statute did not separately address plaintiffs' knowledge of information furnished directly to plan participants under ERISA's separate disclosure rules because that information was already covered by the statute's "actual knowledge" provision. Furnishing disclosures to plan participants ensures that they have "actual" knowledge of the information disclosed, so Congress did not need to separately charge those participants with "constructive" knowledge of the same information. The only tenable reading of the

statute as enacted, therefore, is that plan disclosures give rise to actual knowledge.

The Ninth Circuit's contrary conclusion undermines the careful balance struck in ERISA's disclosure regime and statute of limitations. By informing participants about their plans (including available investment options), the disclosure requirements are also designed to assure plan sponsors and fiduciaries that participants are accountable for the information disclosed to them. Plan sponsors and fiduciaries also rely on the three-year statute of limitations to create predictability about the plans' exposure to potential liability. That system breaks down if participants can disclaim knowledge of the information disclosed to them. There is no way to ensure that participants actually read the disclosed information or to verify that they have done so. The three-year statute of limitations cannot serve its purpose of creating certainty about potential liability if there is no objective basis for plan sponsors and fiduciaries to ensure that plan participants are sufficiently informed of their rights to trigger the limitations period.

Finally, the decision below exacerbates the ever-present threat that plan sponsors and fiduciaries will face legal challenges to their investment strategies based on hindsight alone. Even the most prudent investments may ultimately underperform as compared to other available alternatives. When they do, plan sponsors and fiduciaries often find themselves accused of failing to predict the unpredictable. While ERISA requires, and courts recognize in theory, that the prudence of an investment decision must be judged in light of the information available to the fiduciary at the time of

the decision rather than in hindsight, triers of fact often struggle in practice to avoid the natural tendency toward hindsight bias in evaluating past decisions. Even where courts ultimately reach the correct outcome, plan sponsors and fiduciaries may incur significant costs in defending themselves from meritless, hindsight-based claims. ERISA's three-year statute of limitations mitigates the risk of hindsight bias by requiring plan participants to decide whether to challenge adequately disclosed investment strategies promptly—with the benefit of only three rather than six years of hindsight. The Ninth Circuit's decision, in contrast, would allow participants a longer look-back period before deciding in hindsight whether to challenge the investment strategy.

ERISA plans already face a flood of high-priced litigation in recent years challenging plan investment decisions that were disclosed to plan participants at the time they were made. The Ninth Circuit's decision undermines a critical defense to that litigation, and it does so based on an erroneous interpretation of the statute. Under the correct interpretation, the claims here are time-barred. The Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

The applicable limitations provision of ERISA states that "[n]o action may be commenced … with respect to a fiduciary's breach of any responsibility" more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Numerous federal courts have correctly recognized that, for purposes of this provision, plan participants have "actual knowledge" of information disclosed to them pursuant

to ERISA's disclosure requirements.[2] In the decision below, by contrast, the Ninth Circuit held that a plan participant can disclaim actual knowledge of that information by claiming he did "not recall seeing" the disclosures even though he indisputably received them. Pet App. 16a-17a.

Congress designed ERISA's disclosure requirements to ensure that plan participants are given meaningful information about the structure and operation of the plan. To allow plan participants to disclaim knowledge of the contents of plan disclosures would undermine the purpose and value of the disclosure requirements. It would also expose even the most prudent investment decisions to costly hindsight-based lawsuits, and thereby upset the careful balance Congress struck between encouraging and policing employee benefit plans. This Court should therefore reverse the decision below and restore the balance struck by Congress in ERISA.

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[2] *See*, *e.g.*, *Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 571 (6th Cir. 2010); *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017); *In re Northrop Grumman Corp. ERISA Litig.*, No. 2:06-cv-6213, 2015 WL 10433713, at *22 (C.D. Cal. Nov. 24, 2015); *Enneking v. Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1284 (D. Kan. 2012); *Shirk v. Fifth Third Bancorp*, No. 1:05-cv-49, 2009 WL 3150303, at *3, *6 (S.D. Ohio Sept. 30, 2009); *Young v. Gen. Motors Inv. Mgmt. Corp.*, 550 F. Supp. 2d 416, 419 n.3 (S.D.N.Y. 2008), *aff'd on other grounds*, 325 F. App'x 31 (2d Cir. 2009); *Reeves v. Airlite Plastics, Co.*, No. 8:04-cv-56, 2005 WL 2347242, at *5-6 (D. Neb. Sept. 26, 2005).

I. ERISA PLAN DISCLOSURES GIVE PLAN PARTICIPANTS ACTUAL KNOWLEDGE OF THE INFORMATION DISCLOSED

ERISA's required disclosures are the primary means through which retirement plans communicate with their participants. The disclosure requirements are "extensive." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 944 (2016). Plans "must present participants with a plan description explaining, among other things, the plan's eligibility requirements and claims-processing procedures" (*ibid.*), as well as the plans' terms and sources of funding. *See* 29 U.S.C. §§ 1021(a)(1), 1022, 1024(b). These disclosures must be "written in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to reasonably apprise such participants … of their rights and obligations under the plan." *Id.* § 1022(a).

"Congress' purpose in enacting the … disclosure provisions" was to "ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone*, 489 U.S. at 118 (quoting H.R. Rep. No. 93-533, at 11). The statute itself indicates that the required disclosures would be a source of knowledge for plan participants about their "rights and obligations." 29 U.S.C. § 1022(a). ERISA's legislative history indicates that Congress viewed disclosure "as a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R. Rep. No. 93-533, at 11. And Congress carefully crafted the disclosure requirements to ensure the "effectiveness of communication of plan contents to employees." *Id.*

at 8. "It was expected that the knowledge thus disseminated would enable participants to police their plans." *Id.* at 4. Congress thus understood that just by transmitting the required disclosures, plans were "disseminat[ing]" "knowledge." *Ibid.*

ERISA's disclosure regime runs both ways: It both informs plan participants about their plans, and it holds them accountable for that information. The disclosures addressed Congress's concern that it was "unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts." H.R. Rep. No. 93-533, at 8. As a result, so long as the disclosures "adequately explai[n]" the plan's requirements for receiving benefits, ERISA does not "impose any further duty on Plan fiduciaries" to ensure that plan participants are aware of the information disclosed, and participants may be held to the plan terms. *Allen v. Atl. Richfield Ret. Plan*, 480 F. Supp. 848, 852 (E.D. Pa. 1979), *aff'd*, 633 F.2d 209 (3d Cir. 1980). Any additional duty would be unworkable and would discourage employers from offering benefits like these to employees.

ERISA's statute of limitations provision must be understood against this background. It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States,* 508 U.S. 129, 132 (1993). "In law as in life, … the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

Here the context is clear: ERISA's three-year statute of limitations runs from when the plaintiff obtains "actual knowledge" of information regarding

the design and operation of the plan (29 U.S.C. § 1113(2)), and that is precisely what the ERISA disclosures were designed to confer. Whatever "actual knowledge" may mean in other contexts, its meaning here—under ERISA's "comprehensive and reticulated" statutory/regulatory regime (*Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985))—necessarily encompasses information disclosed to plan participants.

The Ninth Circuit's contrary decision ignores statutory context. Drawing on circuit precedent interpreting an unrelated statute—the Digital Millennium Copyright Act ("DMCA")—the court held that disclosing information directly to plan participants gives rise only to "constructive knowledge"—not "actual knowledge." Pet. App. 6a-7a, 13a-14a. But the DMCA does not involve detailed, congressionally mandated disclosure requirements, nor does it provide the kind of comprehensive regulatory structure that ERISA imposes on plans, plan fiduciaries, and plan participants. Whatever "actual knowledge" might mean in a DMCA case is irrelevant here, because in the context of ERISA's statute of limitations the term is plainly broad enough to encompass knowledge obtained from a required disclosure.

"Actual knowledge"—like "'[k]nowledge'"—"means different things in different contexts." *United States v. Spinney,* 65 F.3d 231, 236 (1st Cir. 1995). Black's Law Dictionary, for example, expressly distinguishes between "express actual knowledge" and "implied actual knowledge." Black's Law Dictionary (11th ed. 2019) (definition of "actual knowledge"). And courts regularly speak of imputing, charging, or presuming actual knowledge. In some

contexts, for example, an agent's "actual knowledge" may be "imputable" to the principal. *Cent. Nat'l Bank v. Conn. Mut. Life Ins. Co.*, 104 U.S. 54, 63 (1881). "[T]he knowledge imputed to the principal is considered actual knowledge, not constructive." *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 n.4 (4th Cir. 1995). Courts also "presume that a party to a contract has actual knowledge of the provisions of the contract." *Grupo Condumex, S.A. de C.V. v. SPX Corp.*, 195 F. App'x 491, 502 (6th Cir. 2006); *see also Prudential Prop. & Cas. Ins. Co. v. Pendleton*, 858 F.2d 930, 932 (3d Cir. 1988) (discussing a "presumption that an insured's signature … evidences 'actual knowledge and understanding of … benefits and limits'"). In some circumstances that presumption of "actual knowledge" may even be "conclusive." *State Farm Mut. Auto. Ins. Co. v. Vollrath*, 132 F. App'x 414, 416 (3d Cir. 2005). Even the Ninth Circuit has recognized that "actual knowledge" can sometimes be proven by "circumstantial evidence that tends to establish what [a person] must have actually known"—the term does not mean that "a court must simply take the [person's] word for his state of mind." *In re Su*, 290 F.3d 1140, 1146 n.6 (9th Cir. 2002).

To be sure, a higher standard may apply, for example, when actual knowledge is used to show willful misconduct, such as fraud or intentional discrimination. While "[a] misrepresentation is fraudulent if the maker … knows" the truth (Restatement (Second) of Torts § 526 (1977)), a company that contradicts long-forgotten information buried in its files is not necessarily engaged in fraud. Similarly, "[d]iscrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent" (*Silvera v. Orange*

Cty. Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001))—a supervisor "c[an]not discriminate against [an employee] on account of race if he d[oes] not know [the employee's] race" (*Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992))—even, presumably, if that information were disclosed on an unread form.

This case, by contrast, is not about whether the plaintiff engaged in wrongdoing. The question is whether a plan participant had sufficient "actual knowledge" because of information indisputably in his possession to trigger ERISA's three-year limitations period. This question arises in the context of a "comprehensive and reticulated" statute (*Russell*, 473 U.S. at 146) in which the defendant is obligated to make certain disclosures to the plaintiff and the plaintiff is accountable for the information disclosed. That regime far more closely resembles the circumstances of a contracting party, where there is a written instrument or other evidence of knowledge that the responsible party cannot just disavow.

In other words, if the subject of the suit is something that is covered by the disclosures and it was in fact disclosed, then the plaintiff here has actual knowledge "regardless of whether the plaintif[f] 'actually saw or read the documents'" (*Brown*, 622 F.3d at 571), no matter what the term might mean in other contexts.[3]

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[3] This is not to say that "actual knowledge" is *synonymous* with disclosure. Instead, it is *broader* because it includes all information disclosed to *or* otherwise learned by plan participants. In certain cases, for example, plan participants may learn of a breach of fiduciary duty from their "dealings with [plan fiduciaries]" or "investment professionals." *Wright v. Heyne*, 349 F.3d 321, 331 (6th Cir. 2003); *see also Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1552 (3rd Cir. 1996) (plaintiffs had "actual knowledge" of

II. CONGRESS DID NOT INTEND TO IMPUTE GREATER KNOWLEDGE OF REPORTS FILED WITH THE SECRETARY OF LABOR THAN OF DISCLOSURES SENT DIRECTLY TO PLAN PARTICIPANTS

Congress's intention that plan disclosures would create "actual knowledge" for statute of limitations purposes is also apparent from its differential treatment of plan disclosures and reports. ERISA provides separate requirements for reporting to the Secretary of Labor and disclosure to plan participants. Disclosures are sent directly to plan participants, but reports are not, so plan participants are much more likely to actually read the disclosures than the reports. Yet when Congress first enacted ERISA, its three-year statute of limitations provision originally charged plan participants with constructive knowledge of the contents of reports to the Secretary, but said nothing about plan disclosures. The implication is clear: Congress did not need to charge participants with constructive knowledge of the contents of plan disclosures because it was self-evident that they would have *actual knowledge* of the information disclosed to them.

ERISA's requirements for reporting to the Secretary of Labor differ in important ways from its requirements for disclosure to plan participants. The contents of those reports and disclosures are distinct, and plaintiffs obtain knowledge of them in different ways.

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plan changes because they "asked about" them). Plan disclosures are a sufficient source of actual knowledge, but they are not the only source.

Whereas ERISA's disclosure requirements focus on participants' "rights and obligations" (29 U.S.C. § 1022(a)), ERISA's reporting requirements focus on plan financial information. The statute requires retirement plans to file "annual reports" with the Secretary of Labor, "referred to, in common parlance, as 'Forms 5500.'" *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 956 (D.C. Cir. 1985); *see* 29 U.S.C. §§ 1021(b)(1), 1023, 1024(a); 29 C.F.R. § 2520.103-1. The reports must include a comprehensive "financial statement" examined by an independent accountant and listing detailed information about all plan "assets," "loans," "fixed income obligations," "leases," and "trust[s]," as well as significant financial transactions. 29 U.S.C. § 1023(a)(3), (b)(3). Plans must also file "terminal and supplementary reports" when "winding up [their] affairs." *Id*. § 1021(b)(2), (c).

Though these reports are generally available to the public (29 U.S.C. § 1026) and are available to plan participants upon request (*id.* § 1024(b)(2)), they are not automatically furnished to plan participants directly (*see id.* §§ 1021(a), 1024(b)). Unlike the disclosures furnished to plan participants, there is no expectation that the detailed financial information included in annual reports will be "written in a manner calculated to be understood by the average plan participant," or even read by most plan participants. *Id.* §§ 1022(a), 1023. Instead, plan participants receive a "*summar*[*y*] [of] the … annual report" listing "aggregated" assets, liabilities, receipts, and disbursements (*id.* §§ 1023(b)(3)(A)-(B), 1024(b)(3) (emphasis added)), in addition to summary plan descriptions and periodic statements about the value of their benefits (*id.* §§ 1021(a)(1), 1022(b), 1025). Unlike the annual report, this summary

information is furnished directly to plan participants. *Id.* §§ 1021(a)(1), 1024(b).

The original version of ERISA's three-year statute of limitations expressly addressed participants' knowledge of ERISA reports filed with the Secretary—"Form 5500," *Fink*, 772 F.2d at 956—but said nothing about disclosures furnished directly to plan participants. Until 1987, the statute charged plaintiffs with knowledge of the contents of any "report … filed with the [S]ecretary" of Labor under ERISA. 29 U.S.C. § 1113(a)(2)(B) (1976). The three-year limitations period thus began to run when *either* the plaintiff gained "actual knowledge" of the breach (*id.* § 1113(a)(2)(A)) or a report was filed "from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach" (*id.* § 1113(a)(2)(B)).

Congress separately addressed information submitted only to the Labor Department because it is unlikely that most plan participants would have had "actual knowledge" of the complex, detailed financial information in reports that were not written for or furnished to plan participants. By contrast, there was no need to stipulate that plan participants had *constructive* knowledge of disclosures furnished to plan participants because Congress had every reason to believe those disclosures would achieve their express objective of giving participants "*actual* knowledge" of the information disclosed in a simple-to-understand manner.

The Ninth Circuit's construction of ERISA's actual knowledge requirement leads to the inexplicable implication that in the original version of the statute, Congress charged plan participants with greater knowledge of hard-to-understand technical

information reported to a third party (the Secretary) than of information disclosed to participants directly, "written in a manner calculated to be understood" by them individually, and designed "to reasonably apprise [them] of their rights and obligations under the plan." 29 U.S.C. § 1022(a). The Ninth Circuit never confronted that bizarre consequence of its interpretation or offered any explanation for why Congress would have intended that result. The statute "should be interpreted to avoid [such] untenable distinctions and unreasonable results." *Am. Tobacco Co. v. Patterson,* 456 U.S. 63, 71 (1982).

Rather than addressing the original meaning of "actual knowledge," the Ninth Circuit focused on the repeal of the provision that charged plaintiffs with knowledge of reports filed with the Secretary. Congress eliminated that provision in 1987. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330. This amendment was central to the Ninth Circuit's reasoning on the question presented. Pet. App. 6a-7a, 13a-14a. The court reasoned that making information available in an ERISA report or disclosure gives rise only to "constructive knowledge," and Congress rejected that form of knowledge when it repealed the provision charging plaintiffs with constructive knowledge of the contents of ERISA reports. *Ibid.*

The Ninth Circuit's reasoning conflates ERISA's reporting and disclosure requirements. The repealed provision did not deal with ERISA disclosures at all, so it was error for the court of appeals to infer anything about those disclosures from the repeal of the reporting provision. Instead, the provision dealt only with reports filed with the Secretary, and by repealing it, Congress merely ensured that plaintiffs

would not be charged with knowledge of those reports. As a result, the repeal of the provision has no bearing on the meaning of actual knowledge, and the Ninth Circuit erred in concluding otherwise. The actual knowledge provision has the same meaning after 1987 that it had before 1987: Disclosing information to plan participants gives them actual knowledge, not constructive knowledge, and it triggers the three-year limitations period under Section 413(2) of ERISA.

III. AFFIRMANCE WOULD THREATEN THE CAREFUL BALANCE STRUCK BY ERISA

Affirming the Ninth Circuit's decision, and thus severing the link between required disclosure and knowledge, would harm both employers and employees by providing a disincentive to offering retirement benefits. ERISA's central bargain was to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). ERISA's enforcement provisions—including its statute of limitations—thus reflect a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of [employee benefit] plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

Despite that careful balancing, ERISA litigation "has surged again" in recent years. George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. for Ret. Research at Bos. Coll., *401(k) Lawsuits: What Are the Causes and Consequences?* 1 (May 2018), https://crr.bc.edu/

wpcontent/uploads/2018/04/IB_18-8.pdf. "[O]ver 100 new … complaints were filed in 2016-2017" against 401(k) plans alone—"the highest two-year total since 2008-2009." *Id.* at 2; *see also* Practicing Law Institute, Securities Litigation: A Practitioner's Guide §§ 15:4.2-5 (2017) (surveying types of and trends in ERISA claims). The pressure to settle these lawsuits has remained steady since it was reported in 2012 that over the preceding decade, settlements in ERISA stock-drop cases "totaled over $1 billion." José Martin Jara, *What Is the Correct Standard of Prudence in Employer Stock Cases?*, 45 J. Marshall L. Rev. 541, 544 (2012). The decision below will only accelerate the trend by exposing plans to claims challenging plan investment strategies many years after those strategies were disclosed to plan participants.

The Ninth Circuit's decision leaves plan sponsors and fiduciaries with no way to rely on their statutorily mandated disclosures to plan participants to hold those participants accountable for their knowledge of the information disclosed to them, and no way to achieve the certainty guaranteed by ERISA's three-year statute of limitations. The decision also allows plan participants who have received plan disclosures to disavow knowledge, and then wait to see if the actual investment decisions outperform the market—and if not, sue with the benefit of up to six years of hindsight. The decision amplifies the "litigation expenses" of plan sponsors and fiduciaries in defending against meritless hindsight-driven lawsuits, and, in doing so, risks "unduly discourag[ing] employers from offering … benefit plans in the first place"—precisely the result Congress sought to avoid. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). The Court should reverse the decision below.

A. THE DECISION UNDERMINES THE VALUE OF PLAN DISCLOSURES

Plan sponsors and fiduciaries rely on ERISA's required disclosures to communicate with plan participants about their retirement plans and ensure that those participants are accountable for the information communicated. The Ninth Circuit's decision makes it impossible for plan sponsors and fiduciaries to rely on those communications. This outcome is contrary to ERISA's carefully balanced statutory scheme, and (if allowed to stand) it would harm both retirement plans and participants.

Plan sponsors and fiduciaries must rely on plan disclosures because they typically have no other effective way to communicate with plan participants. Plans for even moderately sized companies may cover "'thousands of employees,'" making it "'practically impossible'" to communicate with any one employee separately to ensure "'individualized notice.'" *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 986 (8th Cir. 1992) (quoting *Childers v. Nw. Airlines, Inc.*, 688 F. Supp. 1357, 1361 (D. Minn. 1988)) (emphasis omitted); *see also Walker v. Fed. Express Corp.*, 492 F. App'x 559, 565-66 (6th Cir. 2012) (same). As a result, it is critical that plans "be able to rely upon the detailed and uniform guidance ERISA provides with regard to disclosure requirements." *Maxa*, 972 F.2d at 986; *Walker*, 492 F. App'x at 565-66.

The same principles apply to ERISA's three-year statute of limitations. The statute serves the "basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). To give plan sponsors and fiduciaries the

sort of "[p]redictability" that is "a primary goal of statutes of limitations" (*Owens v. Okure*, 488 U.S. 235, 240 (1989)), plans need a reliable way to notify their participants of plan terms so that those participants may be held accountable for knowledge of the information disclosed.

The goal of predictability is defeated if, as the Ninth Circuit held, plan participants can disavow knowledge of the information disclosed to them. Plans have no way to compel their participants to read the disclosures, and they have no way to know or prove years after the fact whether the participants actually read them. Whether a plaintiff "ever consulted" a defendant's disclosure about an investment or "paid any attention to it" is "in many"—indeed most—"cases totally unknown and unknowable to the defendant" (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 746-47 (1975)), and "impossible for a defendant to prove" (*Reeves*, 2005 WL 2347242, at *5). Only the participants know whether they actually read the disclosure. If participants claim after the fact that they did not read or do not remember reading the disclosures, there often will be no practical way for the plan sponsors and fiduciaries to prove otherwise. In effect, therefore, the Ninth Circuit's approach gives plaintiffs an "end run around ERISA's limitations requirement." *Young*, 550 F. Supp. 2d at 419 n.3. It thus leaves plan sponsors and fiduciaries with no reliable means to establish knowledge, and no basis to rely on the three-year statute of limitations even for conduct that the plan has transparently disclosed in good faith.

The facts of this case illustrate the problem. Respondent invested his retirement funds in one of several investment options made available through

petitioners' retirement plans. Pet. Br. 8. The entity managing the investment allocated a portion of the invested funds to alternative investments in hedge funds and private equity. *Ibid*. The investment manager chose those alternative investments because it believed they offered unique advantages as part of a larger, diversified portfolio of investments. *Ibid*. "[H]edge funds," for example, "offer investors an important risk management tool by providing valuable portfolio diversification because hedge fund returns in many cases are not correlated to the broader debt and equity markets." SEC, *Implications of the Growth of Hedge Funds: Staff Report to the United States Securities and Exchange Commission* viii (2003), http://www.sec.gov/news/studies/hedgefunds0903.pdf.

The plan at issue in this litigation disclosed these investment options directly to respondent and other plan participants, and they also disclosed "the strategy behind those investments, and [their] possible risks." Pet. App. 16a. Indeed, the Ninth Circuit recognized that respondent "had sufficient information available to him" from petitioners' disclosures "to know about the allegedly imprudent investments" more than three years before he filed his claims. *Ibid*. Thanks to modern technology, the plan alerted respondent to the relevant disclosure materials with targeted emails, and petitioners were able to document his thousands of clicks on webpages throughout the website containing the disclosures. Pet. Br. 9. That is far *more* proof that respondent was aware of the disclosures than even would have been possible before the advent of the Internet when ERISA was enacted in 1974.

Yet the Ninth Circuit concluded that respondent had created a factual issue as to his actual knowledge of the information disclosed to him, based on nothing more than his say-so that he did not "recall receiving or review[ing]" the disclosures. Pet. App. 24a. If documenting respondent's repeated access to the relevant disclosures is not enough to establish actual knowledge as a matter of law, it is difficult to conceive of how a plan sponsor or fiduciary could ever establish actual knowledge absent an admission against interest that no plaintiff is likely to volunteer.

This Court has recognized the problem with such an approach in other contexts. Basing liability on the plaintiff's unfalsifiable testimony alone creates an intolerable incentive for plaintiffs to bring meritless or even frivolous claims in the hopes that the "threat of extensive [and costly] discovery" will coerce the defendant into settling. *Blue Chip Stamps*, 421 U.S. at 742-43. That risk is "'particularly high'" where the plaintiff's claims—though "'difficult to prove at trial'"—are also "'difficult to dispose of before trial'" because they "depen[d] upon [the plaintiff's] uncorroborated oral evidence" of purported facts "unknown and unknowable to the defendant." *Id.* at 742-43, 746. Instead, in many contexts, this Court has long favored interpretations of statutes that premise liability on "matters which are verifiable by documentation, and do not depend upon oral recollection, so that [those matters] can normally be established by the defendant either on a motion to dismiss or on a motion for summary judgment." *Id.* at 742. The law's "preference for objectively measurable data over subjective statements of opinion and intent" dates back to the beginnings of common law. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570 n.22 (1973) (Marshall, J. concurring). And it is

reinforced by the "ordinary rule" in civil litigation that courts "'d[o] not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.'" *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002) (quoting *Campbell v. United States*, 365 U.S. 85, 96 (1961)).

Congress could not have intended to put plan sponsors and fiduciaries in the position of proving that plan participants actually reviewed specific disclosure documents, let alone that they read, comprehended, and remembered the particular words that disclosed the investment strategies they claim were imprudent. Placing that untenable burden of proof on plan sponsors and fiduciaries would effectively nullify the limitations period that Congress guaranteed to them.

Congress enacted both a "[six]-year statute of *repose*" (*Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (emphasis added)) and a three-year "statute of *limitations*" (Pet. App. 13a (emphasis added)) for ERISA claims. If a plaintiff can vitiate the three-year limitations period by simply stating the he does not "specifically remember" reading plan disclosures (J.A. 193-95), then in practice there is no statute of limitations—only the six-year statute of repose. Six years is a long time, and the "[p]assage of time … may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself." *United States v. Marion*, 404 U.S. 307, 321-22 (1971). This Court should honor Congress's decision to enact both a six-year statute of repose and a three-year statute of limitations by "giv[ing] effect to both provisions." *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009). Treating required

disclosures as actual knowledge is the only way to preserve the balance struck by Congress.

B. THE DECISION EXACERBATES THE RISK OF HINDSIGHT BIAS IN ERISA BENEFITS LITIGATION

The Ninth Circuit's approach also exacerbates the problem of hindsight bias. Hindsight bias is a recurrent problem in ERISA litigation, particularly in claims alleging excessive fees or imprudent selection of investment options. Allowing plan participants to object to an investment strategy more than three years after the strategy was openly disclosed to them makes the problem worse.

"While it is easy to pick an investment option in retrospect (buy Apple Inc. at $7 a share in December 2000 and short Enron Corp. at $90 a share), selecting an investment beforehand is difficult." *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014). Plan sponsors and fiduciaries face an onslaught of litigation alleging that a particular investment option offered by the plan and selected by some plan participants to build their portfolios was imprudent because it underperformed over a period of years. *See*, *e.g.*, *Barchock v. CVS Health Corp.*, 886 F.3d 43, 47 (1st Cir. 2018) (affirming dismissal of claims that were based "only on how poorly [investment] decisions turned out"); *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 709 (2d Cir. 2013) (affirming dismissal of complaint that "relie[d] too heavily on facts known only in hindsight"); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 10 (1st Cir. 2009) (rejecting theory that would "judge a fiduciary's actions in hindsight"); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) (rejecting argument

that imprudence of investment could be inferred from company's "losses").

In theory, courts generally recognize that as a matter of law, the prudence of an investment "cannot be measured in hindsight," and instead it must be judged based solely on the information available to the investor at "'the time of the challenged decision.'" *DiFelice*, 497 F.3d at 424 (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994)). What matters *legally* is whether the decision was prudent "when made." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989).

In practice, however, hindsight is not so easily avoided. "[I]gnoring a known outcome is unnatural," and as a result modern psychology has long recognized that "people consistently exaggerate what could have been anticipated in foresight." Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 Or. L. Rev. 61, 67, 69 (2000). "Whenever a court must determine what a party 'should have known,' it is susceptible to the influence of the hindsight bias." *Id.* at 69 (citation omitted). Yet "there is no effective strategy to induce a judge or jury to make an unbiased ex post assessment of the ex ante probability of an adverse outcome. No known decision-making strategy enables people to make decisions in hindsight that resemble decisions made in foresight." *Id.* at 70. "[I]n cases in which investments produced worse than expected results," therefore, "courts consistently fai[l] to appreciate the problems associated with judging in hindsight." *Id.* at 79.

As a result, despite the legal recognition that hindsight has no place in ERISA litigation, judges and juries in ERISA cases continue to fall victim to the

fallacy that the prudence of an investment may be measured in hindsight by showing that an investment "significant[ly] underperform[ed] relative to [a given] benchmark." *St. Vincent*, 712 F.3d at 731 (Straub, J., dissenting) (first and second alterations in original) (advocating analysis that majority found too reliant on hindsight); *see also Tussey*, 746 F.3d at 338 (reversing district court decision based on hindsight bias). More often, this hindsight bias goes unremarked but is nevertheless an ever-present risk in litigation of this sort.

Even when courts ultimately reject claims based on hindsight, the costs of defending against high-risk class actions like the action here is often considerable. *See* Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 17 (2017), http://goo.gl/mKjnJn (in the highest-risk class actions, companies spend between $3 and $30 million per year per case on outside counsel). An ERISA plaintiff who can draft a complaint that survives a motion to dismiss stands to negotiate a substantial settlement regardless of the merits of the claims.

ERISA's three-year statute of limitations mitigates the problem of hindsight by requiring plan participants to decide promptly whether to challenge investment decisions after those decisions have been disclosed to them. The Ninth Circuit decision, however, exacerbates this problem because it allows plan participants to sue more than three years after their investments were made even if all of the relevant details were disclosed to them at the time of the investments and they knowingly accepted the risks of the investments. Under that approach, a "participant could simply disavow knowledge" of a high-risk, high-

reward investment strategy "and wait indefinitely to see whether it worked to his benefit before 'crying foul' and asserting his rights under ERISA." *Reeves*, 2005 WL 2347242, at *5. This sort of wait-and-see strategy transfers all of the risk that an investment will underperform from the participant to the plan fiduciary. If the investment tracks the market or overperforms as compared to available alternatives, the plan participant reaps all of the benefit, but if it underperforms because of unanticipated circumstances, the participant can sue with the benefit of hindsight.

The Ninth Circuit's decision means that plan participants have the benefit of more than three years of hindsight, increasing the likelihood that as a matter of sheer probability, the investment will underperform over some stretch of time, and increasing the potential damages. Participants can sit tight while an investment overperforms for three straight years, and then sue when it drops in year four, claiming the eventual decline was foreseeable from day one.

Increasing the risk of hindsight-based litigation increases the litigation expenses faced by ERISA plan sponsors. The current high cost of retirement plans is a burden on businesses across the country that want to offer competitive retirement benefits to their employees. Ensuring effective liability restraints will further broaden the universe of smaller employers for whom offering competitive retirement benefits is a cost-effective employee benefit. Correcting the Ninth Circuit's faulty approach to ERISA's three-year statute of limitations is therefore critical to restoring the balance Congress struck in ERISA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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