No.

IN THE

Supreme Court of the United States

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, ET AL.,

Petitioners,

v.

CHRISTOPHER M. SULYMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN J. BUCKLEY, JR.
DANIEL F. KATZ
JYOTI JINDAL*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, D.C. 20005
(202) 434-5000

DONALD B. VERRILLI JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, California 90071
(213) 683-9208

Counsel for Petitioners

* Admitted in Virginia and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Intel Corporation Investment Policy Committee; the Finance Committee of the Intel Corporation Board of Directors; the Intel Retirement Plans Administrative Committee; Intel 401(k) Savings Plan; Intel Retirement Contribution Plan; Charlene Barshefsky; Susan L. Decker; John J. Donahoe; Reed E. Hundt; Ravi Jacob; James D. Plummer; David S. Pottruck; and Frank D. Yeary. Respondent is Christopher M. Sulyma.

Petitioners include retirement plans sponsored by Intel Corporation, which is not itself a party. Intel Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

A. THE DECISION BELOW SQUARELY PRESENTS A CONFLICT AMONG THE COURTS OF APPEALS 12

B. THE COURT OF APPEALS' DECISION IS INCORRECT. 17

C. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE 21

CONCLUSION 25

Appendix A: Court of Appeals opinion, November 28, 2018 ..... 1a

Appendix B: District Court opinion, March 31, 2017 ..... 19a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Advocate Health Care Network v. Stapleton,
137 S. Ct. 1652 (2017) 22

Amgen Inc. v. Harris,
136 S. Ct. 758 (2016) 23

Brown v. Owens Corning Investment Review Committee,
622 F.3d 564 (6th Cir. 2010) ..... passim

California Public Employees' Retirement System v. ANZ Securities, Inc.,
137 S. Ct. 2042 (2017) 5

Conkright v. Frommert,
559 U.S. 506 (2010) 22

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995) 18

Edes v. Verizon Communications, Inc.,
417 F.3d 133 (1st Cir. 2005) 19

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 22

Enneking v. Schmidt Builders Supply Inc.,
875 F. Supp. 2d 1274 (D. Kan. 2012) 16

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014).....5

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989).....18

Gobeille v. Liberty Mutual Insurance Co.,
136 S. Ct. 936 (2016).....22

Harris v. Finch, Pruyn & Co.,
Civ. No. 05-951, 2008 WL 2064972
(N.D.N.Y. May 13, 2008).....16

Heimeshoff v. Hartford Life & Accident Insurance Co.,
571 U.S. 99 (2013).....23

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004).....23

Lockheed Corp. v. Spink,
517 U.S. 882 (1996).....5

Lorenz v. Safeway, Inc.,
241 F. Supp. 3d 1005 (N.D. Cal. 2017).....16

Metropolitan Life Insurance Co. v. Glenn,
554 U.S. 105 (2008).....22

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,
514 U.S. 645 (1995).....5

In re Northrop Grumman Corp. ERISA Litigation,
Civ. No. 06-6213, 2015 WL 10433713
(C.D. Cal. Nov. 24, 2015) 16

Reeves v. Airlite Plastics, Co.,
Civ. No. 04-56, 2005 WL 2347242
(D. Neb. Sept. 26, 2005) 16

*Rosen v. Prudential Retirement
Insurance and Annuity Co.*,
718 F. App'x 3 (2017) 14

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002).....22

Shirk v. Fifth Third Bancorp,
Civ. No. 05-49, 2009 WL 3150303
(S.D. Ohio Sept. 30, 2009).....16

Tibble v. Edison International,
135 S. Ct. 1823 (2015).....22

Wilson v. Garcia,
471 U.S. 261 (1985).....23

*Young v. General Motors Investment
Management Corp.*,
550 F. Supp. 2d 416 (S.D.N.Y. 2008).....16, 19

STATE CASES

Poffenberger v. Risser,
431 A.2d 677 (Md. 1981).....19

GRANTS OF CERTIORARI

Cochise Consultancy, Inc. v. United States,
cert. granted, No. 18-315 (Nov. 16, 2018) 23

McDonough v. Smith,
cert. granted, No. 18-485 (Jan. 11, 2019).....23

FEDERAL STATUTES

29 U.S.C. 1021 18

29 U.S.C. 1023 18

29 U.S.C. 1024 18

29 U.S.C. 1024(b).....7

29 U.S.C. 1025(a)(2)(B)(i).....18

29 U.S.C. 1104 .....3, 8

29 U.S.C. 1105 8

29 U.S.C. 1113 .....6, 22

29 U.S.C. 1113(1).....20

29 U.S.C. 1113(2)..... passim

29 U.S.C. 1113(a)(2)(B) (1976).....19

FEDERAL REGULATIONS

29 C.F.R. § 2520.104b-1(c) 8

67 Fed. Reg. 17,264-01 (April 9, 2002) 8

LEGISLATIVE MATERIALS

H.R. Rep. No. 93-533 (1974), *as reprinted in,* 1974 U.S.C.C.A.N. 4639 18

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009).....19

John Manganaro, *Assessing Courts' ERISA Decisions in 2018*, PLANSPONSOR (Dec. 31, 2018).....21

Liam K. Healy, *Ninth Circuit Questions the Sixth Circuit's Understanding of 'Actual Knowledge' in ERISA Statute of Limitations Decision*, Foster Swift Collins & Smith PC (Dec. 13, 2018) 24

Litigation v. Innovation: Defined Contribution's Sweeping Paralysis, Chief Investment Officer (Apr. 13, 2016).....22

Mark E. Schmidtke & Madeline Chimento Rea, *Under ERISA, Ignorance Is Bliss in the Ninth Circuit*, Ogletree Deakins (Dec. 21, 2018).....24

PETITION FOR A WRIT OF CERTIORARI

Intel Corporation Investment Policy Committee; the Finance Committee of the Intel Corporation Board of Directors; the Intel Retirement Plans Administrative Committee; Intel 401(k) Savings Plan; Intel Retirement Contribution Plan; Charlene Barshefsky; Susan L. Decker; John J. Donahoe; Reed E. Hundt; Ravi Jacob; James D. Plummer; David S. Pottruck; and Frank D. Yeary respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 909 F.3d 1069. The opinion of the district court (App., *infra*, 19a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

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

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest

> date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT

Section 413(2) of the Employee Retirement Income Security Act (ERISA) prohibits actions commenced 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). The question presented here is whether this provision bars suit where all of the information relevant to an alleged violation was disclosed to the plaintiff more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or does not recall whether he read the materials provided to him.

The court of appeals held that the plaintiff could overcome Section 1113(2)'s statute of limitations under those circumstances. In doing so, it expressly "disagree[d] with" the analysis of the Sixth Circuit in *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564, 572 (6th Cir. 2010), which had applied Section 1113(2) to bar plaintiffs from proceeding with an ERISA claim under closely analogous circumstances. App., *infra*, 14a. The court of appeals was explicit that under its "interpretation of ERISA," the knowledge of the plaintiffs in *Brown* would be deemed "constructive

knowledge only" and therefore insufficient to trigger Section 1113(2)'s three-year limitations period. *Id*.

Petitioners are two retirement plans for employees of Intel Corporation, as well as certain committees and individuals that played a role in administering the plans. Respondent, Christopher Sulyma, is a former engineer at Intel. Through the plans' service provider and otherwise, petitioners provided extensive disclosures to respondent about his retirement plans. Respondent received targeted emails alerting him that important documents were available online and providing links to the plans' website, which hosted the documents and which respondent repeatedly visited. Those documents laid out the percentage allocation of the plans' investments and explained that a significant portion of the investments was allocated to alternative investments such as hedge funds and private equity. The materials also spelled out in detail the risks and disadvantages of the allocation, including higher fees and lower returns than equity-heavy funds during periods when equity markets were rapidly rising. The materials explained the investment committee's judgment that the allocation was prudent because it dampened the volatility of the funds' performance and protected investors against significant losses when equity markets declined.

More than three years after the relevant information was provided to him, respondent filed a putative class action against petitioners, alleging, *inter alia*, that petitioners had imprudently over-allocated funds in Intel retirement plans to alternative investments, in violation of the plan administrators' fiduciary duties under 29 U.S.C. 1104. After the parties conducted statute-of-limitations discovery, the district court

granted summary judgment to petitioners, holding that respondent had "actual knowledge" of the facts on which his claims were based more than three years before filing suit.

Respondent appealed and the court of appeals reversed. The court acknowledged that petitioners had provided plan participants with detailed materials regarding the investments respondent challenged and that respondent thus had sufficient information available to him to know about the allegedly imprudent investments more than three years before he filed suit. But the court held that the limitations defense was unavailable unless the defendant could establish that the plaintiff had in fact *read* the information he received. Because respondent testified in his deposition that he did not recall whether he read the relevant information and denied that he was subjectively aware of it, the court held that a fact issue existed as to whether respondent had the "actual knowledge" required to trigger the three-year limitations period, thus precluding summary judgment.

By departing from the Sixth Circuit's interpretation of Section 1113(2) in *Brown* (and the uniform view of the district courts on this issue, see pages 15–17 *infra*), the Ninth Circuit has subjected multistate employers to conflicting legal regimes for claims concerning their company-wide retirement plans, and provided plaintiffs with an easy-to-execute and difficult-to-refute tactic for evading Section 1113(2)'s statute of limitations in a category of cases that arise with great frequency. That is the definition of an intolerable conflict. And this case is an optimal vehicle for resolving it and setting forth a uniform nationwide rule. The petition for a writ of certiorari should therefore be granted.

1. ERISA regulates private employer retirement plans. It does not require employers to provide employee benefit plans or prescribe any particular type or level of benefit a plan must provide. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Instead, it establishes extensive reporting and disclosure mandates, see 29 U.S.C. 1021–1031; and, of relevance here, various fiduciary responsibilities for plan administrators, see *id.* 1101–1114. ERISA imposes a duty of care on plan fiduciaries in managing trust funds. See *id.* 1104. To enforce its provisions, ERISA provides for civil liability and other sanctions in the event of breach. See *id.* 1131–1145; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 651 (1995). ERISA "careful[ly] balanc[es]" protections for plan beneficiaries with the recognition that overly burdensome regulation can discourage employers from providing benefit plans in the first place. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) (citation omitted).

To prevent stale claims and to deter plaintiffs from sleeping on their rights, ERISA's statute of limitations bars claims that a fiduciary breached any duty if they are brought 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). Another subsection contains a six-year repose period, prohibiting claims brought six years or more after "the date of the last action which constituted a part of the breach or violation," or, in cases of omission, after "the latest date on which the fiduciary could have cured the breach or violation." *Id.* 1113(1); see *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2050 (2017). In a provision not at issue here,

the section provides an exception for cases of fraud or concealment; in such cases, the repose period runs from the plaintiff's discovery of the violation. See 29 U.S.C. 1113.

2. Respondent, an engineer with a doctorate in experimental physics, worked at Intel between 2010 and 2012. During that time, he participated in two retirement plans sponsored by Intel: the Intel Retirement Contribution Plan and the Intel 401(k) Savings Plan (both petitioners here). The funds available in each plan were managed by the Intel investment policy committee (also a petitioner here). The funds in which respondent invested included alternative investments in hedge funds and private equity. In the aftermath of the 2008 financial crisis, the investment policy committee selected that allocation to increase diversification and reduce volatility during periods of market decline. But the alternative investments came with higher fees, and their returns were expected to trail equity-heavy funds when the equity markets were yielding strong returns. As would be expected of funds of this type, when equity markets surged after the financial crisis, the funds' returns were lower than those of equity-heavy index funds and similar portfolios. App., *infra*, 3a–4a.

Petitioners "disclosed these investment decisions to [respondent]," specifying both the fact of the allocation and the strategy behind that decision. App., *infra*, 3a–4a. For example, a 2010 "Fund Fact Sheet" for one of respondent's funds disclosed that the fund was invested more heavily in hedge funds than were comparable portfolios, and it illustrated the allocation with graphs and tables. The fact sheet explained that the investments would provide diversification that was expected

to reduce volatility and increase performance in times when the overall market was declining rapidly. But the fact sheet also warned that the steadier performance "c[a]me with a price," including reduced performance in certain market conditions and higher costs, and that as a result the fund was not generating returns as robust as those of equity-heavy funds. *Id.* at 4a, 38a–39a.

Petitioners made the documents containing the information available electronically, using targeted email notifications with links to many of the documents, which were hosted on plan and company websites. The emails alerted respondent to the availability of the documents and their importance. During his brief tenure with Intel, respondent regularly accessed the website for those materials, clicking on more than a thousand webpages within that site; it was undisputed that respondent "accessed some of th[e] information" that disclosed the disputed investment decisions "on the websites." App., *infra*, 3a–4a; see C.A. Supp. Rec. 247–265. Nonetheless, respondent did not concede that he was aware of the information contained in the materials, asserting that he did not "recall" reading the relevant information and was not "aware" of the allocation and its downsides until shortly before filing suit. App., *infra*, 16a–17a.[1]

---

[1] The Intel plan administrators' electronic disclosure of information about the plans satisfied ERISA's requirement to furnish certain documents to plan participants. See 29 U.S.C. 1024(b). Department of Labor regulations provide that posting information to a plan website and emailing participants about the availability of the documents—as the plan administrators did here—satisfies a plan administrator's statutory obligation

3. On October 29, 2015, more than three years after the relevant information was disclosed to him, respondent filed a putative class action against petitioners, alleging that petitioners had imprudently overallocated funds in the two retirement plans to alternative investments and had failed to disclose relevant facts about those allocations, in violation of 29 U.S.C. 1104. Respondent also asserted derivative-liability claims on the theory that each petitioner had failed to monitor and remedy other petitioners' alleged breaches, in violation of 29 U.S.C. 1105.

After the parties conducted discovery on the limitations question, the district court granted summary judgment to petitioners on all counts. App., *infra*, 19a–49a. It held that, for purposes of 29 U.S.C. 1113(2), respondent had "actual knowledge" of the facts on which his claims were based more than three years before he filed suit. *Ibid.*

At the outset, the district court noted that the "gravamen of [respondent's] complaint is that [petitioners] imprudently over-allocated to hedge funds and private equity investments," which presented an undue risk of high fees and costs. App., *infra*, 21a. Respondent did not dispute that he received certain documents that set out the investment allocations he alleges were imprudent. *Id.* at 34a–35a. Nor did respondent dispute that those documents "directed" him to review additional materials (also made directly available to him) that set out the allocation and described the investment strategy. *Id.* at 35a–36a. Similarly, other materials respondent admitted to reviewing specifically "directed him" to

---

to furnish the information to participants. See 29 C.F.R. 2520.104b-1(c); 67 Fed. Reg. 17,264-01 (April 9, 2002).

the plans' website. *Id.* at 40a. Because the elements of the asserted counts were all "disclosed to respondent" more than three years before he sued, petitioners were entitled to summary judgment and the suit was time-barred. *Id.* at 44a.

The district court emphasized that respondent admitted reviewing materials that "directed him" to the plans' website. App., *infra*, 40a. In the district court's view, respondent's decision not to review those materials—or his claim years later that he did not recall doing so—could not suffice to defeat the limitations defense. *Ibid.*

For similar reasons, the district court granted summary judgment to petitioners on the failure-to-disclose counts, App., *infra*, 48a, and it entered judgment for petitioners on the derivative-liability counts because no live primary-liability counts remained, *id.*[2]

4. Respondent appealed the grant of summary judgment based on the limitations defense, and the court of appeals reversed. App., *infra*, 1a–18a. At the outset, the court observed that "ERISA does not define 'knowledge' or 'actual knowledge.'" *Id.* at 6a. The court perceived "confusion * * * over the scope of the 'actual knowledge'" standard, and it proceeded to "determine the meaning of 'actual knowledge' in this circuit." *Id.* at 6a–7a. The court concluded that, in order to obtain summary judgment on a limitations defense under ERISA, the defendant must show that "there is no

[2] The district court also granted summary judgment on the merits on the failure-to-disclose claims. See App., *infra*, 45a n.11. Respondent did not appeal the merits determination as to his failure-to-disclose claims, and the judgment on these counts therefore is final. See *id.* at 5a n.2.

dispute of material fact that the plaintiff was actually aware that the defendant acted imprudently." *Id.* at 13a–14a. The court of appeals took the view that, because receiving materials directly from an employer can suffice to establish *constructive* knowledge, it must be insufficient to establish *actual* knowledge. *Id.* at 14a. Accordingly, the court of appeals determined that, unless the undisputed record established that respondent specifically reviewed the provided materials and was "actually aware" of the disclosed information, summary judgment based on the limitations defense necessarily must be denied. *Id.* at 13a.

In adopting that interpretation, the court of appeals recognized that "[its] understanding of actual knowledge conflicts with the Sixth Circuit's." *Id.* at 14a. The Sixth Circuit had held that plan participants' "failure to read the documents" provided by the plan "will not shield them from having actual knowledge of the documents' terms." *Ibid.* (quoting *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564, 571 (2010)). The court of appeals in this case expressly "disagree[d]" with that holding. *Ibid.*

Turning to the facts of the case, the court of appeals recognized that petitioners had disclosed the "alternative investments, the strategy behind those investments, and possible risks" in multiple documents provided to respondent between 2010 and 2012. App., *infra*, 16a. Accordingly, the court acknowledged, respondent "had sufficient information available to him to know about the allegedly imprudent investments before October 29, 2012"—that is, more than three years before he filed suit. *Id.*

Despite that acknowledgment, the court of appeals concluded that the suit could proceed because petitioners could not additionally establish, with undisputed evidence, that respondent actually had read and recalled the documents provided to him. App., *infra*, 16a. Respondent asserted in his deposition that he did "not recall" seeing the documents and that he was "unaware" that funds had been invested in hedge funds and private equity. *Ibid.* As a result, in the court's view, petitioners had failed to establish that respondent had the "actual knowledge" required to trigger the three-year limitations period. *Ibid.* The court therefore reversed the grant of summary judgment on the relevant counts and remanded to the district court for further proceedings. *Id.* at 16a–17a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case presents a square and acknowledged circuit conflict on a question of statutory interpretation under ERISA that arises frequently and is of manifest importance to the sound administration of the statutory scheme. That conflict, which represents the considered views of the courts on either side, is unlikely to be resolved without the Court's intervention. And the lack of uniformity concerning the calculation of the limitations period urgently requires resolution to ensure that multistate employers are not subject to conflicting regimes depending on where ERISA plaintiffs choose to sue them, and to ensure that all employers can order their affairs so as to minimize the risk of suits like the one respondent is pursuing here. Because this case presents an optimal vehicle for resolving the conflict, the petition for a writ of certiorari should be granted.

A. The Decision Below Squarely Presents A Conflict Among The Courts Of Appeals

This case presents a recognized circuit conflict, and the decision below disrupts a settled body of case law concerning the meaning of "actual knowledge" under ERISA's statute of limitations, 29 U.S.C. 1113(2). Until the Ninth Circuit's decision in this case, the overwhelming consensus in the federal courts was that plan participants possessed actual knowledge of facts where the facts were divulged to them in plan documents disclosed pursuant to ERISA. The decision below, however, requires specific proof that each individual *read* the plan documents in order to establish actual knowledge. That holding means that, in a large swath of the country, the application of ERISA's limitation period will turn on whether a plaintiff admits to reviewing information clearly set out before him—something plaintiffs will have little incentive to do and defendants will have great difficulty establishing.

As the decision below acknowledged, the Sixth Circuit's test for actual knowledge would have led to the opposite result in this case. The Sixth Circuit, like multiple district courts, has long applied the rule that "actual knowledge" does not require an ERISA defendant to prove that plan participants in fact read the information disclosed to them. Instead, defendants can satisfy the actual-knowledge requirement by establishing that a participant is provided with, or specifically directed to, documents disclosing all the material facts relevant to his claim. Under that test, an employee's failure to read the documents will not shield him from possessing actual knowledge of the documents' terms.

The Court's review is plainly warranted to resolve this conflict.

1. As the Ninth Circuit expressly recognized (App., *infra*, 14a), its decision in this case directly conflicts with the Sixth Circuit's decision in *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564 (6th Cir. 2010). There, a group of plan participants brought a class-action lawsuit under ERISA against the fiduciaries who administered their retirement plans, alleging that the fiduciaries failed to divest an investment that had become imprudent. *Id*. at 566. The running of the limitations period in Section 1113(2) turned on when the plan participants first had actual knowledge that the fiduciaries had the authority to divest from the challenged investment. See *id.* at 570–571.

The plan at issue provided the participants with two categories of documents more than three years before they filed suit. First, certain plan communications, including account statements and a letter from the company's chief executive officer, explained the rules for contributions to the stock fund. See *Brown*, 622 F.3d at 570. Second, some participants were provided "with access to" summary plan descriptions, which were either sent by mail or provided via a notification that the documents were "available on the company's internet website." *Id.* at 567. Those descriptions "clearly" disclosed the relevant information. See *id.* at 571 (emphasis omitted). The district court had granted summary judgment to the plan fiduciaries, holding that the suit was time-barred because the plan participants had actual knowledge of the relevant facts more than three years before filing suit. See *id.* at 570–571.

The Sixth Circuit affirmed. It explained that the account statements and the CEO's letter had disclosed that *someone* had control over the imprudent investment. See *Brown*, 622 F.3d at 570. And, critically, the summary plan descriptions clearly identified plan fiduciaries as the entities with authority over that investment. See *id.* at 571.

Although the summary plan descriptions specifically disclosed the relevant information, the plan participants argued that evidence that they were "provided with access to the [descriptions]" would, at most, "amount to *constructive* knowledge of the terms contained therein, not *actual* knowledge." *Brown*, 622 F.3d at 571. But the Sixth Circuit disagreed. It explained that "[a]ctual knowledge does not require proof that the individual [p]laintiffs actually saw or read the documents that disclosed" the relevant facts. *Ibid.* (internal quotation marks and citation omitted). The court elaborated that "no material distinction" exists "between being directly handed plan documents and being given instructions on how to access them." *Ibid.* It accordingly held that, "[w]hen a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." *Ibid.* Applying that standard, the Sixth Circuit concluded that the summary plan descriptions, along with other plan communications, "gave the [p]laintiffs actual knowledge" of the relevant facts. *Id.* at 572.[3]

---

[3] The Second Circuit subsequently relied on *Brown*'s reasoning, albeit for the distinct purpose of determining substantive liability under ERISA. See *Rosen v. Prudential Retirement*

2. Here, as in *Brown*, the respondent had been provided with access to the plan documents, but it was disputed whether he had in fact read them. Because a plan participant in the Sixth Circuit who receives "specific instructions on how to access plan documents" has actual knowledge of "the documents' terms" regardless of his "failure to read the documents," the limitations defense would have barred this suit if it had been brought there. *Brown*, 622 F.3d at 571. The conflict between the two decisions is undeniable.

Recognizing the conflict, the Ninth Circuit expressly "disagree[d] with th[e] analysis" in *Brown*. App., *infra*, 14a. And lest any doubt remain, it conceded that *Brown* would have come out the other way under the rule it was adopting, deeming the plaintiffs in *Brown* to have "constructive knowledge only" and emphasizing that, "[u]nder [its] interpretation of ERISA," the *Brown* plaintiffs' "knowledge [would be] insufficient" to trigger the three-year limitations period. *Ibid.* There can be no doubt, therefore, that this case presents a circuit conflict that warrants this Court's review.

3. The Ninth Circuit's decision also upends the consensus among federal district courts that have considered the question. As one court has explained, in establishing actual knowledge for purposes of Section 1113(2), the relevant inquiry is "whether the documents provided to plan participants sufficiently disclosed the alleged breach of fiduciary duty"; that court

---

Insurance and Annuity Co., 718 F. App'x 3, 7 (2017) (noting that "[a]ctual knowledge does not require proof that the individual [p]laintiffs actually saw or read the documents that disclosed the allegedly harmful investments" (quoting *Brown*, 622 F.3d at 571)).

expressly rejected as "an end run around ERISA's limitations requirement" an interpretation of "actual knowledge" that asks "whether individual [p]laintiffs actually saw or read the documents." *Young v. General Motors Investment Management 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); see also, *e.g.*, *Enneking v. Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1284 (D. Kan. 2012); *Shirk v. Fifth Third Bancorp*, Civ. No. 05-49, 2009 WL 3150303, at *3, *6 (S.D. Ohio Sept. 30, 2009); *Reeves v. Airlite Plastics, Co.*, Civ. No. 04-56, 2005 WL 2347242, at *5–*6 (D. Neb. Sept. 26, 2005); but see *Harris v. Finch, Pruyn & Co.*, Civ. No. 05-951, 2008 WL 2064972, at *3–*4 (N.D.N.Y. May 13, 2008) (requiring evidence that the plaintiff "read and underst[ood] the terms listed in the plan or [summary plan description]").

Indeed, until the decision below, district courts in the Ninth Circuit had consistently deemed Section 1113(2) satisfied in circumstances similar to those here. See*, e.g.*, *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017) (holding that a plaintiff had "actual knowledge" when the plan's disclosure notice was available to him, "regardless of whether [the plaintiff] actually read the * * * [d]isclosure"); *In re Northrop Grumman Corp. ERISA Litigation*, Civ. No. 06-6213, 2015 WL 10433713, at *22 (C.D. Cal. Nov. 24, 2015) (adopting the Sixth Circuit's rule in *Brown* and holding that, "[given] undisputed evidence that the [plan documents] were mailed, and the lack of any evidence rebutting the presumption of receipt, the plaintiff class is deemed to have had actual knowledge of their contents as a matter of law").

The decision below thus departs from the consensus interpretation of "actual knowledge" for purposes of ERISA's limitation provision, and all but invites plaintiffs to flock to district courts in the Ninth Circuit to bring ERISA actions that would be time-barred elsewhere. The need for a uniform national rule is patent and urgent.

B. The Court Of Appeals' Decision Is Incorrect.

The court of appeals erred in holding that a plaintiff may avoid actual knowledge for purposes of Section 1113(2) simply by refusing to read plan documents provided to him for the express purpose of informing him of the plan fiduciaries' decisions, or claiming he cannot recall the contents of what he has been provided.

1. Section 1113(2) provides that a plaintiff alleging a breach of fiduciary duty must bring suit within three years of the date on which he "had actual knowledge of the breach or violation." 29 U.S.C. 1113(2). When contained in a statute of limitations, the term "actual knowledge" necessarily covers situations in which the plaintiff "had" or possessed the facts that form the basis for a claim. This is, after all, a statute of *limitations*. Its very point is to minimize stale claims and preclude plaintiffs from sleeping on their rights when they possess the knowledge that would allow them to bring their claims.

2. Construing "actual knowledge" to exist when the plaintiff has received the documents containing the relevant information is necessary to effectuate Congress's intent in imposing ERISA's extensive disclosure requirements on plan fiduciaries. Plan administrators must provide substantial information about

the plan and its investments, including, for instance, "the value of each investment to which assets in the individual account have been allocated." 29 U.S.C. 1025(a)(2)(B)(i). Plan administrators must also provide a summary plan description and an annual report containing financial accounting and actuarial statements, as well as comprehensive statements of individuals' rights under the plan. 29 U.S.C. 1021, 1023, 1024.

These disclosure provisions "enable [plan participants] to know whether the plan [is] financially sound and being administered as intended," and to "police their plans." H.R. Rep. No. 93-533, at 11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649; see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Congress designed the disclosure requirements so "that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owned by the fiduciary to the plan in general." H.R. Rep. No. 93-533, at 11, 1974 U.S.C.C.A.N. at 4649. Congress thus anticipated that plan participants would obtain knowledge of a breach or violation from the plan fiduciary's disclosures to them—and it no doubt crafted Section 1113 on that basis.

3. The Ninth Circuit believed that its reading of Section 1113(2) was necessary to ensure that plaintiffs would not be barred from bringing an ERISA action where they lacked "actual knowledge" but could be charged with "constructive knowledge" of the factual basis of their claims. App., *infra*, 4a. That is incorrect. "Actual knowledge" in the relevant sense—i.e., in a statute-of-limitations context—encompasses situations

in which a plaintiff has in his own possession all the knowledge he needs to protect himself. See, *e.g.,* Black's Law Dictionary 950 (9th ed. 2009) (defining "implied actual knowledge," as distinct from constructive knowledge); see also *Poffenberger v. Risser*, 431 A.2d 677, 681 (Md. 1981) (distinguishing this type of actual knowledge from constructive knowledge). In such situations, the individual is not charged with drawing reasonable inferences or inquiring further to seek out additional facts, as would be the case under a "constructive knowledge" standard. Rather, he is simply held responsible for the factual information that he actually possesses. Construing "actual knowledge" in this manner makes sense: Congress could hardly have "intended * * * to excuse willful blindness by a plaintiff" who has received extensive plan disclosures. *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005); *Young*, 550 F. Supp. 2d at 419 n.3.

The court of appeals appears to have thought its unduly narrow interpretation was required because Section 1113 at one time contained a "constructive knowledge" provision that Congress later repealed. But that inference is unwarranted. The repealed provision did not impose a general constructive knowledge standard. It provided only that that the three-year limitations would begin to run after the earliest date "on which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the secretary under this title." 29 U.S.C. 1113(a)(2)(B) (1976). Congress's decision to enact or repeal a provision that imputes constructive knowledge in the specific circumstance of a report filed with the Secretary of Labor—which no reasonable reading of the "actual knowledge"

provision would reach—says nothing about how broadly or narrowly Section 1113(2) should be read.

4. The Ninth Circuit's constricted reading of "actual knowledge" will undermine the balance that ERISA's carefully crafted disclosure framework seeks to achieve. Under that reading, no amount of disclosure by plan fiduciaries can ensure that plan participants will possess "actual knowledge" of the facts disclosed by the plan, enabling virtually every plaintiff to get past a motion for summary judgment. Indeed, plan participants will be discouraged from timely reviewing the disclosures provided by the plan, knowing that doing so will insulate them from a limitations defense—precisely the opposite of what ERISA's robust and reticulated disclosure regime is designed to accomplish.

The Ninth Circuit's rule also will vitiate Section 1113(2)'s function within the statutory scheme. Section 1113(1) establishes a six-year statute of repose running from "the last action which constituted a part of the breach or violation." 29 U.S.C. 1113(1). Section 1113(2) shortens the limitations period to three years whenever a plaintiff gains "actual knowledge of the breach or violation." *Id.* 1113(2). Congress thus anticipated that ERISA's disclosure regime would often provide plan participants with actual knowledge of any alleged breaches by plan fiduciaries, and it concluded that such plaintiffs should have only three years to sue. Had Congress intended that fiduciaries should ordinarily be subject to breach-of-duty claims for six years after the alleged breach, it need not have provided the shorter statute of limitations in Section 1113(2).

Yet the Ninth Circuit's decision will render the three-year limitations period essentially meaningless. Under the rule adopted below, the availability of a limitations defense depends on what each individual plaintiff will admit he read, knew, and understood—and, for that matter, on what he is able to recall, potentially many years after the fact. After all, even proof that a plaintiff was handed a newsletter or was present at a seminar can be rebutted by testimony that the plaintiff did not read the paper, look at the slide, or pay attention to the presentation (or that the plaintiff simply does not recall doing so). The decision below will therefore prevent Section 1113(2) from serving as an effective tool for cutting off stale claims.

C. The Question Presented Is Exceptionally Important and Warrants Review In This Case

The question presented is also of substantial legal and practical importance, and this case is an optimal vehicle for the Court's review.

1. As long as the question presented remains unanswered, thousands of employers and millions of employees will operate in an environment lacking predictability and uniformity concerning the ERISA limitations period—a critical threshold issue in many ERISA cases. ERISA litigation is quite prevalent: more than 80,000 cases have been brought under ERISA over the last decade. See John Manganaro, *Assessing Courts' ERISA Decisions in 2018*, PLANSPONSOR (Dec. 31, 2018).[4] Lawsuits to recover

[4] https://www.plansponsor.com/assessing-courts-erisa-decisions-2018/.

from plan fiduciaries who have allegedly breached duties imposed by ERISA make up a major share of this litigation, with the prime targets being employers with the largest plans. See *Litigation v. Innovation: Defined Contribution's Sweeping Paralysis*, Chief Investment Officer (Apr. 13, 2016).[5] The statute of limitations in 29 U.S.C. 1113, which applies to breaches of fiduciary duty under ERISA, is potentially implicated in a large swath of such cases.

The Ninth Circuit's decision has thus injected significant uncertainty into the ERISA landscape. As this Court has recognized, ERISA generally requires "efficiency, predictability, and uniformity" for the effective administration of the employee benefit plans it regulates. *Conkright v. Frommert*, 559 U.S. 506, 518 (2010); see *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). By "assuring a predictable set of liabilities," such uniformity plays a critical role in "inducing employers to offer benefits." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002); see also *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105, 122 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) (observing that "certainty and predictability are important criteria under ERISA" that affect employers' decisions "whether to establish ERISA plans").

Given the importance of uniformity in this context, the Court routinely grants certiorari to resolve conflicts among the courts of appeals concerning the correct interpretation or application of ERISA provisions. See, *e.g.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (2-2 conflict); *Gobeille v. Liberty Mutual*

---

[5] https://www.ai-cio.com/news/litigation-v-innovation/.

Insurance Co., 136 S. Ct. 936 (2016) (1-1 conflict); *Tibble v. Edison International*, 135 S. Ct. 1823 (2015) (2-1 conflict); *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 571 U.S. 99 (2013) (6-1 conflict); cf. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 758 (2016) (granting certiorari and reversing Ninth Circuit in an ERISA case despite the absence of a conflict). Further bolstering the case for review, this Court has recognized the need for uniformity of decisions interpreting statutes of limitations or repose even outside the ERISA context. "Few areas of the law," after all, "stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (citation omitted), superseded by statute as recognized in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Accordingly, this Court routinely grants certiorari to resolve circuit conflicts on limitations issues. See, *e.g.*, *McDonough v. Smith*, cert. granted, No. 18-485 (Jan. 11, 2019); *Cochise Consultancy, Inc. v. United States*, cert. granted, No. 18-315 (Nov. 16, 2018); *Heimeshoff*, *supra*.

2. In addition, the Ninth Circuit's decision will generate adverse practical consequences. The decision provides plaintiffs with a roadmap for avoiding Section 1113(2)'s limitations period. Faced with a timeliness defense based on actual knowledge, a plaintiff can simply assert that he did not read the relevant plan documents, or simply that he cannot recall whether he saw them. Plan administrators will have no ready means of disproving that assertion. The decision also encourages forum shopping, as plaintiffs' attorneys seeking to file nationwide class actions will no doubt see the advantage in the Ninth Circuit's timeliness rule.

It is little wonder, then, that commentators have already taken notice of the decision below, noting the "radically different views" of the Sixth and Ninth Circuits and the "need" for this Court's intervention. Liam K. Healy, *The Ninth Circuit Questions the Sixth Circuit's Understanding of 'Actual Knowledge' in ERISA Statute of Limitations Decision*, Foster Swift Collins & Smith PC (Dec. 13, 2018)[6]; see also Mark E. Schmidtke & Madeline Chimento Rea, *Under ERISA, Ignorance Is Bliss in the Ninth Circuit*, Ogletree Deakins (Dec. 21, 2018)[7] (explaining that, in the Ninth Circuit, "[p]articipants in effect can simply deny that they read or understood disclosures that were sent to them, regardless of the nature or substance of those disclosures").

3. This case is an optimal vehicle for resolving the circuit conflict. The relevant facts, which were developed after discovery specific to the limitations question, are undisputed. The question presented was the focus of both decisions below, and was definitively resolved—albeit in opposite ways—by those courts. The decisions below also thoroughly developed the arguments on both sides of the question, and the court of appeals expressly considered and rejected the contrary view of the Sixth Circuit. No obstacle would prevent the Court from deciding the question presented. Especially given the urgent need for uniformity, plenary review is plainly warranted.

---

[6] https://www.fosterswift.com/communications-actual-knowledge-questioned-erisa-litigation.html.

[7] https://ogletree.com/insights/2018-12-21/under-erisa-ignorance-is-bliss-in-the-ninth-circuit/.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. BUCKLEY, JR.
DANIEL F. KATZ
JYOTI JINDAL*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, D.C. 20005
(202) 434-5000

DONALD B. VERRILLI JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, California 90071
(213) 683-9208

Counsel for Petitioners

FEBRUARY 26, 2019

---

* Admitted in Virginia and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).