No. 18-1116

IN THE

# Supreme Court of the United States

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, ET AL.,

*Petitioners*,

v.

CHRISTOPHER M. SULYMA,

*Respondent.*

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit**

**BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, 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 transparent 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, $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters 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 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,

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[1] The parties in this case received timely notice under Rule 37.2(a) and 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.

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 organization representing 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 members are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies affecting their ability to provide benefits to millions of active workers, retired persons, and their families nationwide, ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

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 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* (March 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 the Ninth Circuit's decision, if left in place, could have a detrimental impact on employer-sponsored retirement plans.

## 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 it to them in simple-to-understand language that apprises 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 Ninth Circuit held, however, that participants can avoid the three-year statute of limitations simply by disclaiming that they read (or can recall having read) ERISA plan disclosures. The decision creates an acknowledged conflict with the Sixth Circuit and 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.

This Court should intervene to reinstate the consensus rule. Immediate review is warranted for several reasons.

*First*, the decision below undermines the careful balance struck in ERISA's disclosure regime and statute of limitations. The disclosure requirements are designed both to inform participants about their

plans, and to assure plan sponsors and fiduciaries that participants are well-informed and 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.

*Second*, the decision 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. When they do, plan sponsors and fiduciaries that faithfully and prudently served plan participants often find themselves accused of failing to predict the unpredictable. While courts recognize in theory that the prudence of an investment decision must be judged in light of the information available at the time 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. If properly interpreted and applied, ERISA's three-year statute of limitations mitigates the risk of hindsight bias by requiring plan

participants to decide whether to challenge plan investment strategies promptly with the benefit of only three rather than six years of hindsight. The Ninth Circuit's decision, however, makes the problem worse by allowing plan participants to wait to see how the investments perform relative to the market—locking in the benefits if the investment overperforms—before deciding in hindsight whether to challenge the investment strategy.

*Third*, the Ninth Circuit's decision rests on a fundamental misunderstanding of legislative intent, as revealed by the statutory history of the limitations provision. As originally enacted, the statute provided that the limitations period to allege a violation of ERISA could be triggered either by "actual knowledge" of the violation or "constructive knowledge" of information reported to the Secretary of Labor 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. In 1987, Congress repealed the provision charging participants with constructive knowledge of ERISA reports filed with the Secretary. The Ninth Circuit interpreted that decision as repudiating all forms of "constructive" knowledge based on information made available by plans. But the repealed provision involved reports to the Secretary, not disclosures directly to plan participants, and the amendment said nothing about plan participants'

"actual" knowledge of information disclosed to them directly. The Ninth Circuit erred in conflating the statutes' reporting and disclosure regimes.

## ARGUMENT

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" in the first instance. *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, litigation of ERISA claims "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; *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 Ninth Circuit's decision will only accelerate the trend by exposing plans to claims challenging plan investment strategies many years after those strategies have been transparently disclosed to plan participants.

The decision below leaves plan sponsors and fiduciaries with no way to rely on their

communications with plan participants to hold those participants accountable for their knowledge of the information disclosed to them, and thus no way to achieve the certainty and repose guaranteed by ERISA's three-year statute of limitations. Worse still, the decision allows plan participants who have *actually* read plan disclosures to disavow knowledge, then wait to see if the investing strategies made available to them outperform the market—and if not, sue with the benefit of up to six years of hindsight. The decision thus 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 welfare benefit plans in the first place"—precisely the result Congress sought to avoid. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

The decision is harmful and wrong. This Court should grant review to restore the balance struck by Congress in ERISA.

## I. THE NINTH CIRCUIT'S 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. That outcome is contrary to ERISA's carefully balanced statutory scheme, and will harm both retirement plans and the participants they serve.

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," *id.*, as well as the plans' terms and sources of funding. 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 intended for these disclosures to be a source of knowledge for plan participants about their "rights and obligations." 29 U.S.C. § 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). 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." *Id.*

Plan sponsors and fiduciaries must rely on these disclosures because they typically have no other reliable means 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)); *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.

ERISA's disclosure regime thus runs both ways: It both informs plan participants about their plans, and allows them to be held 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.

The same principles apply to ERISA's three-year statute of limitations. The statute provides 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). 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 v. Airlite Plastics, Co.*, No. 8:04-cv-56, 2005 WL 2347242, at *5 (D. Neb. Sept. 26, 2005). 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 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). 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. 6. The entity managing the investment allocated a portion of the invested funds to alternative investments in hedge funds and private equity. *Id*. The investment manager chose those alternative investments because it believed they offered unique advantages as part of a larger, diversified portfolio of investments. *Id*. "[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.

Petitioners transparently disclosed these investments directly to respondent and other plan participants, and 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. *Id*. Thanks to modern technology, petitioners alerted respondent to the relevant disclosure materials with targeted emails, and were able to document his thousands of clicks on webpages throughout the website containing the disclosures. Pet. 7. That is far *more* proof that respondent was aware of the disclosures than even would have been possible prior to the advent of the Internet when ERISA was enacted in 1974.

Yet the Ninth Circuit concluded that petitioners had failed to prove that respondent had 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. As a result, the court allowed respondent to challenge the investments beyond the three-year limitations period. If documenting respondents' repeated access to the relevant disclosures is not enough to establish actual knowledge, 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 this 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, 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" 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 on plan sponsors and fiduciaries effectively nullifies the repose that Congress guaranteed to them in exchange for the promise of transparency. This Court should grant review to restore the balance struck by Congress.

## II. THE NINTH CIRCUIT'S 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 just 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 thus 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 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.

And even when courts ultimately reject claims based on hindsight, the costs of defending against those claims is often considerable. Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://www.lockton.com/whitepapers/Boeck_Fiduciary_Liability_Claim_Trends_Feb_2017.pdf (observing that litigating certain types of ERISA cases "through the motion-to-dismiss stage costs between $500,000 and $750,000" and, "due to the number of documents involved and fact-intensive nature of these cases, completing discovery can cost between $2.5 million and $5 million"). An ERISA plaintiff who can draft a complaint that survives a motion to dismiss thus 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 thus 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: If the investment tracks the market or overperforms, the plan participant reaps all of the benefit, but when it underperforms as a result of unanticipated circumstances, the participant can sue with the benefit of hindsight.

The Ninth Circuit's decision means that plan participants in that circuit will now 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, 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 plans. The current high cost of retirement plans is a burden on small 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.

For a nationwide employer, the Ninth Circuit's decision also means that the plan could be subject to different liabilities depending on where its

participants may bring suit. Congress enacted ERISA to "ensure" a "uniform body of benefits law," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990), including "a predictable set of liabilities" under "a uniform regime of ultimate remedial orders and awards when a violation has occurred," *Moran*, 536 U.S. at 379. Differences from jurisdiction to jurisdiction in the rules affecting liability—including the applicable statute of limitations—create opportunities for forum shopping, "complicate the administration of nationwide plans," and produce "inefficiencies that employers might offset with decreased benefits." *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

The very existence of the circuit split here is a reason to grant review so that plans are subject to (and participants may assert) claims on the same time schedule nationwide. Whether the Ninth Circuit's decision is ultimately affirmed or reversed (and it should be reversed), this Court should grant review to restore the nationwide uniformity that is at the heart of the statutory scheme of ERISA.

## III. THE NINTH CIRCUIT'S DECISION CONFLATES ERISA'S DISCLOSURE AND REPORTING REQUIREMENTS

The Ninth Circuit attempted to justify its narrow definition of "actual knowledge" by reference to the drafting history of ERISA's limitations provision. Until 1987, ERISA's statute of limitations 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).

In 1987, Congress eliminated the provision that charged plaintiffs with knowledge of reports filed with the Secretary. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9342(b), 101 Stat. 1330. This amendment formed the centerpiece of 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"—not "actual knowledge"—and Congress rejected that form of knowledge when it repealed the provision charging plaintiffs with constructive knowledge of the contents of ERISA reports.

The Ninth Circuit's reasoning conflates ERISA's reporting and disclosure requirements. ERISA provides separate requirements for reporting to the Secretary of Labor and disclosure to plan participants. The contents of those reports and disclosures are distinct, and plaintiffs obtain knowledge of them in different ways. The repealed provision involved reporting, not disclosure. Equating them was error.

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). The report must further include a "complete actuarial statement" prepared by an "enrolled actuary" that "disclose[s] the actuarial position of the plan." *Id.* § 1023(a)(4), (b)(4). 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 for examination by plan participants upon request, *id.* § 1024(b)(2), they are not 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 and actuarial 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 period 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. Congress addressed information in ERISA reports separately because it is unlikely that most plan participants would have had "actual knowledge" of the complex, detailed financial and actuarial information in reports filed with the Secretary 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 contrary conclusion 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).

At minimum, because the repealed provision did not deal with ERISA disclosures at all, it was error for the court of appeals to infer anything about those disclosures from the repeal of that 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 prior to 1987: Disclosing information to plan participants gives them actual knowledge, not constructive knowledge, and thus triggers the three-year limitations period under Section 413(2) of ERISA.

This Court should grant certiorari to correct the Ninth Circuit's error and restore uniformity to the courts of appeals.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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