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 PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KAREN W. FERGUSON
NORMAN P. STEIN
Of Counsel
PENSION RIGHTS CENTER
1730 M St. N.W.,
Suite 1000
Washington D.C. 20037
(202) 296-3776
kferguson@pensionrights.org
nps32@drexel.edu

ELIZABETH HOPKINS
Counsel of Record
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, CA 91324
(818) 886-2525
ehopkins@kantorlaw.net

Counsel for Amicus Curiae

October 28, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Section 413 of the Employee Retirement Income Security Act of 1974 provides that a lawsuit alleging fiduciary misconduct must be brought within six years of the fiduciary breach or obligation, unless the plaintiff has "actual knowledge of the breach or obligation," in which case a three-year limitations period applies. 29 U.S.C. 1113. The limitations period is further extended where there is "fraud or concealment," in which case the plaintiff may bring suit within six years of the discovery of the breach or violation. *Ibid*.

The question presented is whether a plan participant has "actual knowledge" of the breach sufficient to trigger the shortest, three-year limitations period in Section 413(2) whenever that participant is given access to information from which the participant could glean a fiduciary breach.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE ORDINARY TOOLS OF STATUTORY CONSTRUCTION ESTABLISH THAT MERE ACCESS TO INFORMATION IN PLAN DISCLOSURES DOES NOT SUFFICE TO CONFER "ACTUAL KNOWLEDGE" OF FIDUCIARY BREACHES ON PLAN PARTICIPANTS AND BENEFICIARIES	4
A. The text of Section 413(2) plainly requires more than constructive knowledge	6
B. The legislative history of Section 413(2) confirms the meaning of the plain text	10
II. ERISA'S PURPOSES TO MAKE FIDUCIARIES RESPONSIBLE FOR MANAGING PLAN INVESTMENTS AND TO REMOVE JURISDICTIONAL BARRIERS AND PROVIDE READY ACCESS TO THE COURTS WOULD BE ILL-SERVED BY PETITIONERS' COUNTER-TEXTUAL READING OF SECTION 413(2)	11
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page(s)

BP Am. Prod. Co. v. Burton,
549 U.S. 84 (2006).................................... 6

Deal v. U.S.,
508 U.S. 129 (1993).................................. 8

Dodd v. U.S.,
545 U.S. 353 (2005).................................. 12

Edes v. Verizon Communications, Inc.,
417 F.3d 133 (1st Cir. 2005)........................ 11, 14

Fink v. Nat. Sav. & Trust,
772 F.2d 951 (D.C. Cir. 1985).................. 10

Fish v. GreatBanc Trust Co.,
749 F.3d 671 (7th Cir. 2014)..................... 7, 9

Gluck v. Unisys Corp.,
960 F.3d 1168 (3d Cir. 1992)................ 7, 10, 13

Hardt v. Reliance Standard,
560 U.S. 242 (2010).................................. 6

LaRue v. DeWolff, Boberg & Assocs., Inc.,
552 U.S. 248 (2008) 13

Martin v. Consultants & Admins., Inc.,
966 F.2d 1078 (7th Cir. 1992)................... 7, 10

Mass. Mut. Life Ins. Co. v. Russell,
417 U.S. 134 (1985) 5

Reich v. Lancaster,
55 F.3d 1034 (5th Cir. 1995)..................... 11

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997).................................. 9

TABLE OF AUTHORITIES—Continued

Page(s)

Sebelius v. Cloer,
569 U.S. 369 (2013) 6

Smith v. U.S.,
508 U.S. 223 (1993) 6

STATUTES

29 U.S.C. 1001(b) 5, 13, 16

29 U.S.C. 1021 14

29 U.S.C. 1022 14

29 U.S.C. 1024(b)(1) 14

29 U.S.C. 1024(b)(2) 14

29 U.S.C. 1025 14

29 U.S.C. 1104 13

29 U.S.C. 1104(a)(1)(A) 5

29 U.S.C. 1104(a)(1)(B) 4, 5, 15

29 U.S.C. 1113 .... *passim*

29 U.S.C. 1113(a) 3

29 U.S.C. 1113(a)(2) (1976) 10

29 U.S.C. 1113(1) 9

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

29 U.S.C. 1303(e)(6) 9

29 U.S.C. 1370(f)(2) 9

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 9432(b), 101 Stat. 1330 11

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Anne Tucker, *Retirement Revolution: Unmitigated Risk in the Defined Contribution Society*, 51 Hous. L. Rev. 188-89 (Fall 2013) 15

Black's Law Dictionary (11th ed. 2019)....... 6, 7

H.R. Rep. No. 93-533 (1973), *as reprinted in*, 1974 U.S.C.C.A.N. 4639 .... 14, 15-16

Eugene P. Schulstad, *ERISA Disclosure Decisions: A Pyrrhic Victory for Plan Participants*, 34 Ind. L. Rev. 501 (2001) .. 15

Richard H. Thaler, *Financial Literacy, Beyond the Classroom*, N.Y. Times, Oct. 5, 2013 14

Walter Hamilton, *Millions of Americans Lack Financial Literacy, Studies Show*, L.A. Times, Dec. 27, 2013 14

INEREST OF THE *AMICUS CURIAE*[1]

The Pension Rights Center ("Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization. Its mission is to protect and promote the retirement security of American workers, retirees, and their families. Since its founding in 1976, the Center has provided legal assistance to thousands of retirement plan participants and beneficiaries seeking to understand and enforce their rights under their plans, to recover benefits under the terms of their plans, and to ensure that their plans are adequately funded and prudently managed in their interests.

The issue presented here concerns whether plan participants and beneficiaries, whose interests lie at the heart of the Employee Retirement Income Security Act of 1974 ("ERISA") and its protective regime, should be assumed to have "actual knowledge" of a breach sufficient to start the three-year limitations period of Section 413(2), 29 U.S.C. 1113(2), running whenever they have been given access to information from which they could glean fiduciary breaches and violations, regardless of whether they actually found, read and understood this information. The Ninth Circuit correctly rejected this view of actual knowledge.

The Ninth Circuit was right not merely as a matter of statutory construction, but also because fiduciary breaches, particularly those involving investment decisions, can be both critically important to plan

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

participants and beneficiaries and fiendishly difficult to unravel, even for the most sophisticated individuals. The Center has a keen interest in ensuring that required plan disclosures are used to provide participants with accessible information about their benefits and are not employed by fiduciaries as a shield to cut off prematurely the ability of plan participants and beneficiaries to bring suit to protect themselves and their plans from imprudent or self-serving investment decisions by plan fiduciaries.

SUMMARY OF ARGUMENT

1. As in any statutory interpretation case, the court must begin with a consideration of the text, construing statutory terms in their ordinary sense employing ordinary tools of interpretation. In ordinary usage, the term "knowledge" connotes awareness or understanding and "actual" means real. Thus, "actual knowledge" is defined in contrast to "constructive knowledge" that a person should have and that is therefore attributed to that person. Here, by employing the phrase "actual knowledge" to trigger the shortest statute of limitations period, Congress meant to set a high bar to ensure that the three-year period would not begin to run until a plaintiff had a real, not imputed, awareness or understanding of the facts. This understanding is confirmed by both the structure of Section 413 – which suggests that the six-year limitations period will apply in the ordinary run of cases – and by the wider statutory context – which shows that Congress knew how to start limitations period running based on the plaintiff's constructive knowledge of the basis for a suit.

2. The legislative history also confirms what the plain language provides. Until 1987, Section 413 contained a provision under which the three-year

limitations period began to run upon filing of on annual report with the Secretary of Labor that could have reasonably alerted the plaintiff to a breach. By repealing this provision and leaving only the "actual knowledge" trigger, Congress made it abundantly clear that it was rejecting a standard that would attribute knowledge of facts to plaintiffs who do not actually have such knowledge.

3. Given that the meaning of the text is clear, resort to policy considerations is unwarranted. But even if ERISA's policies were relevant, Petitioners' policy arguments are both unsupported and unavailing and are outweighed by countervailing policy concerns.

There is no reason to think that plan participants will lie about what they knew during the relevant period and no support for this proposition. Nor is there any basis for believing that strictly construing the "actual knowledge" requirement of Section 413(2) will discourage plan participants from reading plan disclosures or following online links to additional information, as Petitioners allege Sulyma should have done here. Most participants are already discouraged from reading complicated plan disclosures and supporting documents, particularly financial information about investments that is provided electronically. And given the low rates of financial literacy among the population at large, there is little reason to think that such information would be understood.

Because, contrary to Petitioners' suggestion, Congress did not place the heavy burden of understanding or second-guessing plan investment strategies on participants in retirement plans, far better policy arguments support Sulyma's contention that this Court should strictly construe the "actual knowledge" requirement. Congress crafted a complex and protective statutory

scheme that places the primary responsibility for managing plans and their assets on fiduciaries. When it comes to plan investments and other complex matters of plan administration, participants rightly rely on these fiduciaries to protect their financial interests and be the experts who act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. 1104(a)(1)(B). And, in enacting ERISA, Congress was at pains to provide plan participants with access to courts to enforce their rights to prudent and loyal plan management and to eliminate barriers that, prior to ERISA, stood in the way of such suits. Given these policies, which support what the plain language of the statute provides, this Court should refuse to impute knowledge of facts about a fiduciary breach that were available to the plaintiff but that were not known to him for purposes of the three-year statute of limitations.

ARGUMENT

I. THE ORDINARY TOOLS OF STATUTORY CONSTRUCTION ESTABLISH THAT MERE ACCESS TO INFORMATION IN PLAN DISCLOSURES DOES NOT SUFFICE TO CONFER "ACTUAL KNOWLEDGE" OF FIDUCIARY BREACHES ON PLAN PARTICIPANTS AND BENEFICIARIES

ERISA is a remedial statute designed to "protect * * * the interests of participants in employee benefit plans and their beneficiaries by requiring the reporting and disclosure to participants and beneficiaries of financial and other information * * * by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Fed-

eral courts." 29 U.S.C. 1001(b). See also *Mass. Mut. Life Ins. Co. v. Russell*, 417 U.S. 134, 140 n. 8 (1985) (ERISA was enacted to "establish judicially enforceable standards to ensure honest, faithful and competent management of pension and welfare funds"). To this end, ERISA imposes strict standards of prudence and loyalty on those who manage plans and their assets. 29 U.S.C. 1104(a)(1)(A), (B).

This case was brought as a putative class action by Christopher Sulyma, a participant in two defined contribution pension plans, challenging the prudence of how plan fiduciaries managed his pension plans. Sulyma claims that, over the relevant period, plan fiduciaries allowed the primary investment funds for his two pension plans to become far too heavily invested in risky hedge funds and private equity. These alternative investments allegedly caused large losses to the plans, and to his individual accounts in the plans, through excessive fees and low returns. The account statements Sulyma received by mail, however, did not alert him to the fact or amount of these alternative investments, but directed him to go online for additional information. Although the information available to him online included information about the increasingly large percentages of assets invested in hedge funds and private equity, Sulyma stated that he never saw those documents and, unsurprisingly considering he was not a financial expert, would not have understood the significance of them if he had. See Pet App 2a-4a.

He brought suit less than six years after these alleged fiduciary breaches, but more than three years after he received account statements that directed him to go online for further investment details.

A. The Text of Section 413(2) plainly requires more than constructive knowledge

Whether Section 413(2) starts the clock running whenever a plan participant is given access to information that, if read and understood would be sufficient to alert him to a fiduciary breach, is a question of statutory construction. Any such construction naturally must begin "'with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). The Court thus "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard*, 560 U.S. 242, 251 (2010).

Because the words "actual knowledge" are not defined by ERISA, one must construe these terms according to their "ordinary or natural meaning." *Smith v. U.S.*, 508 U.S. 223, 228 (1993) (citation omitted). The ordinary, dictionary definition of "knowledge" is "[a]n awareness or understanding of a fact or circumstance" or "a state of mind in which a person has no substantial doubt about the existence of a fact." *Knowledge*, Black's Law Dictionary 14c (11th ed. 2019). Under this definition, a plan participant cannot be said to have knowledge of a fiduciary "breach or violation" until that participant is aware of or understands the breach or has no substantial doubt about the existence of the breach or violation.

This dictionary definition of knowledge is hard to square with the standard proposed by Petitioners, which would impute awareness or understanding of a fiduciary breach based on information made available to a plan participant. See Brief for the Petitioners

(Pet. Br.) 20-21. It is harder still when one considers the meaning of the phrase "actual knowledge," which Black's defines as "[d]irect and clear knowledge, *as distinguished from* constructive knowledge." *Actual knowledge*, Black's Law Dictionary 16c (11th ed. 2019) (emphasis added). See also *id.* at 14c (defining "actual" as "existing in fact," or "real"). Constructive knowledge" in turn, is defined as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id*. at 18c.

Petitioners propose just such a "constructive knowledge" standard in arguing that Sulyma had actual knowledge of the breaches more than three years before filing suit based on "disclosures that were designed and made specifically to ensure that Sulyma had" information about plan investments, Pet. Br. 20-21, "even if he did not read," much less understand, this information. *Id.* at 34. This cannot be the correct standard given that "actual knowledge" is defined in contrast to "constructive knowledge." See *Gluck v. Unisys Corp.*, 960 F.3d 1168, 1176 (3d Cir. 1992) (pointing out that "a plaintiff may have constructive knowledge of a breach before he actually knows of the breach, but section 1113 calls for actual knowledge"). To the contrary, it is clear that "knowledge" connotes some kind of understanding and "actual" means a real, not implied or constructive, understanding. See *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 678 (7th Cir. 2014) ("'actual knowledge' * * * must be distinguished from 'constructive' knowledge or inquiry notice") (citing *Martin v. Consultants & Admins., Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992)).

Twisting the protective intent of the statute, Petitioners argue that, because Congress imposed

disclosure duties on plan fiduciaries to "enable employees to police their plans," and "disclosure" means "making something openly known," it follows that disclosure by fiduciaries is equivalent to actual knowledge by participants. Pet. Br. 24, 25 (citations omitted). Moreover, without actually addressing the dictionary definition that distinguishes "actual knowledge" from "constructive knowledge," Petitioners deny that they seek to impose a constructive knowledge standard, because, they insist, constructive knowledge is knowledge that "triggers a duty to seek out additional information," and Sulyma purportedly had all the information he needed available to him. Pet. Br. 34-35. Petitioners contend that, rather than advocating a "constructive knowledge" standard, the standard they advocate is an actual knowledge standard that simply encompasses the doctrine of "willful blindness," under which "a party is held to have knowledge of facts of which he is not subjectively aware." *Id.* at 35. The problem for Petitioners is that there is absolutely no indication here that Sulyma was willfully blind to his investments' increasingly large holdings in hedge funds and private equity, much less to the meaning and riskiness of such an investment strategy. Verbal gymnastics notwithstanding, because there is no evidence that Sulyma was either aware of or willfully blind to the extent and the significance of the alternative investments more than three years before filing suit, Sulyma had no actual knowledge of the breach sufficient to trigger the three-year statute of limitations.

Context, of course, also gives meaning to statutory terms. *E.g.*, *Deal v. U.S.*, 508 U.S. 129, 132 (1993). Thus, the meaning of statutory language is determined not only "by reference to the language itself," but also by reference to the "specific context in which the language is used, and the broader context of the

statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, the three-year limitations period of Section 413(2) is best understood within the specific context of Section 413. Section 413 sets forth three limitations periods. "The generally applicable rule bars an action brought more than six years after the end of the fiduciary breach, violation of omission." *Fish*, 749 F.3d at 678 (citing 29 U.S.C. 1113(1)). Although Section 413 provides a shorter, three-year limitations period when a plaintiff has "actual knowledge of the breach or violation," 29 U.S.C. 1113(2), it also extends the limitations period where there is "fraud or concealment" of the breach until six years after "discovery" of the breach or violation. *Id.* This three-tiered approach in Section 413 underscores that Congress was at pains to give plaintiffs at least six years from the breach if they do not actually learn of the breach sooner, and to give them even longer if fiduciary misconduct prevents them from learning of the breach within the six-year period.

A wider statutory context confirms this understanding. ERISA elsewhere imposes limitations periods that do not demand actual knowledge. For example, Title IV of ERISA sets forth a three-year limitations period for actions brought by the Pension Benefit Guaranty Corporation (PBGC) that runs from "the earliest date on which the [PBGC] acquired or *should have acquired* actual knowledge of the existence of such cause of action. 29 U.S.C. 1303(e)(6) (emphasis added). Title IV uses the same "acquired or should have acquired" formulation for the three-year limitations period applicable to actions by fiduciaries and other private parties challenging plan terminations. *Id.* § 1370(f)(2). Congress was apparently well aware of

how to set a constructive notice standard and how to impose an inquiry requirement on plan participants and chose not to do so in Section 413(2).

It is thus clear from the language employed by Congress, and the context in which Congress used that language, that Section 413(2) is designed to "set a high standard for barring claims against fiduciaries prior to the expiration of the section's six-year limitations period." *Gluck*, 960 F.2d at 1176. And it is equally clear that Congress meant what it said in imposing an "actual knowledge" requirement. While it may be true that "it is difficult to say in the abstract precisely what constitutes 'actual knowledge,'" *Consultants & Admins.*, 966 F.2d at 1086, there can be little doubt that, to trigger the three-year limitations period, defendants must, at a minimum, establish that the plaintiff was "actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff." Pet. App. 13a.

B. The legislative history of Section 413(2) confirms the meaning of the plain text

Any doubt as to the plain meaning of the statutory text is removed by the legislative history of ERISA Section 413. When ERISA was enacted in 1974, Section 413 contained a constructive knowledge provision that stated that the three-year period began when a plaintiff "could reasonably be expected to have obtained knowledge of such breach or violation" from the annual reports (Form 5500s) filed with the Secretary of Labor. 29 U.S.C. 1113(a)(2) (1976). See *Fink v. Nat. Sav. & Trust*, 772 F.2d 951, 957-57 (D.C. Cir. 1985) (considering whether plan beneficiaries had constructive knowledge of alleged breached based on the plan's Form 5500 annual reports for the relevant period). Congress repealed this provision in 1987 as

part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 9432(b), 101 Stat. 1330.

"The controlling test" under this prior "constructive knowledge" provision of Section 413 "was whether a reasonable person would have been alerted to a probable violation by reading the report." *Reich v. Lancaster*, 55 F.3d 1034, 1058 (5th Cir. 1995). In arguing for a test that would impute "actual knowledge" of a fiduciary breach based on information made available online (like Form 5500s) to plan participants, Petitioners essentially attempt to resurrect the very standard that Congress rejected in amending Section 413 in 1987. This reading of Section 413(2) must likewise be rejected because "[t]he amendment to [Section] 413 means that knowledge of *facts* cannot be attributed to plaintiffs who have no knowledge of them." *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005).

II. ERISA'S PURPOSES TO MAKE FIDUCIARIES RESPONSIBLE FOR MANAGING PLAN INVESTMENTS AND TO REMOVE JURISDICTIONAL BARRIERS AND PROVIDE READY ACCESS TO THE COURTS WOULD BE ILL-SERVED BY PETITIONERS' COUNTER-TEXTUAL READING OF SECTION 413(2)

The ordinary tools of statutory construction – the statute's text, structure and legislative history – make plain that ERISA's three-year statute of limitation is not triggered, as Petitioners contend, by mere access to information concerning fiduciary breaches. Petitioners' resort to policy considerations to bolster its argument is likewise unavailing.

Petitioners' arguments in this regard turn on what they perceive as the unfairness and costs of routinely

subjecting plan fiduciaries to the statute's generally applicable six-year period. Pet. Br. 40. Petitioners imply that most plaintiffs will lie in court about what they knew and when, and speculate that a strict construction of the "actual knowledge" standard will discourage plan participants from reading mandated plan disclosures. Pet. Br. 48.

As an initial matter, Petitioners' resort to policy considerations should be rejected as contrary to the plain statutory text. See Pet. App. 15a ("weighing the policy merits of different knowledge standards was for Congress to undertake when it enacted, and then amended" Section 413). See also *Dodd v. U.S.*, 545 U.S. 353, 359 (2005) (even though a strict interpretation of a statute of limitations has the "potential for harsh results in some cases, we are not free to rewrite the statute that Congress enacted"). Nor do Petitioners offer any empirical support for the harms that they insist will follow by resort to the plain statutory language and application of an unremarkable six-year limitation period in cases in which a plaintiff does not have "actual knowledge." There is simply no support for Petitioners' contention that most plan participants can be expected to lie about what they understood with respect to plan investments or other fiduciary breaches. There is likewise no support for and no reason to think that strictly construing "actual knowledge" will discourage participants from reading plan disclosures and information that is referred to in those documents any more than they are already discouraged from doing so, particularly when the information is lengthy or technical, as we discuss below, *infra* p. 15.

But even if Petitioners' policy arguments were relevant or factually supported considerations, far stronger policy considerations favor Sulyma's argument that he

should not be charged with actual knowledge of complex financial information that he could have, but did not, read online.

First, ERISA charges plan fiduciaries, not participants and beneficiaries, with strict duties of care with respect to the management of ERISA plans and their assets and does so in order to protect the interests of the participants and beneficiaries. 29 U.S.C. 1104, 1001(b). See also Pet. App. 14a (noting that "Sulyma might just as easily argue that there are 'strong policy reasons' to interpret actual knowledge narrowly, such as to promote fiduciary accountability"). These fiduciary duties are critically important with respect to complex financial transactions and investment strategies for retirement plans, particularly with respect to 401(k) and other defined contribution plans where the amount of retirement benefits a participant receives is greatly dependent on investment returns. See *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 262 n.1 (2008) ("As its names imply, a "defined contribution plan" or "individual account plan" promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to the account and the investment performances of those contributions.") Participants understandably count on fiduciaries to be the experts when it comes to investing and managing plan assets. See *Gluck*, 960 F.2d 1168, 1177 (3d Cir. 1992) (noting that "when a transaction does not affect the employees' day-to-day working conditions, it is less likely that employees will immediately become aware of a grievance") (citation omitted).

In the experience of the Center, most plan participants are not financially sophisticated, and no matter how well-educated, lack the financial expertise to

evaluate plan investment decisions based simply on plan disclosures. See *Edes*, 417 F.3d at 142 (recognizing that "determining the meaning of complex transactions may take some time"). Indeed, plan participants are not alone. Study after study has shown that most Americans lack even basic financial literacy, much less an understanding of more exotic investment vehicles, such as the hedge funds and private equity investments at issue in this case. See Richard H. Thaler, *Financial Literacy, Beyond the Classroom*, N.Y. Times, Oct. 5, 2013 (discussing paper based on 168 scientific studies); Walter Hamilton, *Millions of Americans Lack Financial Literacy, Studies Show*, L.A. Times, Dec. 27, 2013 (citing studies from the Securities and Exchange Commission and the Financial Industry Regulatory Authority).

Moreover, ERISA's mandatory plan disclosure requirements with respect to plan participants and beneficiaries are designed primarily to give them summary information about how their plans operate and what benefits they have earned or are entitled to. See 29 U.S.C. 1024(b)(1) (requiring plan administrator to provide participants and beneficiaries with summary plan descriptions that, under 29 U.S.C. 1021 and 1022, must contain such information as a plan's eligibility requirements and claims procedures); 1024(b)(2) (requiring administrator to furnish participants with statements and schedules fairly summarizing annual report filed with the Secretary); 1025 (requiring participants to be furnished with individual benefit statements); see also H.R. Rep. No. 93-533 (1973), *as reprinted in*, 1974 U.S.C.C.A.N. 4639, 4649 (emphasizing that disclosure requirements were designed so that each "individual participant knows exactly where he stands with respect to the plan – what benefits he may be entitled to, what circumstances may preclude him from obtaining

benefits, what procedures he must follow to obtain benefits, and *who are the persons to whom the management and investment of his funds have been entrusted*") (emphasis added). These reporting requirements are largely intended to provide employees with such basic information as "what benefits will be received, what procedures will be followed, who is responsible to the plan, and whether the plan is adequately funded." Eugene P. Schulstad, *ERISA Disclosure Decisions: A Pyrrhic Victory for Plan Participants*, 34 Ind. L. Rev. 501, 502 (2001).

Furthermore, disclosing more information to participants often is ineffective and does not lead to more understanding, not only because of lack of financial literacy, but also because such information may well overwhelm the average participant and is easy to ignore. Anne Tucker, *Retirement Revolution: Unmitigated Risk in the Defined Contribution Society*, 51 Hous. L. Rev. 188-89 (Fall 2013). These problems of access, understanding and inclination to ignore are only compounded by information that is provided online.

The point is not to denigrate the purpose and value of ERISA's disclosure obligations, but simply to stress that these disclosures are not designed to shield fiduciaries from their obligations to be the experts and manage plans in the interests of the participants and beneficiaries and with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. 1104(a)(1)(B).

Finally, in enacting ERISA Congress expressly sought to eliminate "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities." H.R. Rep. No. 93-533, at 17. Petitioners' policy

arguments in favor of a loose reading of Section 413's "actual knowledge" requirement runs directly counter to Congress's goal of providing "ready access to the Federal courts," 29 U.S.C. 1001(b), and removing jurisdictional barriers that would prevent participants and beneficiaries from asserting their rights under the statute. A reading of Section 413(2) that imputes knowledge of everything referenced in plan disclosures, including the meaning and import of complex plan investment vehicles and strategies, so as to run out the clock in half the time that would otherwise be applicable, would clearly frustrate Congress's intent to eliminate "jurisdictional and procedural obstacles to suit."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

KAREN W. FERGUSON
NORMAN P. STEIN
Of Counsel
PENSION RIGHTS CENTER
1730 M St. N.W.,
Suite 1000
Washington D.C. 20037
(202) 296-3776
kferguson@pensionrights.org
nps32@drexel.edu

ELIZABETH HOPKINS
Counsel of Record
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, CA 91324
(818) 886-2525
ehopkins@kantorlaw.net

Counsel for Amicus Curiae

October 28, 2019