No. 18-1116

IN THE

Supreme Court of the United States

INTEL INVESTMENT CORP. POLICY COMMITTEE, et al.,

Petitioner,

v.

CHRISTOPHER SULYMA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION SUPPORTING RESPONDENT AND URGING AFFIRMANCE

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation seek to increase the security and adequacy of public and private pensions and other employee benefits that older individuals receive or may be eligible to receive through participation as amici curiae in state and federal courts, including this Court.[2] One of amici's main objectives is to ensure that participants receive those

[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or its counsel and that no person other than amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), a letter by petitioner consenting to the filing of amicus briefs is on file with the Court. Respondent has consented to the filing of this amicus brief.

[2] *E.g., Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (scope of ERISA "church plan" exemption); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (ERISA preemption);

benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001, et seq. The quality of these workers' lives in retirement depends substantially on their ability to obtain the benefits they were promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

The Court's decision in this case will significantly affect participants' ability to enforce their rights in federal court as Congress intended. ERISA § 2(b), 29 U.S.C. § 1001(b). The decision below properly preserves ERISA's balance between protecting participants' rights and ensuring employers' certainty that claims expire after six years. Intel's approach to the statute would essentially read out the six-year limitations period in ERISA § 413(1), 29 U.S.C. § 1113(1), cutting in half the statute of limitations period that Congress intended. This result would deal a heavy blow to the enforcement of ERISA's fiduciary standards and threaten the retirement security of millions of Americans.

SUMMARY OF ARGUMENT

The statutory language at issue in this case is particularly plain. No case alleging breach of fiduciary duty may be brought after "the earlier of…(1) six years

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LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248 (2008) (ERISA's civil enforcement provision).

after" the breach, "or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." ERISA § 413, 29 U.S.C. § 1113. Respondent Sulyma fully explains that "actual knowledge" means that the plaintiff, in fact, knows about the breach—not, as Intel argues, that they *should have* known about it. Res. Br. at 15-21. This is not a close question; the Court should have no difficulty "enforc[ing] [the] plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Std. Life. Ins. Co.*, 560 U.S. 242, 251 (2010).

Nevertheless, Intel and the amici who support it strain this language to its breaking point. In their view, "actual knowledge" effectively translates into constructive or inquiry notice automatically transmitted to plan participants by the mere receipt of plan disclosures. The "context" of ERISA's disclosure requirement, they maintain, necessitates this interpretation. But, as Justice Scalia put the point: "Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them." *King v. Burwell*, 135 S.Ct. 2480, 2497 (2015) (Scalia, J., Dissenting). "Rewriting" the statute is exactly what Intel and its amici urge the Court to do.

The proper context in which to understand rather than rewrite this provision includes the common law background against which ERISA's authors wrote the statute's fiduciary protections and the purpose for which they drafted them. The statute of limitations Congress actually wrote both mirrors and alters its common law origins, yielding strong

protections, appropriately balanced, for both participants and employers. Where common law breach of trust claims were temporally limited only by the flexible equitable doctrine of laches, Restatement of Trusts § 219(2), ERISA sets out a definite six-year claims period creating certainty for employers and ensuring effective enforcement capability for participants. Intel's approach would effectively read the six-year period out of the statute almost entirely by presuming "actual knowledge" any time an employer complies with its disclosure obligations, whether or not a plan participant even actually reviewed the information provided in the disclosure.

Moreover, Intel's and amici's depiction of the disclosure requirement's function and purpose is decidedly backwards. They suggest that ERISA has created a scheme of reciprocal obligations in which fiduciaries must provide disclosures, and participants must read and understand them or have their rights curtailed. Not so. Fiduciary duty under ERISA, as in the common law of trusts, goes one way: fiduciaries always must act in participants' best interests. This includes the obligation for fiduciaries to disclose information to participants, which is for the *participants'* benefit—not for the purpose of protecting fiduciaries from liability.

In any event, the theory that the threatening stick of the three-year limitations period is the only way to convince participants to read disclosures is highly implausible. Participants have every incentive to read disclosures and do their best to understand them, if possible, because they are typically the *only*

source of information about a possible breach. If participants overlook this information, it is not likely due to gamesmanship, but to the overwhelming amount of information they must process on a daily basis. That is particularly likely when the plan administrator has not highlighted the importance of the information, especially if sent by email or text.

Finally, reading the statute to mean what it says is, unsurprisingly, consistent with Congress's intent to create robust participant protections and empower participants to enforce those protections through the courts. Especially in an era where defined-contribution plans are extremely prevalent, and participants rely more and more on plan fiduciaries' judgment, it is more important than ever to preserve the substantive protections and duties Congress implemented.

ARGUMENT

I. ERISA's Default Six-Year Statute of Limitations For Fiduciary Breach Claims Strikes The Balance Congress Intended.

Intel and its amici rightly note that when Congress enacted ERISA, it struck a careful balance between "offer[ing] employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S.

489, 497 (1996). Pet. Br. at 41; Br. of NAM, et al., at 19.

They go astray, however, in contending that this balance requires a strained definition of "actual knowledge" that would impart sufficient knowledge of a breach to plan participants any time an ERISA-mandated disclosure is received. Pet Br. at 41-42; Br. of NAM at 20. This interpretation, not Respondent's, would upset ERISA's "careful balancing," *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004), by essentially reading out the six-year statute of limitations. On balance, the six-year period significantly limited liability compared to the common law regime while ensuring strong, effective protections for participants. Intel's reworking of the statute into a three-year regime does not.

A. Common law breach of fiduciary duty claims were bounded only by the temporally indefinite equitable doctrine of laches.

The six-year limitations period by which Intel feels burdened is a bargain compared to the length of time that fiduciaries were exposed to liability under the common law of trusts. ERISA's fiduciary duties originate in the common law of trusts. ERISA § 404, 29 U.S.C. § 1104; *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to

define the general scope of [fiduciary] authority and responsibility" under ERISA). Because common law breach of fiduciary duty claims were typically equitable, courts of equity did not apply a statute of limitations, but, instead, considered claims time-barred only when applying the equitable doctrine of laches. Restatement of Trusts § 219(2).[3]

Laches is a flexible doctrine that extends the period for bringing a claim until circumstances would render a claim unfairly prejudicial to the defendant. The justification for applying laches is not "a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). As the Restatement of Trusts explains, "[t]he beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust *for so long a time and under such circumstances that it would be inequitable* to permit him to hold the trustee liable." (emphasis added). Restatement of Trusts § 219(2).

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[3] Claims seeking legal relief generally borrowed statutes of limitations from similar state statutes. Restatement of Trusts § 219(2). In current state breach of trust claims, because the vast majority of courts have merged law and equity and statutes of limitations have proliferated, courts apply those limitation periods more frequently. *See* Restatement (Third) of Trusts § 98 (2012). At the time of ERISA's enactment, however, laches was far more often the method courts used to determine whether claims were time-barred. Restatement of Trusts § 219(2).

Courts analyze many factors to determine if claims are stale. The defendant generally must show not only a "lapse of time," but also that "during the lapse of time, changed circumstances inequitably work[ed] to [its] disadvantage or prejudice." 11A Charles Alan Wright et al., Federal Practice and Procedure § 2946, at 109 (3d ed. 2013) (quoting William Q. de Funiak, Handbook of Modern Equity § 24, at 41 (2d ed. 1956)). In the trust context, "[i]f the beneficiary knowing of the breach of trust makes no complaint, he is ordinarily barred in less time[.]" Restatement of Trusts, Comment on § 2, part (f).

Nevertheless, with no set limitations period, breach of trust claims continued to remain actionable at common law for as long as equity permitted. *The Key City*, 81 U.S. (14 Wall.) 653, 660 (1871) ("[N]o arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case."). Consequently, absent a showing of prejudice, laches did not apply to bar claims even in cases brought many years after the alleged violation occurred. *See*, *e.g.*, *N. Pac. R. Co. v. Boyd*, 228 U.S. 482 (1913) (Ten years' delay by a non-assenting, unsecured creditor of an insolvent corporation before attacking a reorganization plan not barred by laches); *Fetters v. Fetters*, 26 N.E.3d 1016, 1023 (Ind. Ct. App. 2015) (14-15 years' delay in challenging a premarital agreement did not bar claim because there was no prejudice to other spouse); *In re LaRocque*, 164 N.H. 148 (2012) (laches did not bar claim for child support brought after seven years because there was no prejudice to the

defendant); *Sahu v. Iowa Bd. of Med. Examiners*, 537 N.W.2d 674, 676 (Iowa 1995) (seven years' delay not too many because no prejudice shown).

B. ERISA's six-year default statute of limitations for breach of fiduciary duty reflects a modified version of the common law's balanced approach, while giving employers certainty and predictability.

Like the rest of ERISA's fiduciary duty structure, the statute of limitations for breach of fiduciary duty reflects the statute's common law origins, but with modifications. *Varity Corp.*, 516 U.S. at 497. Instead of the indefinite equitable boundaries of laches, Congress set a six-year limitations period for fiduciary breach claims. ERISA § 413(1), 29 U.S.C. § 1113(1). This time period, while relatively generous, gives employers the predictability and certainty the common law did not: all claims expire six years after any breach, absent fraud or concealment. *See* Res. Br. at 36 ("Whereas six years is the floor for many other ERISA limitations, it is the ceiling in this context …as such, it provides 'certainty and reliability' to fiduciaries."). Like the common law, ERISA § 413(2), 29 U.S.C. § 1113(2), creates an exception to the typical, longer time period when participants know about the breach. However, the statute is even clearer than the common law that the exception only applies in cases of "actual knowledge." *Id.*

Congress's insistence on "actual" as opposed to constructive knowledge is most evident in Congress's

1987 amendment to the statute, which eliminated a second part of ERISA § 413(2), 29 U.S.C. § 1113(2), that started the three-year clock on the earliest date "on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary [of Labor] under this Title." PL 93–406 (HR 2), PL 93–406, 88 Stat 829 (1974). In other words, Congress eliminated the portion of the statute that would have charged participants with constructive knowledge of information in a report they were capable of accessing. There is no clearer indication that the bargain Congress struck in the six-year default limitations period is the proper one.

In contrast to an intuitive construction of the plain statutory language, Intel's interpretation would read out the six-year limitations period almost entirely. Under its preferred approach, all employers that comply with ERISA's statutory disclosure requirements (discussed in Part II, *infra*) would be entitled to a three-year default limitations period commencing upon the participant's receipt of those disclosures. If this were the case, unless an employer is violating its disclosure obligations in addition to breaching its fiduciary duties under ERISA § 404(a), 29 U.S.C. § 1104(a), the six-year period would *never* apply. Stated otherwise, Intel's interpretation would transform a six-year period with a narrow exception into a three-year period with an extension to six years for employers who fail to disclose adequately the information independently required by ERISA. That result would tip the statutory balance significantly in a way that defies Congress's intent and no longer

mirrors the carefully modulated structure of the common law reflected in ERISA § 413, 29 U.S.C. § 1113.

II. Congress Required Disclosures Solely to Benefit Participants, Not to Punish Them for Failure to Read or Understand Them.

Intel recognizes the duty of disclosure ERISA places on plan fiduciaries, including the statutory mandate to provide those disclosures in understandable language and ensure that participants receive them. Pet. Br. at 24-26 (citing 29 U.S.C. §§ 1021-25, 1104(c)(5)(B)(ii)). However, Intel follows this unremarkable assertion with a far more remarkable one: that "in turn" for these disclosures, 29 U.S.C. § 1113(2) curtails participants' time to bring suit. *Id.* at 25. Intel's amici more directly—and wholly without support—assert that under ERISA, "defendant is obligated to make certain disclosures to the plaintiff and the plaintiff is accountable for the information disclosed." Br. of NAM, et al., at 14; *see also id.* at 11 (arguing that ERISA's "disclosure regime runs both ways : it informs plan participants about their plans, and it holds them accountable for that information."). ERISA's fiduciary duties, however, impose no such reciprocity. *See* Res. Br. at 28 (discussing Intel's attempt to characterize participants who miss information in disclosures as culpably delinquent). Rather, disclosures are solely for the *participant's* benefit—principlly toaid them in their investment decisions.

As discussed in Part I, ERISA's fiduciary duties originate in trust law. Unlike the contract scenario amici envision, Br. of NAM, et al., at 14, in the context of a trust, the trustee owes a duty to the beneficiary, and the beneficiary has rights and remedies, not reciprocal duties. *See* George T. Bogert, TRUSTS § 1 (6th ed. 1987) (describing parties to a trust and one-way obligations of the trustee to act in the beneficiary's best interests). As then-Judge Cardozo explained, the fiduciary relationship is entirely unlike ordinary contractual business. "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place." *Meinander v. Salmon*, 249 N.Y. 458, 463 (1928). Accordingly, the Court should reject Intel's and its amici's invitation to erode the fiduciary duty of disclosure by creating a reciprocal beneficiary duty—and a corresponding limitation on beneficiaries' rights.

A suit under ERISA section 502(a)(1), 29 U.S.C. 1102(a)(1), is akin to a contract claim creating a reciprocal duty on the employee's part. The employer must provide promised benefits in exchange for work the employee/beneficiary has performed. Sections 502(a)(2) and 502(a)(3), 29 U.S.C. § 1102(a)(2), on the other hand, authorize actions by participants to remedy a fiduciary's breach of *trust*, a one-way obligation that does not depend on any participant "responsibility." See Section 404(a), 29 U.S.C. 1104(a), Congress codified the extent of employers' fiduciary

duty to disclose and the means to enforce it.[4] Yet, consistent with the common law of trusts, it imposed no reciprocal duty on participants and beneficiaries, even when they are exercising control over their own assets. See section 404(c), 29 U.S.C. 1104(c) participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise.").

Indeed, the legislative history on which Intel and its amici rely focuses exclusively on the benefits Congress expected disclosures to provide *for participants. See* Pet. Br. at 2, 24; Br. of NAM, et al., at 11. These reports speak to Congress's aspiration for disclosures to give participants "enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general," S. Rep. No. 93-127 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. They do not reflect any concern that participants who *do* receive this information will sleep on their rights, nor do they speak to any Congressional desire to limit the enforcement rights of participants

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[4] Notably, the issue in this case is not whether employers must do more than ensure receipt of proper, clear information to satisfy the duty of *disclosure*. The issue is whether satisfying that duty automatically ensures "actual knowledge" of any breach of fiduciary duty—which it clearly does not. Thus, the consequence of doing the statutory minimum to inform participants about the plan is not that employers will be held liable for failure to disclose. It is that, absent any other discovery of a breach, participants will have the set six-year period from that breach to bring suit, rather than a shortened three-year period from receipt of the disclosures

who overlook or do not appreciate critical information in the disclosures.

Amici also rely on the House Report's statement that it is "unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts," arguing that disclosures satisfy this concern by causing participants to have actual knowledge Br. of NAM, et al., at 11 (citing H.R. Rep. 93-533, at 8)). The House Report's statement is actually about plan descriptions that include employee obligations to qualify for coverage, rather than periodic plan disclosures that might reveal a breach of fiduciary duty. But even if it were relevant, it would only underscore that the Court should avoid penalizing participants for failing to act when they did not know about a breach. From any angle, it is readily evident that Congress intended to impose duties on fiduciaries to benefit employees, not that it intended to create a reciprocal duty on participants to scour disclosures in search of any potential breach, or risk forfeiting their rights.

Of course, the absence of an affirmative duty to read and gain insight from disclosures does not imply an absence of consequences if a participant *does* actually know of a fiduciary breach and sleeps on her rights. As under the common law, ERISA shortens the period of time in which to bring suit under those circumstances. *Compare* Restatement of Trusts, Comment on § 2, part (f), *with* ERISA § 413(2), 29 U.S.C. § 1113(2). And, if the participant never learns of the breach, absent fraud or concealment, the six-

year period in ERISA § 413(1), 29 U.S.C. § 1113(1) extinguishes the claim anyway.

Indeed, that is precisely why the notion that applying the "actual knowledge" standard as written will somehow discourage participants from reading disclosures, as Intel and its amici suggest, Pet. Br. 44-45; Br. of NAM, et al., 20-22, is unrealistic. Res. Br. at 37-38. Participants still have every incentive to read disclosures, as disclosures that, in fact, *are* informative enough to reveal a breach of fiduciary duty are the most likely source of that information for most participants, so reading them is in their best interests. The speculation that participants will refuse to inform themselves because doing so could give them a longer period of time in which to sue over breaches that *might* be occurring unbeknownst to them is farfetched. There is no evidence that participants have engaged in this gamesmanship or "hidden behind a veil of" deliberate ignorance for the first 45 years of ERISA's existence, and there is no reason to believe that will change now.

In any event, there are far more likely, and understandable, reasons that participants may not read all plan disclosures. One compelling reason is the fact that they are inundated with information. This is inevitable in an era where plans are increasingly relying on electronic disclosures. *See* Proposed Rule, *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 84 Fed. Reg. 56,894 (permitting employers to make electronic disclosures by default rather than allowing employees to opt-in). Currently, workers send and receive an average of

246.5 emails *per day*. The Radicati Group, Inc., *Email Statistics Report, 2015-2019*, available at https://www.radicati.com/wp/wpcontent/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf. Any given disclosure might easily escape the attention of even the most diligent employee, especially when disclosures are often incomprehensible to most workers. The information in disclosures is particularly likely to be lost on employees when the emails themselves do not even contain the disclosure, but require participants to navigate to a separate site, enter a separate login, and then download the information—steps that put up additional hurdles for many employees. Especially given many Americans' discomfort with using online technologies to perform various financial management tasks, it is more than likely that workers and retirees simply will not have the time, energy, and expertise to read and make use of disclosures provided in this manner. *See* AARP Letter to Assistant Secretary Rutledge Re: Electronic Disclosures and Other Recommendations for Improvement to Retirement Plan Disclosures (August 26, 2019), *available at* https://www.aarp.org/content/dam/aarp/politics/advocacy/2019/08/082619-e-disclosure-letter-final.pdf.

In these instances, participants certainly should not be deemed to have unknowingly started the clock on a shorter limitations period, and fiduciaries have not been deprived of a right to anything Congress gave them. Instead, the default six-year statute of limitations in 29 U.S.C. § 1113(1) simply applies.

III. Permitting Participant Suits for the Full Duration Congress Set is Crucial to Enforcing ERISA's Substantive Fiduciary Duties—the Statute's Core Protections.

Intel and its amici would recast ERISA as a disclosure-based scheme in which receiving documentation of the plan's performance is the statute's primary participant protection. Ironically, in attempting to fend off participant enforcement, Petitioner argues that disclosures are "the foundation upon which the statutory enforcement scheme rests." *See* Pet. Br. at 24. Amici go even further, suggesting that disclosures are so much the essence of ERISA's protections that if fiduciaries had to go further than ERISA's "disclosure regime" to help participants understand investment choices, they would choose not to offer retirement benefits at all. Br. of NAM, et al., at 11.

These arguments fail to recognize that a fiduciary's duty to act in participants' best interest of participants is ERISA's central protective mechanism. Consequently, empowering participants to bring suit, rather than cutting their time to sue short if they fail to read or understand plan disclosures, is the "foundation" of ERISA's statutory enforcement scheme.

A. Congress Imposed Substantive Fiduciary Duties That Are Vital to Protecting Participants' Retirement Security.

While the duty of disclosure plays an important role in helping participants and beneficiaries stay abreast of the plan's status, ERISA imposes far more extensive obligations on fiduciaries. Like the common law, ERISA placed responsibility on fiduciaries to safeguard beneficiaries' interests. Before ERISA was enacted, Congress passed the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA) "purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans." H.R. Rep. No. 93-533, *reprinted at* 1974 U.S.C.C.A.N. 4639, 4642. This statute required plan administrators to file annual reports with the Secretary of Labor and furnish them on request to participants, so that "the knowledge thus disseminated would enable participants to police their plans."[5] *Id.*

But Congress concluded that this scheme was "weak," both because of "limited disclosure requirements" and , more importantly, because it was "wholly lacking in substantive fiduciary standards." *Id.* ERISA remedied both—with a heavy emphasis on fiduciary responsibility. Congress was focused on "the absolute need that safeguards for plan participants be

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[5] Amici for Intel mistakenly attribute this quotation to Congress's statement on ERISA's disclosure requirements. Br. of NAM, et al., at 14.

sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." *Id.* Those safeguards included the fiduciary duties of prudence, loyalty, and diversification. ERISA § 404(a)(1), 29 U.S.C. § 1104 (a)(1). Congress assured the enforceability that the WPPDA lacked by granting participants, as well as the Secretary of Labor and fiduciaries themselves, a right of action to remedy breaches of fiduciary duty. ERISA §§ 502(a)(2), and 502(a)(3), 29 U.S.C. §§ 1102(a)(2), 1102(a)(3).

Enforcing these duties is more crucial than ever given the shift in the retirement landscape toward defined contribution plans. *LaRue,* 552 U.S. at 255 n.5. With the increasing number of defined contribution plans, more plan participants bear the risk associated with the performance of the funds in which fiduciaries like Intel invest their money. *See* Edward A. Zelinsky, "The Defined Contribution Paradigm," 114 YALE L.J. 451, 453 (2004) ("The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee[.]"). Employees' defined contribution accounts often constitute the entirety of their retirement investment and are often modest in size, magnifying the personal consequences of poor returns or losses. The quality of performance hugely affects the benefits that participants receive upon retirement. *Tibble*, 135 S. Ct. at 1826. They entrust their money to plan fiduciaries based on the assumption that fiduciaries are administering the

plans prudently and solely in the participants' best interest. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

The move toward defined contribution plans makes ERISA's substantive fiduciary protections even more critical because of the increased risk to plan participants. The effectiveness of the statutory enforcement scheme is, thus, also of the utmost importance, including adherence to the intended meaning of "actual knowledge."

B. ERISA's Reliance on Participant Lawsuits for Enforcement Cuts in Favors of Narrowly Construing "Actual Knowledge" by its Plain Terms.

Intel appears to acknowledge the importance of private lawsuits for ERISA's enforcement. Pet. Br. 24-25; *see* also S. Rep. No. 93-127, at 35 (1973), reprinted in 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), reprinted in 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms); *Varity Corp.*, 516 U.S. at 512 (discussing enforcement structure). From this premise, however, Intel draws the counter-intuitive conclusion that the Court should go to lengths to interpret clear statutory language in

a manner that *curtails* participant lawsuits. That is exactly backwards.

Instead, ERISA's statute of limitations should be construed in a manner that empowers participants to police the "misuse and mismanagement of plan assets by plan administrators" that was the "crucible of congressional concern." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). A literal, straightforward construction effectuates the statute's core remedial purpose: "to protect…the interests of participants…and…beneficiaries…by establishing standards of conduct, responsibility, and obligation for fiduciaries…and…providing for appropriate remedies…and *ready access to the Federal courts*." *Varity Corp.*, 516 U.S. at 513 (citing ERISA § 2(b)) (emphasis original). All the Court must do to accomplish the legislature's goal is to take Congress at its word.

CONCLUSION

For all these reasons, amici respectfully submit that the Court should affirm the decision of the Ninth Circuit in this case.

Respectfully Submitted,

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