No. 99-1529

IN THE SUPREME COURT OF THE UNITED STATES

DONNA RAE EGELHOFF,
Petitioner,

v.

SAMATHA EGELHOFF, A MINOR,
BY AND THROUGH HER NATURAL
PARENT KATE BRENINER AND
DAVID EGELHOFF,

Respondents.

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFRENCE OF MAYORS AS AMICI CURIAE SUPPORTING RESPONDENTS

Filed September 18th, 2000

QUESTION PRESENTED

Whether ERISA preempts Washington State's divorce-revocation statute, Wash. Rev. Code § 11.07.010.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] *Amici* have a long-standing interest in preserving traditional exercises of state authority from the unintended encroachment of ERISA preemption.

Among the most important exercises of the States' authority is the enactment of the laws governing divorce and the administration of decedents' affairs. Washington's divorce-revocation rule, Wash. Rev. Code § 11.07.010, applies to nonprobate assets the traditional common law rule that a divorce revokes a prior testamentary transfer in favor of an ex-spouse. The statute thus recognizes the increasing importance of nonprobate wealth in modern society and protects a decedent's dependents from the misallocation of assets based on a stale beneficiary designation.

Petitioner's contention that ERISA preempts Washington's divorce-revocation law rests on an erroneous view of the statute's effect on ERISA plans. The Washington statute imposes at most a *de minimis* burden on plan administrators. It is clear that the statute does not "do 'major damage' to 'clear and substantial federal interests,'" which would be necessary to hold it preempted under principles of conflict preemption. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

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[1] The parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.3, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Washington's Divorce-Revocation Statute

In 1993, the Washington Legislature enacted Wash. Rev. Code § 11.07.010, unifying the law of probate and non-probate transfers by applying the traditional rule that a divorce revokes a prior testamentary disposition of assets that pass outside of wills, such as life insurance policies, annuities, IRAs, pensions, bank accounts and trusts. Under the Washington statute, which applies only to divorce decrees entered "by a superior court of this state," Wash. Rev. Code §11.07.010(1), "a provision made prior" to the dissolution or invalidation of a marriage "that relates to the payment or transfer at death of a decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked." *Id.* § 11.07.010(2)(a). Under the statute, "the nonprobate asset affected passes, as if the former spouse failed to survive the decedent." *Id.*

Washington's divorce-revocation rule does not apply, however, if "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise." *Id.* § 11.07.010(2)(b)(i). It also does not apply if the divorce decree "requires that the decedent maintain a nonprobate asset for the benefit of a former spouse or children of the marriage . . . and other nonprobate assets of the decedent fulfilling such a requirement . . . do not exist at the decedent's death," or if "the decedent could not have effected the revocation by unilateral action because of the terms of the decree." *Id.* §11.07.010(2)(b)(ii) & (iii). Because the statute applies only to beneficiary designations made prior to divorce, it does not apply to beneficiary designations made in favor of an ex-spouse post-divorce.

Under the statute, the third party in possession of a non-probate asset "is not liable for making a payment or transferring an interest . . . to a decedent's former spouse whose interest in the nonprobate asset is revoked," if it does not have "actual knowledge of the dissolution or other invalidation of marriage." *Id.* § 11.07.010(3)(a). Where the third party holding the asset has "actual knowledge . . . of a dispute between the former spouse and the beneficiaries" it is not required to pay over the asset. *Id.* § 11.07.010(3)(b). While the holder can pay over the asset and demand security, *id.* § 11.07.010(3)(c), it need do no more than "notify" the parties that the dispute exists and "refuse to pay or transfer" the asset until the parties agree or a court resolves the dispute. *Id.* § 11.07.010(3)(b)(i), (ii).

2. Summary of Argument

A. ERISA's express preemption provision, 29 U.S.C. § 1144(a), does not preempt Washington's divorce-revocation rule, Wash. Rev. Code § 11.07.010, which applies to non-probate assets regardless of whether they are held in an ERISA plan. The statute does not have a sufficient connection with ERISA plans to warrant preemption.

Section 11.07.010 does not "mandate[] employee benefit structures or their administration," *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995), and is far removed from the core concerns of ERISA. The statute does not interfere with the discretionary aspects of plan design with respect to benefits and benefit levels. The statute simply effectuates the likely intent of a divorcing plan participant by creating a default rule, revoking a beneficiary designation made prior to the divorce, which can be overcome by the terms of a plan that "expressly provides otherwise," or by the terms of the divorce decree. Wash. Rev. Code § 11.07.010(2)(b). It likewise does not compel plan administrators to determine beneficiary

status under state law as the statute allows the plan to hold the asset until the parties agree or a court resolves a dispute between competing claimants. *Id.* § 3(b).

Petitioner's contention that Washington's statute "interferes with the nationally uniform administration of employee benefit plans", Pet. Br. 17, is not persuasive. A suit such as this one, between competing beneficiaries, imposes no more than a *de minimis* burden on ERISA plans. Under the Washington statute, a plan "is not liable" if it transfers the asset in reliance on the governing instrument before it receives "written notice" as to the dissolution of the marriage and the existence of a dispute. Wash. Rev. Code §11.07.010(3)(a) & (d). Where the plan receives notice of a dispute between claimants, it "may, without liability, notify in writing" the parties as to "the existence of a dispute." *Id.* § 11.07.010(3)(b). Beyond that, the plan need do nothing until the parties resolve their dispute. The plan can – but need not -- transfer the asset to the designated beneficiary and demand security "for any liability, loss, damage, costs, and expenses for or on account" of the transfer. *Id.* § 11.07.010(3)(c). Plans are thus not threatened with double liability. As a practical matter, the plan need do no more than send a form letter to the competing claimants. Such a "burden" is simply too inconsequential to render this important state law preempted.

B. Petitioner also argues that Washington's divorce-revocation rule conflicts with ERISA's substantive provisions. None of petitioner's arguments establish that " 'compliance with both federal and state regulations is a physical impossibility,' " or that " 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Boggs v. Boggs,* 520 U.S. 833, 844 (1997) (citation omitted).

Petitioner's first theory is that Section 11.07.010 "directly conflicts with ERISA's definition of 'beneficiary.' " Pet. Br. 28. This argument fails, however, because ERISA's definition of the term "beneficiary" contemplates contingent beneficiaries, and under the plans, Mr. Egelhoff's children and estate are contingent beneficiaries. *See, e.g.*, J.A. 40.

Petitioner's second theory is that "Congress intended that the rights of ERISA plan beneficiaries would be determined by reference to readily accessible ERISA plan documents, not on the basis of varying and potentially inconsistent state laws." Pet. Br. 33. This argument rests on the erroneous premise that ERISA plans determine beneficiary status solely by reference to the plan documents and can entirely ignore state law in that process. That cannot be the case. State statutes and common law frequently ascribe the legal consequences of important life events and relationships; plan administrators must abide by these determinations.

For example, the States generally presume that a person missing for a prescribed period of years is dead. Could an ERISA plan disregard a state court determination that the designated beneficiary is dead and refuse pay benefits to the contingent beneficiaries? In short, the rights of ERISA beneficiaries are not solely "determined by reference to . . . plan documents." Pet. Br. 31 State law plays an important role, and cannot be preempted on the basis of a "mere conflict in words." *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979).

Invoking *Boggs,* petitioner further asserts that Section 11.07.010 conflicts with "ERISA's goal of protecting plan participants and their beneficiaries." Pet. Br. 35. But in *Boggs,* a state law conflicted with ERISA's clear and substantial interest in protecting surviving spouses. By contrast, ERISA does provide a mechanism for ex-spouses to protect their interest as beneficiaries—the QDRO provision—which defers to state law. Petitioner, however, did not avail herself of this provision and in the divorce settlement expressly disclaimed her interest in Mr. Egelhoff's pension. *See*

J.A. 33. It is petitioner's interpretation of ERISA—not Washington law—which conflicts with ERISA's purpose of protecting the economic well-being of participants and their dependents. *See* 29 U.S.C. § 1001b(a)(2).

Nor does Section 11.07.010 conflict with ERISA's anti-alienation provision. The statute does not affect an "assignment or alienation," as those terms are commonly understood—transfers of property undertaken by voluntary act and not by operation of law. The regulatory definition likewise does not support petitioner because respondents did not acquire their rights to their father's pension through an "arrangement" with either their father or petitioner. 26 C.F.R. § 1.401(a)-13. Finally, by the terms of her divorce, petitioner was no longer Mr. Egelhoff's dependent. Section 11.07.010 thus does not conflict with what this Court has identified as the purpose of the anti-alienation provision: "safeguarding a stream of income for pensioners . . . and their dependents." *Boggs*, 520 U.S. at 852 (quotation and citation omitted).

ARGUMENT

ERISA DOES NOT PREEMPT WASHINGTON'S DIVORCE-REVOCATION STATUTE

The Washington Supreme Court correctly held that ERISA does not preempt Wash. Rev. Code § 11.07.010. The statute is an integral part of a comprehensive legislative scheme regulating the disposition of a decedent's property, whether the property is a probate or nonprobate asset. Derived from the traditional common law rule that a divorce revokes a prior testamentary disposition, *see* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1135 & n.107 (1984), the statute—which is modeled on Section 2-804 of the Uniform Probate Code—applies the same rule to nonprobate assets,

revoking beneficiary designations in favor of an ex-spouse made prior to divorce in will substitutes.

Divorce-revocation rules recognize that "[c]ircumstances often change across the decades in ways that [decedents] do not address," rendering wills and beneficiary designations in will substitutes "stale." Langbein at 1135. "As [family] circumstances change, there is considerable danger that the transferor may neglect to update one or more components of an estate that involves numerous instruments and institutions of transfer." *Id.* at 1140. While "[g]ood divorce lawyers take it as part of their job to see to it that clients revise their wills [and other instruments], . . . not every client is represented by counsel, much less good counsel, nor do clients inevitably act promptly in accordance with counsel's advice." *Id.* at 1135. The premise of divorce-revocation rules is that "because most [decedents] do not want to benefit ex-spouses," designation of an ex-spouse in wills and will substitutes "no longer reflects the intentions" of the decedent. *Id.* The statutes thus protect a decedent's dependents from the misallocation of assets based on stale beneficiary designations.

In adapting the common law rule to nonprobate assets, Washington's statute recognizes the increasing role of contractually-based wealth in modern society. *Id.* at 1119. As Professor Langbein has explained, "The bulk of modern wealth takes the form of contract rights rather than rights in rem—promises rather than things. . . . Promissory instruments—stocks, bonds, mutual funds, bank deposits, and pension and insurance rights—are the dominant component of today's private wealth." *Id.* Indeed, "'the proceeds of one or more life insurance policies'" are significant assets in most estates. Spencer Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in *Life Insurance Law In International Perspective* 74, 75-76 (J. Hellner & G. Nord eds. 1969) (quoted in Langbein at 1110). Moreover, retirement benefits—whether

in the form of Individual Retirement Accounts or employer-provided retirement accounts—also comprise "[a] very large portion of the wealth of many decedents." II A. James Casner & Jeffrey N. Pennell, *Estate Planning* § 9.0, at 9.3 (6th ed. 1999 Supp.); *see also* Langbein at 1111.

That the nonprobate assets at issue in this dispute—the proceeds of an employer-provided life insurance policy and a defined contribution pension plan,[2] *see* Pet. App.3a—were provided by ERISA plans does not render Washington's statute preempted. As explained below, Wash. Rev. Code § 11.07.010 is a law of general applicability which is not preempted by ERISA's express preemption provision, 29 U.S.C. §1144(a). And giving effect to Washington's statute in this case—a suit between two competing claimants that is based on principles of unjust enrichment and to which no ERISA plan is a party—does not conflict with the purposes of ERISA. In contrast to *Boggs v. Boggs*, 520 U.S. 833 (1997), neither the text of ERISA nor its legislative history clearly manifest a Congressional purpose to displace Washington State's traditional authority to determine the rules by which a decedent's property should be distributed. Petitioner's position likewise calls into question the validity of other state laws such as slayer-revocation provisions, *see, e.g.*, Wash. Rev. Code § 11.84; Uniform Probate Code § 2-803, and rules governing the legal consequence of a person's prolonged absence. *See* 25A C.J.S. *Death* § 6 (1966). This Court should therefore affirm the judgment below.

A. ERISA Section 514(a) Does Not Expressly Preempt Washington's Divorce-Revocation Statute

Petitioner contends that ERISA Section 514(a), 29 U.S.C. § 1144(a), which provides that ERISA "shall supersede any and all State laws insofar as they may now or

[2] Mr. Egelhoff's pension plan was "jointly provided by him and his employer." Pet. App. 3a.

hereafter relate to any employee benefit plan" subject to ERISA, expressly preempts Wash. Rev. Code § 11.07.010. Petitioner asserts that "Section 11.07.010 has a 'connection with' an ERISA plan because it mandates plan administration and binds plans to a particular choice regarding matters of core ERISA concern." Pet. Br. 11. Petitioner further argues that Washington's statute "has a 'connection with' an ERISA plan because it interferes with the nationally uniform administration of employee benefit plans." *Id.* at 17. This is so because Wash. Rev. Code § 11.07.010 overrides a plan participant's designation of beneficiary, thereby " 'mandat-[ing] employee benefit structures or their administration' " and 'bind[ing] plan administrators to [a] particular choice.'" Pet. Br. 6-7 (quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658, 659 (1995)).

In petitioner's view, the Washington statute "directly regulates the determination of beneficiary status and the payment of ERISA plan benefits—functions that lie at the very heart of ERISA's concerns." *Id.* at 7. Furthermore, if Washington can enforce its law, "ERISA plans would be prevented from employing a uniform administrative scheme for determining beneficiary rights, and would instead be required to determine beneficiary status and pay plan benefits in a different manner in different jurisdictions, depending on which state's law was thought to apply," thus frustrating Congress' purpose of subjecting plan administrators "'to a uniform body of benefits law.'" *Id.* (quoting *Travelers*, 514 U.S. at 656). The Court should reject petitioner's overstated claims.

1. The Court has repeatedly reaffirmed that ERISA preemption is not some unique species, but rather is subject to the same rules applicable in all preemption cases. *See California Div. of Lab. Stds. Enforcement v. Dillingham Const., Inc.*, 519 U.S. 316, 324-25 (1997); *Travelers*, 514

U.S. at 654-55. As the Court observed in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993), "we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis."

Thus, in ERISA cases the Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). And where, as here, " 'federal law is said to bar state action in fields of traditional state regulation, . . . [the Court has] worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ' " *Dillingham*, 519 U.S. at 325 (quoting *id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Furthermore, "[s]tate family and family-property must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo*, 439 U.S. at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

The Court has accordingly recognized that the text of ERISA's express preemption is unhelpful in defining the scope of preemption. Read literally, Section 514a's operative text—"relate to"—would "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality" because " 'really, universally, relations stop nowhere.' " *Travelers*, 514 U.S. at 655 (citation omitted) (order of quotations reversed). Moreover, the Court has acknowledged that its "prior attempt to construe the phrase" as meaning that " '[a] law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan,' " has likewise not proved helpful. *Id.* at 655-56 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983)); *see also Dillingham*, 519 U.S. at 325. As *Travelers* explained, "For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections." 514 U.S. at 656.

The Court must therefore "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *id.*, "as well as to the nature of the effect of the state law on ERISA plans." *Dillingham*, 519 U.S. at 325 (citing *Travelers*, 514 U.S. at 658-59). While "ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation," a "reading of § 514(a) resulting in the pre-emption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say would be 'unsettling.' " *Id.* at 330 (quoting *Travelers*, 514 U.S. at 665).

2. The Court has identified " ' "reporting, disclosure, fiduciary responsibility, and the like" ' " as the core concerns of ERISA. *Id.* at 330 (quoting *Travelers*, 514 U.S. at 661 (quoting *Shaw*, 463 U.S. at 98)). As *Travelers* explains, "[t]he basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." 514 U.S. at 657. Thus, the Court has invalidated "state laws that mandated employee benefit structures or their administration." *Id.* at 658. The Court has thus held preempted state laws prohibiting a plan from discriminating on the basis of pregnancy or requiring a plan to pay a certain benefit level to disabled employees, *see Shaw*, 463 U.S. at 89, a state law prohibiting a plan from seeking reimbursement from a beneficiary who recovered damages from a third party, *see FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and a state law which prohibited a plan from offsetting an employee's pension benefit by the amount of worker's compensation

benefits. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

Washington's divorce-revocation statute, however, does not "mandate[] employee benefit structures or their administration," *Travelers*, 514 U.S. at 658, and is far removed from the core concerns of ERISA. In contrast to the statutes at issue in the cases cited above, Wash. Rev. Code § 11.07.010 does not require that an ERISA plan offer any particular benefit or circumscribe a plan's ability to seek reimbursement or offset against a benefit.

Nor does it "mandate the administration of an ERISA plan" by "bind[ing] a plan administrator to a particular choice," *see* Pet. Br. 12 (order of quotations reversed), as that concept of preemption has been defined in this Court's cases. As the Court has made clear, state law is preempted when it interferes with the discretionary aspect of plan design with respect to benefits and benefit levels. But to the extent "the determination of beneficiary status pursuant to plan terms is a core administrative function of any ERISA plan," Pet. Br. 12, it is largely a ministerial one. While plan administrators have "choice" in deciding a hierarchy of beneficiary designation, they do not otherwise possess "choice" to decide who is entitled to receive benefits. That choice remains with the plan participant. Wash. Rev. Code § 11.07.010 simply effectuates the likely intent of a divorced plan participant by creating a default rule, which can—but need not—be overcome either by plan terms "expressly provid[ing] otherwise," or a "decree of dissolution . . . that requires the decedent maintain a nonprobate asset for the benefit of a former spouse" or that prohibits the decedent from "effect-[ing] the revocation by unilateral action." Wash. Rev. Code § 11.07.010(2)(b). To the extent that plan administrators have discretion in creating plan terms, the statute does not compel any "particular choice." Pet. Br. 12. Plan administrators are free to adopt plan terms that expressly reject

Washington's divorce-revocation rule. *See* Wash. Rev. Code § 11.07.010(2)(b)(i).[3]

As for a plan, the statute clearly states that if the administrator relies on the plan documents to make payment or transfer the asset to a former spouse before it has "actual knowledge of the dissolution . . . of marriage," it "is not liable." Wash. Rev. Code § 11.07.010(3)(a). Where a plan has "actual knowledge" of a dispute between "the former spouse and beneficiaries," the statute does not require that the plan make any "particular choice" as to its course of action. *Id.* § (3)(b). Rather, it can transfer the asset to one of the parties, conditioned on the provision of security indemnifying it "for any liability, loss, damage, costs, and expenses," *id.* § (3)(c), or it can "without liability, refuse to pay or transfer" the asset until the parties consent to the transfer or a court directs it. *Id.* § (3)(b). Thus, contrary to petitioner's assertion, the statute does not "compel plan administrators to determine beneficiary status" under state law. Pet. Br. 16. The plan can, of course, apply the divorce-revocation rule, but it can also leave the decision to the parties or the court. Wash. Rev. Code § 11.07.010(3)(b)(i) & (ii). Thus, the statute in no sense "binds a plan administrator to a particular choice." Pet. Br. 12.

Petitioner makes much of various ERISA statutory provisions, asserting that the "determination of beneficiary status" is a "central" concern of ERISA. Pet. Br. 15. Petitioner invokes Section 404(a)(1), which provides that "a fiduciary shall discharge his duties . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," Pet. Br. 13 (quoting 29 U.S.C. § 1104(a)(1)(A)(i)), and Section 403(c)(1), which requires

[3] Petitioner's argument that Washington's statute "bind[s] plan administrators to a particular choice," Pet. Br. 12, is especially misplaced in this case, in which neither the Boeing pension plan nor life insurance plan are parties.

that plan assets be "held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying" plan expenses. *Id.* § 1103(c)(1). Respondents, however, who are Mr. Egelhoff's children (including a minor child), are also beneficiaries because they are contingent beneficiaries under the express terms of the pension plan. *See* J.A. 40 (pension funds "will be paid . . . [i]f there is no surviving spouse, to your children in equal shares").[4] Moreover, neither Sections 404(a)(1) nor 403(c)(1) address how "beneficiary status," Pet. Br. 15, is to be ascertained.

Similarly, that Congress defined the term "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is *or may become* entitled to a benefit thereunder," 29 U.S.C. § 1002(8) (emphasis added), does not aid petitioner. This definition clearly contemplates contingent beneficiaries, whether they be "individuals" such as Mr. Egelhoff's children or his "estate." *See id.* § 1002(9) (defining "person" as meaning, *inter alia*, an "individual" or "estate"). The divorce-revocation rule does not create a new class of beneficiaries. It simply treats the divorce as having the same effect as the death of a former spouse; the plan benefits are still transferred to beneficiaries in accordance with the plan documents.

In petitioner's view, the on-file designation form is the be-all and end-all of the beneficiary determination. *See* Pet. Br. 12-15. But the reason the beneficiary designation ordinarily controls the disposition of the asset is not merely because it is on file. It is because it reflects the intent of the plan participant. When divorce occurs, "most testators do not want to benefit ex-spouses," Langbein, *The Nonprobate Revolution*, 97 Harv. L. Rev. at 1135, and the designation of

[4] Mr. Egelhoff's estate is the beneficiary of the life insurance proceeds. *See* Pet. App. 34a. His children therefore inherit as statutory heirs. *Id.* at 34a-35a.

an ex-spouse no longer accurately reflects the participant's intent. Rather, that intent is best reflected by the property settlement the participant and ex-spouse arrive at, which can, of course, under both Wash. Rev. Code § 11.07.010 and the ERISA QDRO provisions, 29 U.S.C. § 1056(d)(3)(A), make provision for an ex-spouse.[5]

Indeed, state slayer-revocation statutes have the same "connection with" an ERISA plan as divorce-revocation rules, "treating the affected interest as though the decedent had revoked the beneficiary designation." John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 438 (2d ed. 1995).[6] Under petitioner's theory, a State's slayer-revocation statute could not be enforced to deny a designated beneficiary benefits due under a plan. The IRS, however, " 'has recognized that [an ERISA] plan must conform to a state's 'slayer' statute, and not pay benefits to the person who murdered the participant, even if that person is named as the

[5] The United States argues that "it cannot be assumed that a plan participant would necessarily have chosen to revoke the designation of the former spouse as beneficiary immediately upon divorce. A participant might, out of feelings of obligation, remorse, or continuing affection, intend that the former spouse remain as beneficiary, at least for the time being." U.S. Br. *Am. Cur.* 23.

Such a participant can, of course, agree to retain a former spouse as a beneficiary under the settlement agreement. *See* Wash. Rev. Code § 11.07.010(2)(b)(ii) & (iii). And because the statute applies only to beneficiary designations made "prior to" the divorce, *id.* § 11.07.010(2)(a), a participant can always re-designate his ex-spouse as beneficiary after the divorce.

[6] "As of 1993, forty-four states and the District of Columbia had slayer statutes; four other states applied a common law bar." Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. Cin. L. Rev. 803, 805, 876 n.12 (1993), quoted in *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 959-60 n.11 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 903 (1999). While such statutes " 'vary considerably from jurisdiction to jurisdiction,' " *id.*, to *amici*'s knowledge no court has held that ERISA preempts a slayer-revocation statute.

beneficiary.' " *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 960 n.11 (9th Cir. 1998), *cert. denied,* 119 S.Ct. 903 (1999) (quoting Natalie B. Choate, *Qualified Plan and IRA Distributions: The Year of Death,* CA 43 ALI-ABA 191, 196 (1996) (citing IRS Letter Ruling 8908063 (Nov. 30, 1988))). The burden on a plan of having to conform to state slayer-revocation statutes is indistinguishable from that imposed by Washington's divorce-revocation rule. In either situation, a plan need take no action while the relevant factual questions are determined by the courts. *See* Model Probate Code § 2-803(h)(2). Neither anti-slayer rules nor divorce-revcation- rules have a sufficient connection to ERISA's core concerns to be preempted.

3. Similarly unpersuasive is petitioner's contention that Washington's divorce-revocation rule "has a 'connection with' an ERISA plan because it interferes with the nationally uniform administration of employee benefit plans." Pet. Br. 17. While petitioner correctly notes that the purpose of ERISA preemption is to protect plans from "the administrative and financial burden of complying with a hodge-podge of differing and inconsistent state and local regulation," *id.* at 17-18, this state law suit between competing beneficiaries, to which no ERISA plan is a party, imposes at most a *de minimis* burden on plans.

As explained above, under the Washington statute, a plan "is not liable" if it transfers the asset in reliance on the governing instrument before it receives "written notice" as to the dissolution of the marriage and the existence of a dispute. Wash. Rev. Code § 11.07.010(3)(a) & (d). Where the plan receives written notice "of a dispute between the former spouse" and other beneficiaries, it "may, without liability, notify in writing" the parties as to "the existence of the dispute or its uncertainty as to who is entitled" to the asset. *Id.* § 3(b). Beyond that, the plan need do nothing until the dispute is resolved. Alternatively, the plan can—but need

not—transfer the asset to the designated beneficiary and demand security "for any liability, loss, damage, costs, and expenses for and on account" of the transfer. *Id.* § (3)(c). Petitioner is thus mistaken in asserting that "ERISA plans would be threatened with the substantial risk" of having to "pay[] the same benefits twice." Pet. Br. 26. And as a practical matter, the plan need do no more than send a form letter to the competing claimants. *See* Wash. Rev. Code § 11.07.010(3)(b). Such a "burden" is simply too inconsequential to render this important state law preempted.

Petitioner misapprehends the operation of the Washington statute in asserting that "[p]lan administrators . . . do not automatically receive notice of the divorce of a plan participant and designated beneficiary, and thus often lack knowledge of the very fact that may trigger the applicability of state divorce-revocation laws." Pet. Br. 26. Under the statute, the burden of notice is placed on those challenging a pre-divorce beneficiary designation. The plan "is not liable" if it makes payment before it receives "actual knowledge of the dissolution . . . of marriage." Wash. Rev. Code § 11.07.010(3)(a).

Even if one views Wash. Rev. Code § 11.07.010 as subjecting a plan to "regulation," it does not follow that Washington's rule is so burdensome as to warrant pre-emption. Most of the financial institutions who provide ERISA plans with insurance and pension products also sell such products to Washington's citizens outside of ERISA plans. For example, in 1998, of the 455 companies that sold life insurance in Washington State, just twenty-two sold only group plans.[7] *See* State of Washington, Office of the

[7] While employer-provided group life insurance is typical of ERISA employee welfare benefit plans, not all group insurance is subject to ERISA. Some is purchased by plans not subject to ERISA, *see* 29 U.S.C. § 1003(b)(1) & (2), or offered through professional associations. *See*

Insurance Commissioner, *1998 Washington Market Share, Line of Business: Life and Annuity* <http://www.insurance.wa.gov/autorizeindex/98ReportAppendix/98AuthLAH_All.pdf>. The great majority of insurance companies doing business in Washington thus sell policies to individuals, *see id.*, and are, of course, subject to the State's divorce-revocation rule.[8] As life insurers are already knowledgeable as to the workings of Washington's divorce-revocation rule, the " 'administrative and financial burden of complying' " with the rule (Pet. Br. 18 (citation omitted)) is minimal.

Similarly, most ERISA pension plans are administered by large financial institutions such as banks, investment companies and insurance companies. *See* U.S. Department of Labor, Pension and Welfare Benefits Administration, *Final Report: Study of 401(k) Plan Fees And Expenses* § 2.7.1 (1998) ("in a recent survey, it was estimated that 59% of 401(k) plans use bundled services from full service providers" such as mutual funds, banks and insurance companies). These institutions likewise sell investment products such as annuities and IRAs to individuals in Washington State and are familiar with the workings of trusts and joint bank accounts as well as the divorce-revocation rule. To the extent the Washington statute arguably places an administrative and financial burden on an ERISA plan, it is too insubstantial to warrant preemption.

Petitioner further asserts that "[i]n many instances, . . . it would be difficult, if not impossible, for plan administrators

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American Council of Life Insurance, *ACLI Life Insurance Fact Book 1999* 18 (1999).

[8] In 1998, life insurance companies doing business in Washington collected $2.58 billion in premiums on ordinary life policies. This was more than six times the amount of premiums collected on group policies. *See 1998 Washington Market Share Line of Business: Life and Annuity* <http://www.insurance.wa.gov/autorizeindex/98ReportAppendix/98AuthLAH_Top40.pdf>.

to determine which state's law governed, given the possibility that the contesting claimants, the plan administrator, the divorce court, and the probate proceedings could be located in two or more different states." Pet. Br. 25-26. The Washington statute, however, expressly limits its reach to divorce decrees entered "by a superior court of this state." Wash. Rev. Code § 11.07.010(1); *Henley v. Henley*, 974 P.2d 362, 365 (Wash. Ct. App. 1999). Moreover, the same issue arises whenever a decedent in a State with a divorce-revocation rule leaves nonprobate assets, whether they are ERISA assets or not. Most significantly, under Washington's statute, plan administrators do not have to determine which State's law controls. They can leave this question to the claimants or the courts to resolve.[9] *See id.* § 11.07.010(3)(b).

4. Petitioner further takes issue with the Washington Supreme Court's conclusion that the statute's "burden on ERISA plans 'is too slight to overcome the presumption against preemption of state family and family property law.' " Pet. Br. 22 (quoting Pet. App. 21a-22a). Petitioner asserts that Section 514(b)(7), 29 U.S.C. § 1144(b)(7), the provision of ERISA's express preemption section that saves QDROs from preemption, represents the entire realm of state domestic relations law that Congress intended to save from preemption. *See* Pet. Br. 23 (citing 29 U.S.C. § 1144(b)(7)). In petitioner's view, "Congress's decision to create a limited exception in order to permit this carefully circumscribed type of state-law involvement in ERISA benefit allocation decisions confirms that, outside the context of QDROs, Congress intended ERISA to preempt all other attempts to

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[9] Petitioner further contends that "ERISA plan administrators . . . may face liability under ERISA's provisions for failure to comply with the terms of the applicable plan or for breach of fiduciary duty if they administer the plan in accordance with the state statute rather than the governing plan documents." Pet. Br. 26. This argument is without merit. If the Court holds that ERISA does not preempt Washington's statute, then a plan administrator cannot be held liable.

use state domestic relations law to override ERISA plan beneficiary designations." Pet. Br. 24.

The Court, however, has questioned whether ERISA § 514(b)(7) was even necessary "to save domestic relations orders from pre-emption," stating that "another plausible construction of Congress' action . . . [is] that Congress thought that some courts had erroneously construed § 514(a) as pre-empting such orders." *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 839 (1988). As *Mackey* indicates, Section 514(b)(7) merely "served the purpose of correcting the error, thus clarifying the original meaning of " Section 514(a). *Id.*

Moreover, even if Section 514(b)(7) is necessary to save QDROs from preemption, it does not follow that all other applications of state domestic relations law are preempted. The reason a QDRO is saved from preemption is because it effects an assignment or alienation of a participant's benefits; a QDRO "relate[s] to" a plan because ERISA expressly requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Thus, absent the savings clause of Section 514(b)(7), a domestic relations order assigning a participant's pension benefits to an ex-spouse would be preempted.[10]

[10] Prior to the enactment of the Retirement Equity Act of 1984, which contained the QDRO provisions, "the judicial consensus [was] that neither antialienation nor preemption should insulate pension wealth from the reach of state domestic relations jurisdiction." Langbein & Wolk, at 548. It has been suggested that "[i]t is most likely that Congress simply did not consider the issues raised by a potential conflict between ERISA and state domestic relations law." William J. Kilberg & Catherine L. Heron, *The Preemption Of State Law Under ERISA*, 1979 Duke L. J. 383, 417. This itself is legally significant. *See Dillingham*, 519 U.S. at 331 ("Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt [state labor laws] we are reluctant to alter our ordinary 'assumption that the historic police powers of the States were not superseded by the Federal Act.'") (citation omitted).

But where, as here, a divorce decree does not require a plan participant to provide ERISA plan benefits to a former spouse, it does not effect "the creation, assignment, or recognition of a right to any benefit payable with respect to a participant." 29 U.S.C. § 1056(d)(3)(A). *See also id.* §§ (d)(3)(B)(ii)(I) (defining a "domestic relations order" as "any judgment, decree or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a . . . former spouse . . . or other dependent") & (B)(i) (defining QDRO as "a domestic relations order which creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan"). Rather, the plan participant fully retains those rights and the power to revoke a beneficiary designation. If Mr. Egelhoff had immediately changed his beneficiary designations to remove his ex-wife, he would not have effected an "assignment" or "alienation" under § 1056(d)(1). That Washington law changes the beneficiary designation for him does not alter this conclusion. *See, e.g., Black's Law Dictionary* 72 (6th ed. 1990) (defining "alienation" as "[e]very mode of passing [property] by act of the party, as distinguished from passing it by the operation of law").

In any event, petitioner's contention that Section 514(b)(7) establishes that ERISA preempts "all other attempts to use state domestic relations law to override ERISA plan beneficiary designations," Pet. Br. 24, collides head on with "the strong presumption against preemption" of traditional exercises of the States' authority, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992); *Dillingham*, 519 U.S. at 331, and the rule that Congress' intent to preempt state law must be "clear and manifest." *Cipollone*, 505 U.S. at 516 (quoting

Rice, 331 U.S. at 230). The Court should reject this theory, which relies on Congressional silence to preempt a traditional exercise of state authority. *See Hisquierdo*, 439 U.S. at 581 ("when state family law has come into conflict with a federal statute," review is limited to determining "whether Congress has 'positively required by direct enactment' that state law be pre-empted.'"). *Id.* (quoting *Wetmore v. Markoe,* 196 U.S. 68, 77 (1904)).

B. Washington's Divorce-Revocation Statute Does Not Conflict With ERISA's Substantive Provisions

Petitioner also argues that Washington's divorce-revocation rule conflicts with ERISA's substantive provisions. These arguments, however, are largely recast versions of petitioner's express preemption theories. They neither establish that "'compliance with both federal and state regulations is a physical impossibility,'" or that " 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Boggs,* 520 U.S. at 844 (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992)).

Petitioner's first asserted conflict is that § 11.07.010 "directly conflicts with ERISA's definition of "beneficiary.' " Pet. Br. 28. According to petitioner, "ERISA defines the term 'beneficiary' as 'a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* (quoting 29 U.S.C. § 1002(8)). According to petitioner, "under the terms of the applicable . . . plans, benefits are to be distributed to the person listed on the plan participant's beneficiary designation form on file with the plan administrator" and thus she is the "*only* individual who meets ERISA's definition of 'beneficiary.' " Pet. Br. 28-29.

Petitioner's argument fails because ERISA's definition of the term "beneficiary" contemplates contingent beneficiaries. Each of the respondents, who are Mr. Egelhoff's children—

including a minor child—is "a person designated . . . by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). *See also* J.A. 40 ("If there is no surviving spouse," pension benefit will be distributed "to your children in equal shares."). Furthermore, the pension plan expressly recognizes that in the event "you have an invalid beneficiary designation," the assets would not be distributed to the beneficiary designated by the participant but to the contingent beneficiaries designated by the plan. J.A. 40. There is thus no conflict between § 11.07.010 and ERISA's definition of the term "beneficiary."

2. Equally misplaced is petitioner's related contention that § 11.07.010 conflicts with ERISA provisions such as the requirement that "plan fiduciaries . . . administer plans in accordance with the plan documents, which must specify the method for determining benefit payment rights and be available for review by plan beneficiaries." Pet. Br. 31. According to petitioner, "Congress intended for ERISA plans to specify in the plan documents the method by which beneficiary rights are to be determined and plan benefits are to be paid." *Id.* "Congress intended that the rights of ERISA plan beneficiaries would be determined by reference to readily accessible ERISA plan documents, not on the basis of varying and potentially inconsistent state laws." *Id.* at 33.

This argument erroneously asserts that ERISA plans determine beneficiary status solely by reference to the plan documents and can entirely ignore state law in that process. That cannot be the case. State statutes and common law frequently ascribe the legal consequences of important life events and relationships; plan administrators must abide by these determinations.

For example, what if a designated beneficiary has been missing for the period of years following which the State presumes a person to be dead? *See* 25A C.J.S. *Death* § 6 (1966). Could the plan disregard a state court determination

that the designated beneficiary is dead and refuse to pay benefits to the contingent beneficiaries? What if a State recognizes common law marriage? *See* 55 C.J.S. *Marriage* § 10 (1998). Could the plan disregard the claim of a person who asserts that while she was not formally married, under state law, she is a surviving spouse? What if two persons each claimed to be the surviving spouse or a person born out of wedlock claimed to be a participant's surviving child? Would not the plan look to state law and the state courts to resolve these questions?

In short, the rights of ERISA plan beneficiaries are not solely "determined by reference to . . . plan documents." Pet. Br. 33. The States are the principal expositors of domestic relations law. Petitioner's contention amounts to nothing more than "[a] mere conflict in words," which the Court has recognized "is not sufficient" to preempt "[s]tate family and family-property law." *Hisquierdo,* 439 U.S. at 581.

3. Invoking *Boggs,* petitioner asserts that "if permitted to withstand ERISA preemption, § 11.07.010 would undermine ERISA's goal of protecting plan participants and their beneficiaries." Pet. Br. 35. But in *Boggs*, a state law conflicted with ERISA's clear and substantial federal interest in protecting surviving spouses. *See* 520 U.S. 843-44. Here, by contrast, there is no "'clear and substantial' federal interest[]" requiring conflict preemption, *Hisquierdo*, 439 U.S. at 581 (citation omitted), where a former spouse claims substantial assets based on her ex-husband's failure to change his beneficiary designation prior to an automobile accident and his subsequent death.

ERISA does, of course, provide a mechanism for ex-spouses to protect their interest as beneficiaries—the QDRO provision—which "defers strongly to state law" by "subject-[ing] pension wealth to state domestic relations jurisdiction as fully as possible." Langbein & Wolk, *Pension and Employee Benefit Law* at 557. Indeed, under Washington's community

property law, petitioner could have sought a portion of Mr. Egelhoff's 401k. Wash. Rev. Code § 26.16.030. Petitioner, however, disclaimed her interest in it. *See* J.A. 33. She likewise could have sought to be retained by her ex-husband as a beneficiary on his life insurance policy. *See* Wash. Rev. Code § 11.07.010(2)(b)(ii). There is thus no basis to transform ERISA's purpose into providing financial windfalls to ex-spouses at the expense of other legitimate claims such as those of dependent children. In short, it is petitioner's interpretation of ERISA—not Washington law—which conflicts with ERISA's purpose of protecting the "well-being and retirement income security of . . . workers . . . and their dependents." 29 U.S.C. § 1001b(a)(2).

4. Finally, petitioner contends that § 11.07.010 "conflicts with ERISA's prohibition against alienation of retirement benefits." Pet. Br. 36. As petitioner acknowledges, ERISA's anti-alienation provision, § 206(d)(1), applies only to pension plans. *See* 29 U.S.C. §1056(d)(1). Thus, even if it was the case that § 11.07.010 conflicts with this provision, ERISA section 206(d)(1) does not prevent operation of Washington's statute to alter the disposition of the life insurance proceeds. *See Mackey,* 486 U.S. at 841.

Washington's statute does not, however, conflict with either the text or purpose of Section 206(d)(1). The statute does not effect either an "assignment or alienation" of petitioner's property right in Mr. Egelhoff's pension as those terms are commonly understood. As a leading authority explains, "[a] general [statutory] prohibition against assignment is interpreted to mean assignment by voluntary act and not to include assignment by operation of law." 3 Samuel Williston, *A Treatise on the Law of Contracts* § 422, at 137 (Walter H.E. Jaeger ed., 3d ed. 1960). *See also Blacks' Law Dictionary* at 119 (defining "assignment" as "[t]he transfer by a party of all of its rights to some kind of property"); *id.* at 72 (defining "alienation" as "[e]very mode of passing [property] by the act of the party, as distinguished from passing it by the

operation of law"). The plain meaning of the terms "assignment" and "alienation" demonstrates that ERISA Section 206(d)(1) does not prohibit transfers of pension rights that occur by operation of state law. ERISA Section 206(d)(1) does not contain a sufficiently clear and manifest expression of Congress' intent to warrant conflict preemption of Washington's divorce-revocation rule.

Nor does the Internal Revenue Service's definition of the terms "assignment or alienation," Pet. Br. 38, support the opposite conclusion. Respondents' right to their father's pension is not the result of a "direct or indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan . . . ." 26 C.F.R. § 1.401(a)-13. Respondents did not acquire their rights to the pension through an "arrangement" with their father (the participant) or petitioner (the putative beneficiary). Their rights arose because as part of the divorce settlement, petitioner voluntarily disclaimed her rights under Washington law in her ex-husband's pension. Washington law therefore properly treated her as having pre-deceased her ex-husband. Respondents' right to their late father's pension is not the result of an assignment or alienation, but rather, the distribution of the assets in accordance with the plan terms.

This construction is consistent with the anti-alienation provision's purpose. As the Court explained in *Boggs*, the anti-alienation provision " 'reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . .'." 520 U.S. at 852 (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990)).[11] By the terms of

[11] Petitioner contends that because the property settlement "does not comply with the statutory QDRO requirements designed to assure clarity and ease of application, ERISA requires that the plan be administered and benefits be paid without regard to the non-compliant order." Pet. Br. 41 (citation omitted). Petitioner thus suggests that if the order in this case had met the requirements of a QDRO, it would not be preempted. This argument is mistaken. Under the statutory definition, the agreement could not be a QDRO because it does not "create[] or recognize[] the existence of an alternate payee's right to, or assign[] to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i). Mr. Egelhoff was not an "alternate payee," but the plan participant. *See* 29 U.S.C. § 1056(d)(3)(K). As the Department of Labor has explained, "[f]or purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant." U.S. Department of Labor, *QDROs: The Division of Pensions Through Qualified Domestic Relations Order* 4 <http://www.dol.gov/dol/pwba/public/pubs/qdro.htm>.

That Congress did not include in the statutory definition of DROs and QDROs, orders under which a participant retained the full amount of his or her pension rights, demonstrates that Congress intended that an agreement in which an ex-spouse renounces her interest in a participant's pension is not an assignment or alienation.

petitioner's divorce and property settlement, she was no longer Mr. Egelhoff's dependent. There is thus no conflict between Washington's divorce-revocation rule and ERISA's anti-alienation provision.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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September 18, 2000