No. 99-1529

IN THE

Supreme Court of the United States

DONNA RAE EGELHOFF,

Petitioner,

v.

SAMANTHA EGELHOFF, A MINOR, BY AND THROUGH HER NATURAL PARENT KATE BREINER, AND DAVID EGELHOFF,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

REPLY BRIEF FOR PETITIONER

HENRY HAAS
MCGAVICK GRAVES, P.S.
1102 Broadway, Suite 500
TACOMA, WA 98402
(253) 627-1181

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

I. RESPONDENTS' ATTEMPTS TO AVOID A DECISION ON THE MERITS ARE BASELESS

Respondents belatedly identify three purported grounds for avoiding a decision on the merits of the important questions raised in this case. Respondents' objections are entirely without foundation.

First, Respondents contend that the question presented in this case is "entirely academic" because the decision below "does not impose any duties on ERISA plans or create any rights against such plans." Resp. Br. 14, 15.[1] Respondents' contention is nonsensical.

The court below expressly rejected the contention that "[§] 11.07.010 does not apply to ERISA plans," and refused to find ERISA preemption even after making clear that § 11.07.010 "operate[s] upon the beneficiary designation in an ERISA plan." Pet. App. 18a-19a, 21a. Unless reversed by this Court, therefore, the decision below will compel ERISA plans to comply with § 11.07.010, and will subject them to enforcement actions in state court if they fail to do so. The fact that no plan is a party to this case is thus irrelevant, just as it was in *Boggs v. Boggs*, 520 U.S. 833 (1997). *See id.* at 854 ("It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted.").

Nor is there any significance to the fact that lack of notice may give ERISA plans a limited defense to dam-

---

[1] Respondents waived this argument by failing to raise it either in the courts below or in their brief in opposition. SUP. CT. R. 15.2; *Demarest v. Manspeaker*, 498 U.S. 184, 188-189 (1991); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985).

ages claims under § 11.07.010(3). That limited defense is irrelevant in this case: The insurance plan administrator has already settled with Respondents (Resp. Br. 15 n.3) and the pension plan still holds the pension funds at issue here (and indeed, but for the stay issued by Justice O'Connor, would already have been subjected to the enforcement and contempt proceeding initiated by Respondents in the trial court).[2] More fundamentally, Respondents' attempt to divert the focus of this case to the varying damages provisions set forth in § 11.07.010(3) and (4) is wholly unpersuasive. The crucial provision that forms the basis for their claim against Petitioner is subsection 2(a), which purports to revoke ERISA plan beneficiary designations upon divorce and, in so doing, imposes a legal duty directly on ERISA plans.

Second, Respondents contend that Petitioner's preemption challenge is premature and should be rejected because of the purported possibility that "the trial courts on remand from the Washington Supreme Court can and will expressly address the disputed benefits and satisfy the technical requirements for QDROs." Resp. Br. 16. That wholly speculative contention has been waived because it was not raised previously (*see supra* note 1), and in any event is without merit.

As previously explained (Pet. Br. 23), ERISA exempts QDROs from the scope of its preemption provision. Contrary to Respondents' belated musings, however, no QDROs could be entered by the state courts in this case. *Ablamis v. Roper*, 937 F.2d 1450, 1456 (9th Cir. 1991) ("The limited QDRO exception applies only

[2] *See* No. 99A803 (Apr. 7, 2000). Absent reversal, of course, the decision below would be binding on the pension plan administrator in any enforcement action, both as a matter of *stare decisis* in the Washington courts and by virtue of traditional collateral estoppel principles. RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. g & illus. 13 (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4454, at 462-63 (1981).

to 'domestic relations' orders 'made pursuant to a state domestic relations law,' not to 'probate' orders or orders made pursuant to probate law.").

A QDRO must be a "domestic relations order," which ERISA defines as "any judgment, decree, or order . . . which . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." 29 U.S.C. § 1056(d)(3)(B)(ii). No orders in this case could "relate[] to the provision of child support, alimony payments, or marital property rights" for the simple reason that there are no such rights involved here. Petitioner's entitlement to the ERISA benefits at issue is founded upon her status as the designated beneficiary of the plans, not on alimony or marital property rights; Respondents' contrary claims are based on § 11.07.010(2), not on a child support order or any marital relationship. The only domestic relations order involved in this case—the divorce decree between Petitioner and David Egelhoff—was entered as a final decree in a different case more than six years ago, and concededly does not constitute a QDRO. Respondents' untimely QDRO argument is a red herring.

Third, Respondents claim (Resp. Br. 47) that the presence of summary plan descriptions ("SPDs") rather than the full plan documents in the record provides a "basis for affirmance or dismissing the petition as improvidently granted." Once again, their claim has been waived (*see supra* note 1) and is meritless.

There has never been any dispute in this case about the material terms of the plans. Indeed, Respondents *stipulated* that the record already contains "the relevant provisions of" the pension plan (J.A. 21), and they are also bound by their express admission that "[t]he plans provided that benefits would be distributed upon David's death *to the named beneficiary* or, if the named beneficiary predeceased David, to David's heirs." Br. in Opp. 1 (emphasis added). Nor are Respondents in any position to dispute, for the first time in the case, Petitioner's status as the sole designated beneficiary of both plans. Resp. Br. 43-44. As the courts below found, Petitioner was "beneficiary of record under both [the] life insurance policy and [the] pension plan," and "remained" so "[a]t the time of [David Egelhoff's] death." Pet. App. 4a; *see id.* at 29a, 30a, 46a, 48a.

Respondents' complaints about the record are also wrong on the merits. The record contains the SPDs, which provide compelling evidence of the pertinent provisions of the plans. ERISA § 102(a), 29 U.S.C. § 1022(a); U.S. Br. 21 n.10; *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th Cir. 1996); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-82 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988). If Respondents were dissatisfied with the state of the record in the trial court, they should have obtained additional documents through discovery and introduced them in an effort to rebut Petitioner's factual showing. Respondents cannot now benefit from their own default merely by suggesting—without a shred of evidence—that they might conceivably gain some wholly speculative and dubious advantage if only the complete plan documents were in the record.[3]

[3] Respondents' claim that "[t]he record contains uncontradicted, sworn testimony" that David Egelhoff did not want her to receive benefits (Resp. 25) is without merit. In the first place, Petitioner's alleged *post hoc* speculations regarding the hypothetical intentions of the deceased are irrelevant. The plans make clear that a participant's intentions regarding disposition of plan assets are ineffective unless and until expressed in a beneficiary designation form. Moreover, under Washington evidence law, the statements cited by Respondents lack foundation and are inadmissible hearsay. WASH. R. EVID. 602, 802.

II. SECTION 11.07.010 "RELATES TO" AN ERISA PLAN

A. The "Opt Out" Provision Does Not Save Section 11.07.010 From Preemption

Respondents first contend that ERISA does not preempt § 11.07.010 because the divorce-revocation mandate does not apply if "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise." WASH. REV. CODE § 11.07.010(2)(b)(i). According to Respondents, § 11.07.010 is "strictly optional" and thus does not impose a "cognizable burden" on ERISA plans. Resp. Br. 8, 11-12. Respondents have waived this contention (*see supra* note 1), however, and in any event it reflects a fundamental misapprehension of the nature and scope of ERISA preemption.

ERISA § 514(a) was intended to "establish the regulation of employee welfare benefit plans 'as exclusively a federal concern,'" thereby "avoid[ing] a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656, 657 (1995) (citation omitted). Thus, ERISA preempts state laws that "mandat[e] employee benefit structures or their administration." *Id.* at 657-58. As applied to the plans at issue in this case, § 11.07.010 has precisely that forbidden effect: It directly regulates ERISA plans by invalidating the benefit structures and procedures provided for in the plans and substituting a different, state-conceived scheme for determining beneficiaries and paying benefits.

Respondents' assumption that the plans could have opted out of the particular benefit scheme imposed by § 11.07.010 (if they had been aware of it) is thus entirely beside the point. The crucial and incontrovertible fact is that Washington has, by statute, purported to replace these ERISA plans' beneficiary provisions with a different rule that deprives designated beneficiaries of rights they would otherwise enjoy under the terms of the plans.

To say that such a law does not "relate to" an ERISA plan would be absurd.

Far from advancing Respondents' argument, the opt-out provision in fact constitutes yet another impermissible attempt by Washington to regulate the administration of ERISA plans. The opt-out provision requires ERISA plans to "expressly provide[]" that they reject the default divorce-termination rule, and thus imposes on ERISA plans an additional administrative hurdle that must be overcome before they can implement their desired benefit allocation scheme. In effect, § 11.07.010 subjects ERISA plans to a two-tiered state regulatory regime that "dictate[s] the choices[] facing ERISA plans" (*California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 334 (1997)): A plan must either amend its plan documents in a manner that satisfies the requirements of Washington's "express[]" opt-out provision, or pay benefits in accordance with Washington's divorce-revocation rule, notwithstanding the plan's contrary benefit-allocation scheme. In either case, § 11.07.010 is imposing state-law administrative requirements that regulate ERISA plans' benefit allocation schemes—precisely the type of state regulation that Congress intended to preempt.

The opt-out provision's inability to save § 11.07.010 from preemption is further demonstrated by the implications of Respondents' contrary argument. If the mere presence of an opt-out provision sufficed to save otherwise impermissible statutes from preemption, ERISA plans would be subjected to the very burdens that Congress sought to eliminate. ERISA plan administrators would have to acquire and maintain a detailed familiarity with the ever-changing benefits regulatory schemes of all 50 states and remain constantly on their guard to adopt plan amendments that satisfied the terms of any newly adopted opt-out provisions in order to avoid the otherwise binding effect of new state substantive regulations. Section 514(a) was intended to avoid the need for

"'the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction,'" *Travelers*, 514 U.S. at 656-57 (citation omitted), but Respondents' argument would lead to precisely that impermissible result. The opt-out provision thus cannot save § 11.07.010 from preemption.

B. Section 11.07.010 Mandates Plan Administration And Binds Plans To A Particular Choice Regarding Core ERISA Concerns

Almost in passing, Respondents assert that § 11.07.010 does not mandate plan administration or bind plan administrators to any particular choices, but instead merely "sets up a rule that applies to family law situations not anticipated or addressed by ERISA, by the plan, or by the participant." Resp. Br. 34. To the contrary, the plans at issue here establish a uniform, clear and simple procedure for determining beneficiary status in the circumstances of this case: The plan confers beneficiary status on, and will pay benefits to, the individual listed on the participant's official beneficiary designation form on file with the plan administrator. *See* Pet. Br. 2-3 n.1. By purporting to override that simple rule and substitute a different, state-preferred result, § 11.07.010 clearly mandates plan administration and binds plan administrators to particular choices in an area that lies at the very core of ERISA's concerns—beneficiary status and rights. *See* Pet. Br. 12-17; U.S. Br. 12-17.

Respondents rely on *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988), but the state garnishment law at issue there was merely "a 'procedural' mechanism for the enforcement of judgments" and "d[id] not create the rule of decision in any case affixing liability." *Id.* at 835 n.10. That distinction was essential to the Court's decision, and properly so. A law like § 11.07.010 that intrudes directly into matters regulated by ERISA by overriding and replacing an ERISA plan's "rule of decision" for making beneficiary determinations relates to ERISA plans in a direct and substantial way, unlike a general garnishment statute that merely permits the enforcement of money judgments predicated on state laws that have nothing whatsoever to do with ERISA plans. Respondents' argument that § 11.07.010 is "no less 'procedural' than the law in *Mackey*" (Resp. Br. 35) is thus incorrect.

Respondents next argue that § 11.07.010 ought not be preempted because, in their view, Congress did not intend ERISA to preempt state slayer statutes or simultaneous death laws. Respondents' reliance on these other state laws is misplaced. First, Respondents err in contending that state slayer statutes are "functionally indistinguishable" from § 11.07.010. Resp. Br. 26-27. The "Slayer's Rule" has been universally recognized by the common law for more than a century. *See, e.g.*, RESTATEMENT OF RESTITUTION §§ 187, 189 (1937); *Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) ("It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken."); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889). Indeed, by the time Congress enacted ERISA in 1974, the "Slayer's Rule" was embodied in federal common law and was consistently applied as a judicial gloss in interpreting federal statutes governing benefits payable on death. *See, e.g.*, *Shoemaker v. Shoemaker*, 263 F.2d 931, 932 (6th Cir. 1959); *Burns v. United States*, 200 F.2d 106, 106-07 (4th Cir. 1952); *United States v. Leverett*, 197 F.2d 30, 31-32 (5th Cir. 1952); *Austin v. United States*, 125 F.2d 816, 819-20 (7th Cir. 1942).

Thus, the "Slayer's Rule" was an established part of the common law backdrop against which Congress enacted ERISA in 1974. Accordingly, ERISA may incorporate the Slayer's Rule as reflective of congressional intent, as an accepted doctrine of federal common law, and in order to avoid absurd results. *Lofton v. West*, 198

F.3d 846, 850 (Fed. Cir. 1999) ("Congress legislates against a common law background," and "it is highly unlikely that Congress would have wanted to confer . . . benefits on persons whose claims to those benefits result from their own acts of intentional or wrongful homicide"); *see Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'"); U.S. Br. 29 n.18.[4]

By contrast, the divorce-revocation statutes upon which Respondents rely are a recent phenomenon. At the time of ERISA's enactment, the uniform common-law rule held that divorce did not revoke beneficiary designations with respect to non-probate assets. *See, e.g.*, 4 L. RUSS, COUCH ON INSURANCE § 64:9, at 64-22

---

4 A similar analysis applies to the other state laws invoked by Respondents. *See* Resp. Br. 29-31. Like the common law "Slayer's Rule," definitions of terms like "child," "death," "duress," and "capacity" comprised part of the background common law of trusts in 1974 when Congress enacted ERISA. Similarly, the common law addressed the issue of simultaneous death (while ERISA does not). *See, e.g.*, *Colovos' Adm'r v. Gouvas*, 108 S.W.2d 820 (Ky. 1937); *Masonic Temple Ass'n v. Hannum*, 184 A. 414 (N.J. 1936); *Miller v. McCarthy*, 270 N.W. 559 (Minn. 1936); *Baldus v. Jeremias*, 145 A. 820 (Pa. 1929); *Fleming v. Grimes*, 107 So. 420 (Miss. 1926); *Dunn v. New Amsterdam Cas. Co.*, 141 A.D. 478 (N.Y. 1910). These common law rules form part of the backdrop against which Congress legislated in 1974, and would provide an appropriate basis for development of federal common law rules if necessary. Of course, there is no need to resolve any of these hypothetical questions in this case. *See Ridgway v. Ridgway*, 454 U.S. 46, 60 n.9 (1981) (rejecting attempt to use state divorce decree to override beneficiary designation under federal statute, but leaving open the question whether named beneficiaries might be denied benefits in "extreme fact situations" such as "where the named beneficiary murders the insured").

to –23 (3D ED. 1996) ("Divorce per se does not affect or defeat one spouse's rights as a designated beneficiary in a policy on the other spouse's life, absent a change in beneficiary designation or a provision in the contract of insurance" to the contrary) (footnotes omitted); *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 461-63 (1876); *Marquet v. Aetna Life Ins. Co.*, 159 S.W. 733, 735 (Tenn. 1913); *Farra v. Braman*, 86 N.E. 843, 848-50 (Ind. 1909). Indeed, it was not until 1990 that the Uniform Probate Code was revised to propose a divorce-revocation rule with respect to non-probate assets like ERISA plans. *See* UNIF. PROB. CODE § 2-804 (1990). Even today, only about a third of the States have adopted some version of that approach (Resp. Br. 23 n.9); the overwhelming majority continue to adhere to the contrary common-law rule.

Moreover, ERISA's structure makes clear that Congress determined that divorce would *not* override ERISA plan beneficiary rights except when the divorce decree qualified as a QDRO. *See* Pet. Br. 23-24; U.S. Br. 14-17. Congress exempted QDROs from ERISA's preemption clause in order "to ensure that *only* those orders . . . [that qualify as QDROs] are not preempted by ERISA." S. REP. NO. 98-575, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565 (emphasis added); *see also* H.R. REP. NO. 98-655, at 42 (1984). Respondents' only response to this point is to quote legislative history out of context. Resp. Br. 21. The relevant passage actually provides that "State law providing for the[] rights and payments under a *qualified domestic relations order* will continue to be exempt from Federal preemption under ERISA." S. REP. NO. 98-575, at 19 (emphasis added). Thus, Respondents' selective quotation serves only to reemphasize the narrow scope of the QDRO exception and confirms the impermissibility of Respondents' attempts to use state divorce law to terminate beneficiary status and rights in the absence of a QDRO.

C. Section 11.07.010 Interferes With The Nationally Uniform Administration Of Employee Benefit Plans

Respondents also err in contending that § 11.07.010 does not interfere with the nationally uniform administration of ERISA plans. First, Respondents erroneously assume that "[w]here Congress desired application of a uniform rule, it so provided in the specific 'provisions' of ERISA." Resp. Br. 32. To the contrary, however, ERISA preemption is not limited to circumstances in which ERISA expressly resolves the precise question at issue. Congress instead chose to preempt state laws that "relate to" ERISA plans regardless of whether those laws violate a specific ERISA provision. *See, e.g.*, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) ("Pre-emption is . . . not precluded simply because a state law is consistent with ERISA's substantive requirements.").[5]

Second, Respondents are mistaken in asserting that the variations in state divorce-revocation law are "basically imagined." Resp. Br. 36 n.23. Most fundamentally, the law in states like Washington is directly inconsistent with the law in the majority of states that adhere to the common law rule. It was precisely to avoid such a patchwork scheme of inconsistent state regulation that Congress enacted ERISA's preemption provision. *E.g.*, *Travelers*, 514 U.S. at 657; Pet. Br. 17-21. Moreover,

---

5 Respondents argue that uniformity is "one goal among the many goals animating ERISA," relying on the fact that ERISA plans are subject to state regulation of insurance, banking, securities, and criminal law, and through QDROs. Resp. Br. 32. But in each of these instances, Congress expressly exempted such laws from ERISA preemption and thereby expressly approved of any resulting disuniformity in plan administration caused by these laws. ERISA §§ 514(b)(2)(A), (b)(4), (b)(7), 29 U.S.C. §§ 1144(b)(2)(A), (b)(4), (b)(7). By contrast, Congress did not exempt state divorce-revocation statutes from preemption.

within the minority of states that currently provide for revocation of beneficiary status upon divorce, the individual state laws differ with regard to the types of property to which they apply, the classes of individuals whose rights are voided, and the specific conditions under which they do and do not apply. *See* Pet. Br. 20 n.8. The potential for additional variations in the future is essentially limitless.

Next, Respondents argue that some ERISA plans may already be aware of state laws such as § 11.07.010 because they administer assets that do not qualify for ERISA preemption. Resp. Br. 39. But the fact that some plans or insurers may voluntarily subject themselves to different state laws by administering particular assets does not change Congress's intent to immunize ERISA plans from state laws that would "result[] in a complex set of requirements varying from State to State." *Boggs*, 520 U.S. at 851.[6] Quite simply, if state laws such as § 11.07.010 were permitted to trump ERISA plan beneficiary designations, plans would face a multiplicity of inconsistent state regulation, contrary to this congressional intent. Pet. Br. 17-21. Like the state laws preempted in *Shaw*, *Holliday*, and *Alessi*, which would have required plans to restructure themselves in accordance with state law or to adopt different beneficiary payment schemes in different states (*see* Pet. Br. 16-17), state laws such as § 11.07.010 would force ERISA

[6] Respondents' claim that § 11.07.010 would actually reduce administrative burdens by providing a "default rule" is plainly erroneous. Resp. Br. 33. The plans at issue here are not in need of a "default rule"—they establish by their own terms a clear rule for determining beneficiary status. As the Court explained in *Fort Halifax*, "[t]he most efficient way to meet these [plan] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits"—precisely what the plans at issue here have done. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

plans "to accommodate conflicting regulatory schemes in devising and operating a system for processing claims and paying benefits—*precisely the burden that ERISA pre-emption was intended to avoid*." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987) (emphasis added).[7]

III. SECTION 11.07.010 CONFLICTS WITH ERISA'S PROVISIONS AND OBJECTIVES

A. Section 11.07.010 Conflicts With The Definition Of "Beneficiary"

Respondents assert that § 11.07.010 does not conflict with ERISA's definition of "beneficiary" because they claim to be contingent beneficiaries under the pension plan. Resp. Br. 39-41. To the contrary, however, Respondents' claim to enjoy the status of contingent beneficiaries merely confirms that their attempt to obtain the ERISA benefits at issue here is preempted. As previously discussed (Pet. Br. 13-15 & n.4), claims for benefits brought by purported beneficiaries fall within the "complete preemption" doctrine and are so thoroughly federal in nature that they arise exclusively under federal law, even when, as here, the suit "purports to raise only state law claims." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). Respondents do not

[7] Respondents claim that *Fort Halifax* upheld a state law that "imposed a far more burdensome requirement than [§] 11.07.010—the obligation to pay a severance benefit." Resp. Br. 33. Respondents' argument ignores the crucial distinction that this Court found dispositive in *Fort Halifax*. The state law at issue there did not purport to regulate or affect *ERISA plans* at all; rather, it simply required *employers* to provide a one-time, lump-sum severance benefit. 482 U.S. at 12. Since the statute did not regulate existing ERISA plans and "neither establish[ed], nor require[d] an employer to maintain" such a plan, it did not "relate to" an ERISA plan within the meaning of § 514(a). *Id.* By contrast, § 11.07.010 is expressly directed at "employee benefit plan[s]." WASH. REV. CODE § 11.07.010(5)(a).

even respond to this point, much less offer any basis for avoiding the complete preemption of their state-law claims.

Even leaving aside the complete preemption doctrine, Respondents' claim of contingent beneficiary status does nothing to advance their cause. For purposes of conflict preemption analysis, the crucial point—essentially ignored in Respondents' brief—is that *Petitioner* is unquestionably the sole designated beneficiary entitled to receive benefits pursuant to the terms of the plan and ERISA's definition of "beneficiary." As is confirmed by the regulatory interpretation promulgated by the Internal Revenue Service in the exercise of its regulatory authority under ERISA, divorce does not invalidate a participant's beneficiary designation, and "any elections made while the participant was married to his former spouse *remain valid*, unless otherwise provided in a QDRO, or unless the participant changes them or is remarried." 26 C.F.R. § 1.401(a)-20, A-25(b)(3) (2000).

Thus, by purporting to deprive Petitioner of her "beneficiary" status—a status conferred *by the text of ERISA itself*, 29 U.S.C. § 1002(8)—Washington's statute conflicts directly with ERISA. That undeniable conflict, standing alone, compels a finding of preemption. *See* Pet. Br. 28-30, 39-40; *see also Ridgway v. Ridgway*, 454 U.S. 46, 59-60 (1981) (beneficiary designation under Servicemen's Group Life Insurance Act prevails over contrary result mandated by state divorce law, because "[f]ederal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary"); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950).

In addition, Respondents' claim to be contingent beneficiaries is unpersuasive. Upon the plan participant's death, Petitioner's rights as the designated beneficiary became irrevocable, because she was the only "person designated by [the] participant" in accordance with the "terms of [the] employee benefit plan[s]." 29

U.S.C. § 1002(8). Under the terms of the plan, therefore, Respondents are not persons "who . . . may become entitled to a benefit thereunder," and accordingly they are not contingent beneficiaries.

Even if Respondents were contingent beneficiaries, moreover, their rights would necessarily be inferior to those of Petitioner, the primary beneficiary under the plan terms. As mere contingent beneficiaries, Respondents would have no ability to divest Petitioner of her rights to the plan benefits. Respondents' argument (Resp. Br. 44) that ERISA has no preference for primary beneficiaries over mere contingent beneficiaries is simply wrong. Upon the death of the plan participant and vesting of Petitioner's rights to the plan benefits, Petitioner alone was entitled to the benefits, and ERISA protects her right to receive them. 29 U.S.C. §§ 1104(a)(1)(D), 1132(a)(1).

Respondents argue that "the statute triggers the plan's alternate beneficiary provisions by deeming the former spouse to have predeceased the plan participant." Resp. Br. 40. But the federally protected rights of beneficiaries who have been designated by a plan participant in accordance with the terms of an ERISA plan cannot be nullified by the simple ruse of promulgating a state law that pretends those beneficiaries do not exist. *See* Pet. Br. 29-30; *see also Free v. Bland*, 369 U.S. 663, 669 (1962). For the same reason, Respondents' claim that Petitioner's designation is "invalid" is equally unpersuasive. Resp. Br. 47. If states were permitted to "invalidate" beneficiary designations in this manner, ERISA's solicitude for the protection of beneficiaries would be wholly illusory.[8]

[8] Moreover, it is the ERISA plan administrators, not the courts or state legislatures, who possess discretion to determine whether a beneficiary designation is "invalid" within the meaning of the plan. *See* Resp. Lodging, tab 4, at 12-2 ¶ 12.7; *Bruch*, 489 U.S. at 115. No such determination has been made (or even requested) here.

B. Section 11.07.010 Conflicts With ERISA's Protections For Beneficiaries

Respondents also claim that § 11.07.010 does not conflict with ERISA's provisions protecting beneficiaries' rights to the benefits due under plan documents. Resp. Br. 46. This claim lacks merit. First, contrary to the straw man put forward by Respondent, Petitioner does not assert that ERISA preempts all state laws that conflict with ERISA plan provisions. Instead, Petitioner's position is much narrower: § 11.07.010 is preempted because it imposes a state-law rule of decision for determination of beneficiary status and distribution of benefits, and in so doing compels plan administrators to breach their ERISA-imposed, federally enforceable duties to make benefit determinations in accordance with the terms of the governing plan. Pet. Br. 31-33; U.S. Br. 20-22.

Whatever role state law might have in other circumstances, ERISA's comprehensive regulation of beneficiary status and rights leaves no room for enforcement of laws like § 11.07.010. Congress has expressly mandated that ERISA plans shall "specify the basis on which payments are made . . . from the plan," plan administrators "shall" comply with those plan documents, and beneficiaries have an exclusively federal cause of action "to enforce [their] rights under the terms of the plan." 29 U.S.C. §§ 1102(a)(1), (b)(4), 1104(a)(1)(D), 1132(a). Congress intended that the rights of beneficiaries would be determined by reference to readily accessible ERISA plan documents, not on the basis of varying and inconsistent state laws. Pet. Br. 31-33. By directing plan administrators to pay benefits in a manner contrary to the terms of ERISA plans, § 11.07.010 plainly conflicts with ERISA's provisions and frustrates its objectives.

C. Section 11.07.010 Conflicts With ERISA's Anti-Alienation Clause

Respondents' contention that § 11.07.010 does not conflict with ERISA's anti-alienation provision is

equally unavailing. Resp. Br. 41. The IRS has defined "assignment" and "alienation" to include "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(ii) (2000). Respondents argue that § 11.07.010 does not effect an "assignment or alienation" because under that statute Respondents do not acquire any interest "'from' the named beneficiary." Resp. Br. 42. This reading defies common sense and the ordinary meaning of the relevant terms.

Prior to David Egelhoff's death, Petitioner had a revocable right to receive ERISA benefits upon his death. According to Respondents, § 11.07.010 operated to deprive Petitioner of her status as sole designated beneficiary entitled to plan benefits in these circumstances, thereby causing those rights to pass to Respondents. Thus, § 11.07.010 purports to effect an alienation of ERISA benefits "from" the designated beneficiary to another party. U.S. Br. 24-25. Respondents' attempt to deny this reality is sheer sophistry, and cannot withstand scrutiny.[9]

As this Court has explained, ERISA's prohibition against alienation "is mandatory and contains only two explicit exceptions," for plan loans and QDROs, "which

---

[9] Respondents err in contending (Resp. Br. 42) that the plain-language interpretation of the anti-alienation provision would bar changes in beneficiary designations at the instance of the participant or upon divorce. ERISA expressly authorizes plan participants to determine beneficiaries and specifically terminates guaranteed spousal annuity rights upon divorce (29 U.S.C. §§ 1002(8), 1056(d)(3)(F)(i)), making clear that such occurrences are permissible without regard to the anti-alienation provision. By contrast, no provision of ERISA authorizes states to transfer beneficiary rights from one individual to another.

are not subject to judicial expansion." *Boggs*, 520 U.S. at 851. Because § 11.07.010 purports to transfer pension plan benefits from the designated beneficiary to other individuals without the use of a plan loan or QDRO, it attempts to effect an assignment or alienation and is barred by ERISA's anti-alienation clause. *See, e.g., id.* at 851-53; Pet. Br. 36-41.[10]

D. Respondents' Reliance On Federal Common Law Is Misplaced

Finally, Respondents claim that, if ERISA preempts § 11.07.010, the Court should create a federal common-law rule that "look[s] to state law for its content." Resp. Br. 49. This suggestion is directly contrary to ERISA's provisions and purposes. As this Court has explained, "[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258-59 (1993). Because a divorce-revocation rule would conflict directly with ERISA's specific definition

[10] Respondents' attempt to distinguish *Boggs*, *Guidry*, and *Patterson* fails. According to Respondents, these cases demonstrate "that alienation has consistently been understood to involve the transfer to third parties of a person's continuing interest in a pension plan and not the loss of an interest that results in the ripening of a subsequent and nonderivative claim of right by other beneficiaries." Resp. Br. 42-43 n.28. Respondents' comparison presents a distinction without a difference. Section 11.07.010 would operate to "transfer to third parties [*i.e.*, Respondents] a person's [*i.e.*, Petitioner's] continuing interest in a pension plan." Moreover, ERISA's anti-alienation prohibition is categorical—ERISA permits a transfer of pension plan benefits if and only if the alienation occurs in a manner authorized by ERISA, such as through a QDRO. *See, e.g., Boggs*, 520 U.S. at 851. Absent such statutory authorization, ERISA expressly prohibits the transfer, regardless of whether the beneficiary "los[es] . . . an interest that results in the ripening of a subsequent and nonderivative claim of right by other beneficiaries."

of and protections for the rights of designated beneficiaries (Pet. Br. 28-41), there is no basis for creation of a federal common law rule in this area. U.S. Br. 27-29.

Even if this Court were to find room for the operation of federal common law in this area, moreover, Respondents' suggestion that the Court merely adopt state laws like § 11.07.010 would have to be rejected. While "state law may be incorporated as the federal rule of decision" when "there is little need for a nationally uniform body of law," the opposite result is required here, because areas of law "that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." *United States v. Kimbell Foods*, 440 U.S. 715, 728 (1979); *see, e.g., Kamen v. Kemper Fin'l Servs., Inc.*, 500 U.S. 90 (1991). In light of Congress's express intent in ERISA to secure "the nationally uniform administration of employee benefit plans," *Travelers*, 514 U.S. at 657, it would be entirely impermissible to incorporate the laws of each state in developing a common law rule regarding beneficiary designations in the event of divorce—to do so would result in the very sort of inconsistency in ERISA plan administration that Congress sought to avoid. Rather, courts developing federal common law under ERISA should apply a uniform, federal rule.

In cases in which it is appropriate for courts to develop federal common law for ERISA, courts look to the principles of trust law to determine the content of that common law. *See, e.g., Bruch*, 489 U.S. at 110 (because "ERISA abounds with the language and terminology of trust law[,] . . . . we have held that the courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'") (citation omitted); *id.* at 111 ("[W]e are guided by principles of trust law.").

The common law of trusts does not provide for revocation by divorce. The basic rule is that once a settlor successfully creates a trust, he or she may neither revoke nor modify it unless the terms of the trust so provide, and revocation is permissible only under limited circumstances (such as fraud, duress, undue influence, or mistake) that do not include divorce. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 330, 333 cmt. a (1959); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 992-93, at 218-19 & n.2, 230-32 (REV. 2D ED. 1983). Indeed, the common law rule provides that divorce is a condition for which the settlor should plan, not one for which courts will make provision by operation of law. *Id.* § 994, at 247-48. And, as discussed above (*supra* pp. 9-10), this common law approach continues to be followed in an overwhelming majority of states. Thus, a federal common law rule, guided by principles of trust law and in keeping with the common law background against which Congress enacted ERISA, would hold that beneficiary designations are not revoked in the event of divorce.

CONCLUSION

Section 11.07.010 is preempted by ERISA because it "relates to" and has a "connection with" an ERISA plan, and because it directly conflicts with ERISA's text, structure, and purposes. For all of the foregoing reasons, the decision of the Supreme Court of Washington should be reversed, and Petitioner's entitlement to the plan benefits at issue in this case should be confirmed.

Respectfully submitted.

HENRY HAAS
MCGAVICK GRAVES, P.S.
1102 Broadway, Suite 500
TACOMA, WA 98402
(253) 627-1181

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

October 19, 2000