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No. 07-636

In the Supreme Court of the United States

KARI ELLEN KENNEDY, PETITIONER,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ET AL., RESPONDENTS.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Court granted certiorari to review the following question:

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E. I. du Pont de Nemours and Company is a publicly held corporation. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA, 29 U.S.C. §§ 1001 *et seq.*, are set forth in the appendix to this brief.[1]

STATEMENT

Petitioner Kari Ellen Kennedy is the daughter of William and Liv Kennedy and the executrix of her father's estate. William designated Liv as the sole beneficiary of his account in DuPont's 401(k) pension plan. Although William and Liv later divorced, William never changed that designation. Because his designation remained in effect when William died, it was binding on the plan under ERISA, and accordingly the plan paid William's account balance to Liv.

Petitioner contends that Liv waived her right to William's account balance by the terms of her state divorce decree with William. Petitioner therefore asserts that the estate, which was the next beneficiary in line under the plan, rather than Liv, as the designated beneficiary, is entitled to the account balance. Although petitioner brought this suit against the plan under ERISA, the underlying dispute is between the estate and Liv; the plan recognizes its statutory obligation to pay the pension benefits to the rightful beneficiary.

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[1] Unless otherwise indicated, all statutory citations are to 29 U.S.C.

ERISA's anti-alienation provision prohibits a beneficiary from "assigning" or "alienating" benefits. By this provision, Congress sought to prevent beneficiaries from exchanging their rights to future pension benefits, and hence retirement security, for immediate economic gain. That is precisely what petitioner asserts Liv did here: through the purported waiver in the divorce decree, she gave up her right to William's pension in return for other assets.

Moreover, in the Retirement Equity Act of 1984, Congress amended the anti-alienation provision to address divorce decrees and other "domestic relations orders." 29 U.S.C. § 1056(d)(3)(A), (B)(ii). As amended, the anti-alienation provision prohibits a plan from honoring an assignment or alienation of pension benefits in a domestic relations order such as a divorce decree. However, the Act provides a statutory exception for "*qualified* domestic relations order[s]" ("QDROs"). § 1056(d)(3)(A), (d)(3)(B)(i). To be qualified, a domestic relations order must satisfy specific requirements enumerated in the statute. § 1056(d)(3)(C), (d)(3)(D). The statute prohibits a pension plan from following a domestic relations order that is not a QDRO. § 1056(d)(3)(A), (d)(3)(H)(iii).

Here, it is undisputed that the divorce decree is a non-qualified domestic relations order and that there is no QDRO that applies to the pension benefits at issue in this case. ERISA thus barred the plan from paying benefits in accordance with the purported waiver in the decree.

Although ERISA prohibited the plan from following the non-qualified divorce decree, the statute provides various ways for the parties, if they wished, to prevent Liv from receiving William's account balance. Most directly, William could have changed his beneficiary designation at any time during the seven years between the divorce and his death. In addition, Liv and William could have obtained a qualified domestic relations order specifying a different beneficiary. Finally, outside the divorce context, Liv could have filed a "qualified disclaimer" that would have relinquished her rights under the Plan.

Because none of those steps was taken here, however, William's beneficiary designation remained in effect, and the plan was required to follow that designation and to pay William's account balance to Liv. If the plan had distributed the account balance to petitioner, it would have violated ERISA.

A. ERISA.

1. Employee benefit plans.

In general, there are two types of employee benefit plans covered by ERISA: "welfare plans" and "pension plans." *See* § 1002(3). "[W]elfare plans" provide medical, accident, death, unemployment, vacation and similar benefits. § 1002(1). *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 n.5 (1983). By contrast, "pension plans" provide retirement income. § 1002(2). *See LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1022 n.1 (2008).

ERISA defines a "participant" to mean an "employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." § 1002(7). A "beneficiary" is "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." § 1002(8).

2. Anti-alienation and QDRO provisions.

ERISA requires that, with respect to pension (but not welfare) plans, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." § 1056(d) ("anti-alienation provision"). The statute does not define those terms, and Treasury has adopted a definition by regulation that provides that "'assignment and alienation' include . . . [a]ny direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary . . . a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1).

ERISA states that the anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order." § 1056(d)(3)(A). A domestic relations order includes a divorce decree. *See* § 1056(d)(3)(B)(ii) ("'domestic relations order' means 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 spouse . . . [or] former spouse"). However, as amended by the Retirement Equity Act of 1984 ("REA"), Pub. L.

No. 98-397, 98 Stat. 1426, ERISA excepts from the anti-alienation provision any domestic relations order that is "qualified." § 1056(d)(3)(A) (the anti-alienation provision "shall not apply if the order is determined to be a qualified domestic relations order").

A qualified domestic relations order must satisfy a number of requirements specified in the statute. *See* §§ 1056(d)(3)(B)(i), (C), (D). In brief, to be qualified, a domestic relations order must provide the following information necessary to know what the order requires: (1) the name and address of the participant and each alternate payee; (2) the amount or percentage of the participant's benefit to be paid to each alternate payee; (3) the number of payments or the period to which the order applies; and (4) the plan to which the order applies.

A proposed QDRO is submitted to the pension administrator to determine whether the order satisfies the standards to be a "qualified" domestic relations order. § 1056(d)(3)(G)(i). Each pension plan is required to have "reasonable procedures to determine the qualified status" of such orders. § 1056(d)(3)(G)(ii).

Under ERISA, a pension plan must pay benefits in accordance with a QDRO: "Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." § 1056(d)(3)(A). However, a pension plan may not pay benefits pursuant to a non-qualified domestic relations order. Section 1056(d)(3)(A) provides that the anti-alienation provision "shall apply to . . . any benefit payable . . . pursuant to a domestic relations order [other than a QDRO]." Furthermore, in the case

of a non-qualified domestic relations order, Section 1056(d)(3)(H)(iii) expressly requires a plan to pay benefits as if there were no such order:

> If . . . it is determined that the order is not a qualified domestic relations order, . . . the plan administrator shall pay the . . . [pension benefits] to the person or persons who would have been entitled to such amounts if there had been no order.

Id.

3. Preemption and QDRO provisions.

ERISA also contains a preemption provision that "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan." § 1144(a). "'State law' includes all . . . decisions . . . or other State action having the effect of law." § 1144(c)(1).

As it did for the anti-alienation provision, REA amended the preemption provision expressly to exclude QDROs. *See* § 1144(b)(7). Thus, ERISA preempts non-qualified domestic relations orders but not QDROs.

4. ERISA plan documents.

ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). In particular, the statute provides that the plan "shall specify the basis on which [benefit] payments are made . . . from the plan." § 1102(b)(4). When acting in a fiduciary capacity, a plan

administrator must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan." § 1104(a)(1)(D) (emphasis added).

B. The Present Case.

The following facts are undisputed. *See* Pet. App. 35-36.

1. William's participation in the DuPont pension plan and his marriage to Liv.

a. William Kennedy was employed by DuPont and participated in the company's retirement plans. This case involves what is now called the "Savings and Investment Plan" ("SIP" or "the Plan"), which was formed by the merger of two DuPont pension plans: the "Savings and Investment Plan" and the "Tax Reform Act Stock Ownership Plan" ("TRASOP"). *See* J.A. 28. William also participated in the DuPont "Pension and Retirement Plan" (which is not at issue here).

Under the SIP, a participant "can designate any beneficiary or beneficiaries he chooses to receive all or part" of his SIP account upon his death. J.A. 48. It also states that he "may replace or revoke such designation" at any time. *Id.* The designation of a beneficiary, or a change in a beneficiary designation, must be made "in the manner prescribed by" the Plan. *Id.* at 52. The Plan furnishes forms for the participant to complete and return in order to designate or change a beneficiary. *See id.* at 34, 56-57. Finally, the SIP provides the process for distribution of benefits after the participant's death:

"If no surviving spouse exists and no beneficiary designation is in effect, distribution shall be made to, or in accordance with the directions of, the executor or administrator of the [deceased participant's] estate." J.A. 48.

As required by ERISA's anti-alienation provision, the SIP provides that "no assignment of the rights or interests of account holders under this Plan will be permitted or recognized." J.A. 50-51. However, as authorized by the Internal Revenue Code, the Plan permits a "qualified disclaimer." J.A. 50; SIP § XVI.4(c)(2) (D.I. 40, Ex. D., D0069). This allows a designated beneficiary entitled to benefits as a result of the participant's death to disclaim such benefits; in that event, the benefits are paid directly to the beneficiary next in line under the Plan to receive them.

b. In June 1971, while employed by DuPont, William married Liv Kennedy. In 1974, William designated Liv as his sole beneficiary under the SIP (then called the "Thrift Plan"); he did not designate a contingent beneficiary. In 1980, William similarly designated Liv as his sole beneficiary under the TRASOP and did not designate a contingent beneficiary. Pet. App. 2, 32-33; J.A. 26-28, 34, 56-57.

In 1994, William and Liv were divorced in Texas. Pet. App. 2, 33; J.A. 27. They signed, and the state court entered, a final divorce decree that provided for "a just and right division of the parties' marital estate." Pet. App. 62. The decree identified specific items as each party's "sole and separate property," and stated that the other party "is divested of all right, title, interest

and claim in and to such property." *Id.* at 62, 64. The decree provided that the property awarded to William included the SIP (referred to as the "401k plan"). *Id.* at 64. Petitioner contends that these provisions constitute a waiver of Liv's right, as the designated beneficiary, to receive benefits under the SIP following William's death.

The property awarded to Liv in the divorce included a portion of William's retirement benefits under the Pension and Retirement Plan (which is not at issue here). The parties requested, and the court granted, a QDRO confirming Liv's interest in that plan. In 1997, that QDRO was amended. No QDRO was ever sought or entered for the SIP. Pet. App. 2, 33, 53; J.A. 27.

Several days after entry of the divorce decree, William executed a new beneficiary-designation form to make his daughter, Kari, the beneficiary of the portion of the retirement benefits that William retained under the Pension and Retirement Plan. J.A. 62. This change did not apply to the SIP.

William retired from DuPont in 1998 and passed away in 2001. During the seven years between the divorce in 1994 and his death in 2001, William never submitted a form to change his designation of Liv as his beneficiary under the SIP. Accordingly, Liv remained William's designated SIP beneficiary at the time of his death. Pet. App. 3, 33, 53; J.A. 28.

Following William's death, petitioner qualified as the executrix of his estate. Pet. App. 3, 33. She demanded payment of the balance in William's SIP account on the

ground that Liv had waived her right to that account in the divorce decree and the estate was the next beneficiary in line under the Plan. When the Plan declined that demand and paid the benefits to Liv as the designated beneficiary, petitioner brought this action against the Plan, *inter alia*, to recover the benefits under ERISA. Pet. App. 3, 33; J.A. 29.

2. The decisions below.

a. On cross-motions for summary judgment, the district court granted judgment to petitioner and denied it to respondents. Pet. App. 31-52. The court held that the effectiveness of Liv's waiver under ERISA is governed by federal common law rather than by the statute itself, relying on a line of Fifth Circuit decisions that applied federal common law to purported waivers of ERISA benefits under welfare (not pension) plans.

b. On respondents' appeal, the Fifth Circuit unanimously vacated that ruling and rendered judgment for respondents. Pet. App. 1-14. The panel distinguished the circuit precedent cited by the district court on the ground that those decisions involved welfare plans (to which ERISA's anti-alienation provision does not apply) rather than pension plans. *Id.* at 5-7. The court then held that federal common law was inapplicable because the case was controlled by the anti-alienation provision and the QDRO provision, which is the "sole exception" to anti-alienation in the marital-dissolution context. *Id.* at 7-11. Finally, relying on the applicable Treasury regulation, it rejected petitioner's argument that a purported waiver in a divorce decree is not an assignment or alienation for purposes of the anti-alienation provision. *Id.* at 8.

SUMMARY OF ARGUMENT

1. Three provisions of ERISA bar a plan from following a purported waiver of pension benefits in a non-qualified domestic relations order. First, the anti-alienation and QDRO provisions prohibit any arrangement that constitutes an "assignment" or "alienation" of the beneficiary's pension benefits to another party. Second, the QDRO provision requires a plan to disregard a non-qualified order and to pay benefits as if there were no such order. Third, ERISA preempts a non-qualified domestic relations order. Accordingly, the statute on its face precludes a plan from following a purported waiver in a non-qualified divorce decree. Because the statute is clear and leaves no gap, there is no room for the creation of federal common law.

a. As the Fifth Circuit correctly held, the anti-alienation and QDRO provisions prohibited the Plan from recognizing Liv's purported waiver in a divorce decree that is not a QDRO. Under the applicable Treasury regulation, the purported waiver constitutes an "assignment" or "alienation," which is defined to "include . . . [a]ny direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Because recognizing Liv's waiver would result in the next beneficiary in line under the Plan acquiring Liv's interest, the Plan was barred from honoring the purported waiver.

b. Even if Liv's purported waiver in the non-qualified divorce decree was not an "assignment" or "alienation," the Plan still was barred from following it. The QDRO provision explicitly requires that if a plan determines that an order is not a QDRO, it "shall pay" benefits as "if there had been no order." § 1056(d)(3) (H)(iii). Because Liv's purported waiver was set forth in a divorce decree that was not a QDRO, the Plan could not recognize it and was required to pay the SIP death benefits to Liv.

c. ERISA preempts non-qualified domestic relations orders. ERISA's preemption provision sets forth an exception for QDROs but not for non-qualified orders. Accordingly, the purported waiver included in the Kennedys' non-qualified divorce decree was preempted.

2. As the United States agrees, ERISA's "plan documents" requirement mandates that benefits be paid in accordance with the terms of the plan. This requirement is critical to the efficient and practicable administration of benefit plans.

Here, the SIP provides that, absent a QDRO, benefits will be paid to the beneficiary designated by the participant on a plan form. That person was Liv, and William never changed his designation – as he had the right to do – by submitting a form at any time during the seven-year period between the divorce and his death. Accordingly, the Plan properly paid benefits to Liv as William's designated beneficiary.

ARGUMENT

ERISA PROHIBITS A PLAN FROM PAYING PENSION BENEFITS BASED ON A PURPORTED WAIVER IN A DIVORCE DECREE THAT IS NOT A QDRO.

I. A PENSION PLAN MAY NOT RECOGNIZE A PURPORTED WAIVER IN A DIVORCE DECREE THAT IS NOT A QDRO.

A. The Anti-Alienation And QDRO Provisions Bar Recognition Of A Purported Waiver In A Non-Qualified Divorce Decree.

The Fifth Circuit reached the correct result for the correct reason. As the court held, Liv's purported waiver in the divorce decree constitutes an "assignment" or "alienation" under ERISA. Because the decree is not a QDRO, the anti-alienation provision prohibited the Plan from recognizing it. Moreover, because there is no gap in the statute, petitioner's argument that courts should create federal common law is unavailing.

1. Because Liv's purported waiver in the divorce decree is an assignment or alienation, the anti-alienation provision applies.

ERISA's anti-alienation provision states that "benefits provided under [an ERISA-governed pension] plan may not be assigned or alienated." § 1056(d)(1). Petitioner, now joined by the United States, contends that the purported waiver of pension benefits in a non-

qualified divorce decree is not subject to the anti-alienation provision. Under the applicable Treasury regulation, however, Liv's purported waiver in the divorce decree constitutes a prohibited "assignment" or "alienation" because it is a "direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). For this reason, ERISA barred the Plan from recognizing the purported waiver.

a. *Liv's purported waiver is an "assignment" or "alienation" subject to the anti-alienation provision.*

i. *The statute and regulation establish that Liv's purported waiver is an "assignment" or "alienation."*

(a) If arguendo an assignment requires a transfer to a third-party, the divorce decree here satisfies that requirement.

Petitioner and the United States contend (Pet. Br. 18-19; U.S. Am. Br. 11-13) that an assignment requires a transfer to a third party. Even if ERISA required a third-party transfer – which it does not (*see* pages 17-19, *infra*) – the purported waiver in the Kennedys' non-qualified decree satisfies any such requirement.

According to petitioner and the government, Liv's agreement constituted a "waiver without more" or a "bare waiver" of William's pension benefit because Liv's

rights were renounced without being transferred to someone else. *See* U.S. Am. Br. 10-11, 14, 19-22. But that is not so. If William had passed away at the instant the divorce decree became effective, the right to the pension benefit automatically would have gone to the beneficiary next in line under the Plan. That is a sufficient third-party transfer to constitute an assignment. *See* Pet. App. 8-9.

Although the statute does not define the terms "assign[ment]" or "alienat[ion]," the applicable Treasury regulation provides that they "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)(1)(ii).

The Fifth Circuit correctly recognized (Pet. App. 8-9) that Liv's purported waiver amounts to an "indirect arrangement" within the definition of "assignment or alienation" in the Treasury regulation. The court agreed with Judge Easterbrook that "[w]aiver [in the ERISA context] is an anticipatory gift, to whoever is next in line under the Fund's rules." Pet. App. 9, quoting *Fox Valley & Vicinity Constr. Workers Pension Plan v. Brown*, 897 F.2d 275, 282-83 (7th Cir.) (en banc) (Easterbrook, J., dissenting) (bracketed material added by court), *cert. denied*, 498 U.S. 820 (1990). *See also*

McGowan v. NJR Serv. Corp., 423 F.3d 241, 249 (3d Cir. 2005) (same), *cert. denied*, 127 S. Ct. 1118 (2007). Thus, the purported waiver in the decree is an "assignment" or "alienation" – to the beneficiary next in line – within the plain meaning of the regulation.[2]

Here, because William did not designate a contingent beneficiary, his account balance would have gone to his estate as the beneficiary next in line under the default provision of the Plan. *See* § 1002(8), (9); Pet. App. 8-9; J.A. 48. That would meet any requirement of a third-party transfer. Furthermore, by way of illustration, William was free to designate a contingent beneficiary of his choice and could have selected a third party such as his daughter, Kari. Alternatively, the Plan might have had a different default provision to designate, for example, the participant's child. This demonstrates that a purported waiver in a divorce decree constitutes an "indirect arrangement" that involves a transfer to a third party.

[2] Moreover, as Judge Becker observed in *McGowan*, in many instances the purported waiver specifically serves to enable the participant to give the benefits to a third party (such as a new spouse). *See* 423 F.3d at 251 (Becker, J., concurring). This further confirms that the purported waiver is an "indirect arrangement" for a transfer to a third party that is prohibited by the anti-alienation provision.

(b) ERISA's anti-alienation provision applies to a divorce decree regardless of whether there is a transfer to a third party.

The linchpin of the position of petitioner and the United States is that there is no assignment unless the assigning party transfers the benefit in question to a third party. ERISA imposes no such requirement.

In enacting the QDRO provision, Congress understood that the anti-alienation prohibition would apply to divorce decrees. Indeed, the statutory definition of "domestic relations order" is "any judgment, decree, or order (including approval of a property settlement agreement) which . . . relates to the provision of . . . marital property rights to a spouse [or] former spouse." § 1056(d)(3)(B)(ii). Nothing in this definition restricts domestic relations orders to situations involving third parties. On the contrary, the broad and unrestricted definition, coupled with the fact that divorce decrees often involve only the divorcing parties and their rights *inter se*, indicates that the anti-alienation provision applies regardless of whether the divorce decree requires a transfer to a third party. If Congress had intended to exclude two-party transfers from the anti-alienation provision, it would not have included transfers of pension benefits between ex-spouses in the QDRO exception.

Treasury's own regulation accords with this analysis. *See* 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (quoted at page 15, *supra*). The regulation does not refer to a third party or require that the waiving spouse affirmatively transfer

her interest in the pension benefit to a third party. Rather, it requires, in the passive voice, only that "a party acquire[ ] from a . . . beneficiary a right or interest enforceable against the plan in . . . any part of a plan benefit payment which . . . may become . . . payable to the beneficiary." Accordingly, the government misreads the unambiguous text of the regulation in arguing that the waiver itself must "*direct* an interest from the beneficiary to any other individual." U.S. Am. Br. 19 (emphasis in original).

The government asserts that the anti-alienation provision is not applicable if the waiving spouse's interest "reverts to the [plan] participant." U.S. Am. Br. 12, 14, 19. This is incorrect. To begin with, it has no relevance to this case because a death benefit cannot revert to the participant.

Furthermore, the Treasury regulation does not refer to – let alone exclude – reversions. Quite the opposite, the regulation on its face is broad enough to encompass a reversion. Calling the transfer a reversion does not alter the reality that a property settlement in a divorce involves the waiving spouse's purported exchange of her interest in the pension benefit to the participant spouse in return for other assets, and that constitutes an "assignment" or "alienation." As Judge Becker explained:

> Rosemary's waiver was more than a renunciation of her right to benefits under the plan; rather, it was an attempt to transfer her interest in the plan to McGowan . . . . *[N]othing in the anti-alienation provision*

> . . . *excepts transfers from plan beneficiaries to plan participants* . . . . The purported waiver in this case fits squarely within the definition of assignment or alienation as an "indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan."

McGowan, 423 F.3d at 251 (Becker, J., concurring).

(c) The government's position in its amicus brief is not entitled to controlling deference.

The United States asserts that the position taken in its *amicus* brief is entitled to "controlling" deference as a "reasonable interpretation" of Treasury's anti-alienation regulation under *Auer v. Robbins*, 519 U.S. 452, 462 (1997). *See* U.S. Am. Br. 20.

The Court need not address the deference issue. The preceding arguments demonstrate that the government's brief is inconsistent with the statute and the plain language of the regulation. Such positions do not warrant deference. *See Auer*, 519 U.S. at 461; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987).

If the Court reaches the issue, the government's *amicus* brief is not entitled to controlling deference under *Auer*:

- The key phrase in the regulation on which the government relies is "assignment and alienation." The government, however, neither claims nor has "expertise and experience" to interpret those legal terms. *Gonzales*

v. Oregon, 546 U.S. 243, 757 (2006). Instead, the government's brief largely consists of legal analysis of the meaning of those words at common law; such legal arguments have no right to controlling deference. *See Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978) ("[w]hen the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required").

• Because the crucial phrase "assignment and alienation" in the regulation is taken directly from the statute, it "does little more than restate the terms of the statute itself," and such "parroting" is not entitled to controlling deference under *Auer*. *See Gonzales*, 546 U.S. at 257. *See also Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2370 (2008).

• The regulation does go beyond the statute in its express recognition that "indirect" as well as "direct" arrangements are prohibited by the anti-alienation provision. As the *amicus* brief makes clear, however, it is the "assignment and alienation" language, not the "indirect arrangement" phrase, on which the government rests its position. Indeed, as explained above, the government's position ignores the critical words "direct or indirect."

• As the government itself acknowledges, its *amicus* brief in this case is inconsistent with the position it took in *Keen v. Weaver*, 121 S.W.3d 721 (Tex.), *cert. denied*, 540 U.S. 1047 (2003). Controlling deference is not due if the interpretation does not represent a "consistent view" and was "contrary to the . . . view . . .

advocated in past cases." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). *See also Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994).[3]

(d) The purported waiver in the divorce decree is not a valid disclaimer.

The government's submission appears in large part to be an attempt to protect disclaimers under the Internal Revenue Code from any adverse consequences if the Court affirms the anti-alienation holding of the Fifth Circuit. This case, however, will not affect such disclaimers.

As the United States explains (U.S. Am. Br. 16-17), an Internal Revenue Service General Counsel Memorandum has concluded that the anti-alienation provision does not apply to a disclaimer that meets the requirements of state law and Section 2518(b) of the Internal Revenue Code, and the Code and Treasury regulations provide for the disclaimer of benefits for tax purposes. *See* I.R.S. Gen. Couns. Mem. 39,858, 1991 WL 776304 (Sept. 23, 1991); 26 U.S.C. § 2518; 26 C.F.R.

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[3] The *amicus* brief also is inconsistent with the position taken by the government in the Supreme Court of Washington on remand from this Court in *In re Estate of Egelhoff*, No. 67626-7 (Wash. 2001). There, the government acknowledged both that (1) "[i]f a domestic relations order fails to meet these specific requirements [for a QDRO], the plan may not honor the order's directions without violating ERISA's anti-alienation prohibitions," and (2) "waiver of pension benefits is generally impermissible under the statute." Brief of the Sec'y of Labor as *Amicus Curiae* at 4-5.

§ 1.401(a)(9)–4, Q&A 4. This conclusion reflects the longstanding and common-sense proposition that "[t]he law is certainly not so absurd as to force a man to take an estate against his will." John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 316 (1979), quoting *Towson v. Tickell*, 106 Eng. Rep. 575, 576-77 (K.B. 1819).

The Solicitor General emphasizes that a valid disclaimer is not subject to the anti-alienation provision. Respondents agree that the disclaimer addressed by the General Counsel Memorandum would not violate the anti-alienation provision. However, the purported waiver in this case would not qualify as a disclaimer.

Under both tax and common law, a disclaimer is valid only if it puts the disclaimant in the same position she would have been if she had not received any interest in the benefit. In particular, the disclaimant must receive nothing in return for the putative disclaimer.[4] If the disclaimant receives consideration in exchange for the disclaimer, her position is different from what it would have been if she never had a right to the benefit being disclaimed, and the disclaimer would constitute an alienation. *See* 26 U.S.C. § 2518(b)(3); 26 C.F.R. § 25.2518-2(d)(1).

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[4] *Roseberry v. Moncure* 429 S.E.2d 4, 6 (Va. 1993); *Smith v. Bank of Del.*, 219 A.2d 576, 577 (Del. 1966); *Preminger v. Union Bank & Trust Co.*, 220 N.W.2d 795, 798-99 (Mich. Ct. App. 1974); 4 William L. Fratcher & Austin W. Scott, The Law of Trusts § 337.1 (4th ed. 1989); Restatement (Second) of Trusts § 36, cmt. c (1959).

A purported waiver in a divorce decree cannot be a qualified disclaimer because the disclaimant is not left in the same position she would have been in if she never had a right to the benefit being disclaimed. Not only is the divorce itself consideration for the purported disclaimer, but a disclaimer of pension plan benefits as part of a divorce property settlement invariably involves an exchange for other assets.[5] And, of course, Liv never characterized or couched her purported waiver as a disclaimer under the Code. Accordingly, the divorce decree cannot be treated as a valid disclaimer, and rejecting petitioner's claim for benefits would not cause a valid disclaimer under the tax code to violate the anti-alienation provision.

ii. *The purpose and history of the anti-alienation provision confirm that Liv's purported waiver is prohibited under ERISA.*

The purpose and legislative history of the anti-alienation provision confirm that a pension plan cannot recognize a purported waiver of pension benefits in a

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[5] *See*, *e.g.*, *Clay v. Clay*, No. 06 BE 40, 2007 WL 2582211, at *4 (Ohio Ct. App. 7th Dist. Sept. 7, 2007) (divorce decree may "designat[e] other marital assets to offset the value of the pension, or [require] one party to pay the equivalent value of those benefits or assets to the other party"); 2 Grace Gans Blumberg, *et al.*, Valuation and Distribution of Marital Property § 23.02[4][c] (2008) (court may award entire pension to participant and award "offsetting assets" to other spouse); Anne E. Moss, Your Pension Rights at Divorce: What Women Need to Know 40 (2d ed. 1995) (wife may receive "a share of the pension or other property in exchange for the pension").

non-qualified divorce decree. As this Court has recognized, the anti-alienation provision "'bespeak[s] a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.'" *Boggs v. Boggs*, 520 U.S. 833, 851 (1997) (citation omitted).

The legislative history reflects this congressional policy. As originally enacted in 1974, the anti-alienation provision was designed to ensure that pension "benefits are actually available for retirement purposes." H.R. Rep. No. 93-779, at 66, (1974); H.R. Rep. No. 93-807, at 68 (1974). Congress fully adhered to this policy in enacting the QDRO provision in REA. Indeed, it had a broad understanding of the anti-alienation prohibition: "ERISA prohibits pension benefits from being assigned or alienated (*i.e.*, *giving away rights to future pension benefits*)." H.R. Rep. No. 98-655 (pt. 1), at 30 (1984) (emphasis added).

Thus, Congress intended the anti-alienation provision to prevent a participant or beneficiary from trading future pension benefits for an immediate advantage or gain. This case falls squarely within that congressional proscription: Liv's purported waiver in the non-qualified divorce decree gave her the present benefits of the property specified in the decree in exchange for her interest in future pension benefits.

iii. *The more persuasive lower-court decisions hold that ERISA prohibits pension-benefit waivers in non-qualified divorce decrees.*

The more recent and better reasoned decisions of the courts of appeals support respondents' position that the purported waiver of pension benefits in a non-qualified divorce decree is barred by the anti-alienation provision. The panel below unanimously so held, distinguishing its prior decisions (many of which petitioner continues to cite in this Court) involving insurance benefits on the ground that the anti-alienation provision does not apply to such welfare plans. The Third Circuit reached the same conclusion in *McGowan*, 423 F.3d at 248-50; *id*. at 251-53 (Becker, J., concurring).

The leading decision rejecting this anti-alienation argument is *Fox Valley*, which was followed in *Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78 (4th Cir. 1996).[6] This line of decisions rests on two predicates that are incorrect as a matter of law.

First, these decisions reason that the anti-alienation provision applies only to participants and not to beneficiaries. *See Fox Valley*, 897 F.2d at 279; *Altobelli*, 77 F.3d at 81. That ruling is not supported by § 206(d), which applies without limitation to any assignment or alienation. Nor is it supported by the relevant Treasury regulation, which, contrary to those courts' analysis,

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[6] *See also Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320 (Neb. 2005); *Keen v. Weaver*, *supra*; *Silber v. Silber*, 786 N.E.2d 1263 (N.Y.), *cert. denied*, 540 U.S. 817 (2003).

expressly refers to both "beneficiar[ies]" and "participant[s]." *See* 26 C.F.R. § 1.401(a)-13(c)(1)(ii).

Furthermore, these decisions cannot be squared with the decisions of this Court. *Boggs*, after summarizing the Court's earlier opinions that ERISA generally protects beneficiaries as well as participants (520 U.S. at 845), held that the anti-alienation provision applies to both "participants and beneficiaries." *Id.* at 852. *See also id.* at 864 (Breyer, J., dissenting). Thus, as all three judges in *McGowan* agreed, *Boggs* rejects the reasoning of *Fox Valley*. *See* 423 F.3d at 248, 253 (Becker, J., concurring), 258 (Fuentes, J., dissenting).[7]

Second, the *Fox Valley* line of cases holds that a purported waiver of pension benefits in a non-qualified divorce decree is not an "assign[ment]" and therefore is not subject to the anti-alienation provision. *See Fox Valley*, 897 F.2d at 279-80; *Altobelli*, 77 F.3d at 81. As demonstrated above, that conclusion is wrong and was correctly rejected by the Fifth Circuit in this case and the Third Circuit in *McGowan*.[8]

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[7] Petitioner contends (Pet. Br. 37-38) that the Seventh Circuit adhered to *Fox Valley* subsequent to *Boggs* in *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003). *Melton*, however, involved a welfare rather than a pension plan, and therefore the anti-alienation provision was not at issue.

[8] Moreover, those cases did not consider the additional arguments presented at pages 47-52, *infra*.

b. *In the context of marital dissolution, a QDRO is the only valid way under ERISA that a divorcing spouse can relinquish pension benefits for which she is the designated beneficiary.*

As shown above, ERISA's anti-alienation and QDRO provisions prohibit a pension plan from recognizing a purported waiver of pension benefits in a non-qualified divorce decree. Where a divorcing spouse has been designated by her spouse as his beneficiary under a pension plan in which he participates, she can give up those rights in the divorce proceeding only by means of a valid QDRO. Thus, the Fifth Circuit correctly held that "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision." Pet. App. 10 (emphasis in original). *See also Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 423 F.3d 1091, 1099 (9th Cir.) (QDRO "is the exclusive override method, not merely illustrative"; rejecting argument that QDRO exception is not "exhaustive[ ]" but only "exemplifies one particular scenario"), *cert. denied*, 127 S. Ct. 86 (2006); *McGowan*, 423 F.3d at 250 ("Congress provided only one option to individuals in McGowan's position"); *id.* at 251-52 (Becker, J., concurring) ("Congress saw QDROs as the only means by which a participant or beneficiary could alienate his or her interest in the plan"); *Fox Valley*, 897 F.2d at 279 (QDRO constitutes the "only" exception where the anti-alienation provision is applicable).

To say that a QDRO was the only way Liv could relinquish her rights to the pension benefits in a divorce decree, however, does not mean that there were not other ways for the parties to achieve that objective if they desired. As stressed in the *amicus* briefs of the United States and AARP, William could have eliminated Liv's right to a death benefit under the SIP simply by submitting a beneficiary-designation form to the Plan at any time during the seven years between the divorce and his death – as in fact he did with respect to benefits under another DuPont plan (*see* page 9, *supra*), but not for the SIP.

Likewise, in contexts other than marital dissolution, Liv herself could have elected to forgo the pension benefit. As explained above, the anti-alienation provision does not bar a qualified "disclaimer," but a purported disclaimer is not qualified where, as in divorce cases, it is given in return for consideration. *See* pages 22-23, *supra*.

i. *ERISA's text and legislative history establish that a QDRO is the exclusive exception to the anti-alienation provision in divorce cases.*

As amended by REA, ERISA provides an express exception to the anti-alienation provision in the context of marital dissolution for a "qualified domestic relation order": "[The anti-alienation provision] shall apply . . . to a domestic relations order, except that [it] shall not apply if the order is determined to be a qualified domestic relations order." § 1056(d)(3)(A). A QDRO is

the only exception recognized by the statute in the context of divorce.

The anti-alienation provision makes plain that a plan administrator *must* pay pension benefits in accordance with a QDRO but *may not* pay them pursuant to a non-qualified divorce decree. Section 1056(d)(3)(A) expressly states that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." Thus, a plan administrator is obligated to pay pension benefits in compliance with a valid QDRO.

By contrast, the preceding sentence in § 1056(d)(3)(A) explicitly directs that the anti-alienation provision "shall apply to . . . any benefit payable . . . *pursuant to a domestic relations order, except that [it] shall not apply if the order is determined to be a qualified domestic relations order*" (emphasis added). Moreover, Section 1056(d)(3)(H)(iii)(I) states that "[i]f it is determined that the order is not a qualified domestic relations order, . . . the plan administrator *shall pay* the . . . [benefits] to the person or persons who would have been entitled to such amounts *if there had been no order*" (emphasis added). Hence, the anti-alienation and QDRO provisions prohibit payment of pension benefits pursuant to a divorce decree that is not a QDRO.

The legislative history confirms that the statute means what it says. The history underscores Congress's awareness that the QDRO provision embodies "[s]pecial [r]ules in [d]ivorce, etc. [p]roceedings." H.R. Rep. No. 98-655 (pt. 1), at 39. As the Senate Report unambiguously states, the anti-alienation provision was

"clarified by creating *a limited exception* that permits benefits under a pension, etc., plan to be divided *under certain circumstances*. In order to provide rational rules to plan administrators, the Committee believe[d] it [was] necessary to establish guidelines for determining whether *the exception* to the spendthrift rules applies." S. Rep. No. 98-575, at 19 (1984) (emphasis added). Tellingly, the Report explains in unmistakable terms that the distribution of pension benefits in a divorce decree "is not considered an assignment or alienation of benefits under the plan *if and only if the order is a qualified domestic relations order*." *Id.* (emphasis added). The House Report is to the same effect: "the bill makes clear that the orders [in a divorce case] *have to meet* specific requirements [of a QDRO] if they are to be honored by the plan." H.R. Rep. No. 98-655 (pt. 1), at 39 (emphasis added).

Furthermore, the legislative history also makes clear that Congress purposely confined the exception to the anti-alienation provision to QDROs in order to limit the burden on plan administrators and ensure the practical workability of pension plans. By "mak[ing] clear that the [domestic relations] orders have to meet specific requirements if they are to be honored by the plan," Congress explicitly sought to "minimize the burden on the plan and eliminate any confusion over what the court is ordering." H.R. Rep. No. 98-655 (pt. 1), at 39. Thus, while Congress wanted to increase pension protections, "[i]mportantly, we want to achieve these aims *without imposing unnecessary or unreasonable costs o[n] pension plans*." *Id.* at 25 (emphasis added). Because the specific statutory criteria for QDROs ensure that the proposed order submitted to the plan administrator

provides on its face the necessary information for the administrator to determine whether it is qualified (*see* page 5, *supra*, and page 57-58, *infra*), QDROs are much easier for plan administrators to process and thus avoid the difficulties and burdens associated with non-qualified orders.

> The general goals of ERISA are served . . . [by the QDRO provision] because a divorce decree meeting the requirements contained in section 1056(d) provides all the necessary information to determine the identity of a beneficiary without creating unreasonable administrative burdens for the plan administrator.

Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1120 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991). *See also*, *e.g.*, *Hamilton*, 433 F.3d 1096-97.

As Congress understood, efficiency and administrability are critical to the sound operation of the pension system. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 149 n.3 (2001) (referring to ERISA's central "objective of efficient plan administration"). Plan administrators typically are not lawyers, and the pension system could not effectively operate if advice of counsel routinely had to be sought to process claims. *See Boggs*, 520 U.S. at 853 ("Congress could not have intended that pension benefits from pension plans would be given to accountants and attorneys" to administer). Furthermore, the need for efficiency and simplicity is underscored by the fact that "[p]ension plans are high-volume operations." *Blue v. UAL Corp.*, 160 F.3d 383, 386 (7th Cir. 1998). Accordingly, Congress predicated

ERISA on "unyielding rules" rather than "flexible standards" in order to "yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting).

Non-qualified orders present a problem similar to that in *Egelhoff*. Such orders are entered by courts across the country based upon state law. They may include terms of art under state law or otherwise reflect state-law principles and requirements. Unlike QDROs, non-qualified orders are not required to adhere to prescribed, uniform standards. The administrator of a plan covering employees and retirees living in various states across the country has no feasible way to analyze such divergent orders. *See Egelhoff*, 532 U.S. at 148, 149-50 (variant state law "interferes with nationally uniform plan administration" and "undermine[s] the congressional goal of 'minimiz[ing] the administration and financial burden[s]' on plan administrators") (citation omitted).

This case illustrates these difficulties. Although petitioner contends that the divorce decree "waived" Liv's pension benefits, that word nowhere appears in the decree; rather, it uses the term "divested." It would be impossible for an administrator to divine accurately the meaning to ascribe to that choice of language. Furthermore, while the divorce awarded the SIP account to William, it did not say anything that would have precluded him from maintaining Liv as his beneficiary. *See Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989) (divorce decree providing that

ex-husband "shall have as his own, free and clear of any interest of [his ex-wife], the interest in the profit-sharing plan," did not waive ex-wife's right to death benefits because the decree did not "specifically refer to and modify the beneficiary interest"). Thus, even after a time-consuming and costly process to attempt to interpret the divorce decree, the Plan would be left to speculate what the decree means.

By contrast, the QDRO provision provides an orderly and consistent framework for plan administrators. When a proposed QDRO is submitted to the administrator, it can be compared to the detailed requirements specified in the statute. This process enables administrators to identify and discuss with the parties any deficiencies or ambiguities that need to be corrected for the order to be qualified; in practice, many proposed orders are initially defective, and discussions occur to remedy those problems. All of this takes place without the expense, delay, and uncertainty of litigation.

Petitioner asserts, however, that for two reasons "ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits." Pet. Br. 25. First, she contends that the QDRO provision is merely a "safe harbor" (*id.* at 25, 30) that, while "[s]erv[ing] as *one* exception to ERISA's general prohibition on alienation or assignment of benefits" (*id*. at 26 (emphasis in original)), permits other exceptions not contained in the statute.

ERISA cannot reasonably be read to mean that the carefully enacted and detailed QDRO provision is merely illustrative and leaves open, without so much as a mention in the text or history, alternative extra-statutory exceptions

to the general anti-alienation prohibition. Indeed, the statute and history refute petitioner's position. As explained above, the QDRO provision states not only that the anti-alienation prohibition "shall apply" to a domestic relations order that is not a QDRO, but also that, if an order is not a QDRO, "the plan administrator *shall pay . . . [the benefits] to the person or persons who would have been entitled to such amounts if there had been no order*" (emphasis added). Likewise, Congress clearly indicated that QDRO provides "a *limited exception* . . . under certain circumstances"; that divorce decrees "*have to meet* specific requirements [of a QDRO] if they are to be honored by the plan"; and that a division of pension benefits in a divorce decree is "not considered an assignment or alienation under the plan *if and only if the order is a qualified domestic relations order*" (emphasis added). ERISA thus forecloses the availability of non-statutory exceptions to the anti-alienation provision beyond the express QDRO exception Congress adopted.

Second, petitioner argues that the QDRO provision will not bear this meaning because it merely "'*clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA.'" Pet. Br. 29, quoting S. Rep. No. 98-575, at 3 (emphasis added by petitioner). But the word "clarifies" does not support petitioner's position.

In enacting REA, Congress recognized that "[t]he courts [were] divided on the question of whether [ERISA's] anti-assignment clause applies to State domestic relations orders." H.R. Rep. No. 98-655

(pt. 1), at 30. Congress resolved that conflict by adopting an express exception for QDROs but not for non-qualified orders. In this way, Congress "*clarified . . . [the law] by enacting a limited exception* that permits benefits under a pension plan . . . to be divided under certain circumstances [specified in the QDRO provision]." S. Rep. No. 98-575, at 19 (emphasis added). *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988) (because "Congress thought that some courts had erroneously construed [the statute], . . . the 1984 amendment served the purpose of correcting the error, thus clarifying the original meaning of [the statute]").[9]

Thus, petitioner is incorrect that the QDRO amendment was simply a non-substantive or insignificant "clarification."

ii. ***Courts cannot create common law where Congress has addressed the issue in the statute.***

Because ERISA addresses the issue of purported waivers of pension benefits in divorce decrees and prohibits them absent a QDRO, petitioner's argument that federal common law permits a waiver contained in a non-qualified order is meritless. There is no basis for federal courts to create an exception to anti-alienation for non-qualified domestic relations orders.

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[9] Petitioner relies (Pet. Br. 29-30) on pre-REA cases, but Congress rejected those decisions in adopting the QDRO approach. *See Fox Valley*, 897 F.3d at 278-79; *Silber*, 786 N.E.2d at 1267.

As this Court has explained, "ERISA is . . . a 'comprehensive and reticulated statute' " *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993), quoting *Nachman v. PBGC*, 446 U.S. 359, 361 (1980). Where an explicit provision of ERISA addresses an issue, the Court has been unwilling to read additional terms into the statute. *See*, *e.g.*, *Harris Trust & Serv. Bank v. Salomon Smith Barney*, *Inc.*, 530 U.S. 238, 247 (2000); *Mertens*, 508 U.S. at 254; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

These principles are fully applicable here. "[T]his Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, *declining to recognize any implied exceptions to the broad statutory bar*." *Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (emphasis added). Section 1056(d) "reflects a considered congressional policy choice," and "courts should be loath to announce . . . exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 376 (1990). Thus, the QDRO exception to the anti-alienation provision "is not subject to judicial expansion" or "amenable to . . . sweeping extratextual extension." *Boggs*, 520 U.S. at 850-51. "If exceptions to this policy are to be made, it is for Congress to undertake that task" – as indeed Congress did in REA where it "mandated that the anti-alienation provision should not apply to a 'qualified domestic relations order.'" *Guidry*, 493 U.S. at 376 & n.18.

Federal common law provides no basis for the courts to create legal rules that are inconsistent with the statutory enactments of Congress. As in other areas, federal common law under ERISA is appropriate only to "fill . . . [a] gap" in the statute. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989). *See also Yates v. Hendon*, 541 U.S. 1, 16 & n.5 (2004). "Federal common law is a 'necessary expedient' " where the courts are "compelled to consider federal questions 'which cannot be answered from federal statutes alone.' . . . [W]hen Congress addresses a question . . . the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (citation omitted). In no event is "[t]he authority of courts to develop a 'federal common law' under ERISA . . . the authority to revise the text of the statute." *Mertens*, 508 U.S. at 259.

Petitioner's argument runs afoul of these governing principles. She asks the Court to create a new ERISA concept – a waiver of pension benefits in a divorce decree that is not a QDRO – even though ERISA's anti-alienation and QDRO provisions provide that a plan *cannot* follow a non-qualified domestic relations order. Thus, the statute leaves no gap on this issue that federal common law may appropriately fill in.[10]

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[10] In addition, as the United States demonstrates, courts recognizing the validity of common-law waiver have come to quite different results regarding what language in a decree constitutes an effective waiver, often reaching opposite conclusions on indistinguishable language. *See* U.S. Am. Br. 27 n.9. This is directly contrary to Congress's design that ERISA plans be administered on a uniform nationwide basis. *See Egelhoff*, 532 U.S. at 148.

Faced with these settled principles, petitioner resorts to three arguments. First, she contends (Pet. Br. 43) that the Court should create a federal common law of waiver in non-qualified divorce decrees in order to effectuate the assumed intent of the divorcing parties. Contrary to petitioner's assumption (*id*. at 58-59), however, there is no way to determine the intent of the parties without litigation. Indeed, ex-spouses can remain on good terms following a divorce, and the plan participant might not have changed the beneficiary designation because he wanted the ex-spouse to receive the benefits even after the divorce. *See Keen v. Weaver*, 121 S.W.2d at 732-33 (Hecht, J., dissenting); U.S. Am. Br. 9; AARP Am. Br. 15.[11]

A central purpose of the QDRO provision is to facilitate payment of pension benefits without the delay, expense, and uncertainty caused by highly fact-intensive inquiries into the intent of the parties, the circumstances of their divorce, and their post-divorce relationship. Furthermore, this Court already has recognized that

[11] *See also National Auto. Dealers and Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496, 501 (8th Cir. 1996) (ex-spouses "'maintained an amicable relationship,'" and "after the divorce, [the ex-husband] maintained [the ex-wife] as the plan beneficiary"); *Fox Valley*, 897 F.2d at 277-78 (couple continued to live together for two years after divorce, and ex-wife believed that "even after the divorce, [the participant] intended for her to receive benefits from the Fund"); *id*. at 285 (Ripple, J., dissenting) (ex-wife "alleges that [the participant] made clear, both before and after the divorce, that he expected that the benefits would be payable to her"); *Stobnicki v. Textron, Inc*., 868 F.2d 1460, 1461 (5th Cir. 1989) (after divorce, couple lived together "in common law marriage" for 11 years until participant's death).

ERISA is not to be applied based on the likely intent of the parties. *See Egelhoff*, 532 U.S. at 147-48 & n.2; *id.* at 154 (Breyer, J., dissenting) (taking the position, rejected by the majority, that state law should be upheld because "it is designed to carry out . . . the employee's likely intention").

Second, petitioner argues (Pet. Br. 36, 40) that a decision not to recognize waivers in non-qualified divorce decrees would be inequitable and result in a windfall for the purportedly waiving spouse. This contention rests on the incorrect assumption above that plan administrators can determine what the parties intended and therefore whether more was received than contemplated.

But beyond that, this Court has rejected the idea that the provisions of ERISA should be bent to achieve what judges regard as fair and equitable. Neither the anti-alienation provision nor the QDRO provision is subject to "any generalized equitable exception" (*Guidry*, 493 U.S. at 376) even where "[t]he fairness of the [statute] might be debated" (*Boggs*, 520 U.S. at 854) or the result is "distaste[ful]" (*Guidry*, 493 U.S. at 377). Section 1056(d) "reflects a considered congressional policy choice" (*id.* at 376), and the Court "must respect its policy" (*Boggs*, 520 U.S. at 854). To the extent petitioner questions the wisdom of these ERISA provisions, that is a matter that "should be left to Congress." *Guidry*, 493 U.S. at 377.

Third, petitioner asserts (Pet. Br. 26, 28) that ERISA should be construed in light of its purpose to protect retirement benefits. ERISA, however, serves not one

but two purposes and reflects the balance that Congress struck between them: (1) to protect pension benefits, and (2) to minimize burdens on plan administrators and avoid unnecessary costs and delays. *See* pages 30-31, *supra*; *see also* pages 56-57, *infra*. Courts must respect that congressional balance. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). *See also*, *Ragsdale v. Wolverine World Wide*, *Inc.*, 535 U.S. 81, 94 (2002); *United States v. Kahn*, 415 U.S. 143, 151 (1974).

Furthermore, both petitioner and Liv claim a right to William's pension benefit. The exhortation to protect retirement benefits, therefore, does not resolve this dispute.

Finally, as a matter of statutory construction, this Court has rejected the argument that ERISA's general purpose overrides the express provisions Congress enacted into law:

> In the last analysis, petitioners and the United States ask us to give a strained interpretation to [the statute] in order to achieve "the purpose of ERISA to protect plan participants and beneficiaries." . . . *[V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text* regarding the specific issue under consideration.

Mertens, 508 U.S. at 261-62 (emphasis added).

Although petitioner's claim against the Plan under ERISA must fail, she might have a cause of action against Liv (but not against the Plan) pursuant to state law to recover the amount of the benefits after they were paid to Liv. Under petitioner's view, Liv waived her right to William's pension benefit in the divorce decree. While ERISA prohibits a plan administrator from recognizing that purported waiver, it is possible that state law would allow an action by petitioner against Liv to enforce the property settlement on non-ERISA grounds such as, *e.g.*, breach of the contract between Liv and William for which petitioner is a third-party beneficiary, unjust enrichment, or violation of the state court's divorce order.

ERISA's anti-alienation provision would not prevent petitioner from recovering against Liv on such a claim. *See* AARP Am. Br. 16. That provision applies only to a plan. *See* § 1056(d)(1); 26 C.F.R. § 1.401(a)–13(c)(1)(ii). Thus, courts have recognized that ERISA's anti-alienation prohibition applies only before, and not after, pension benefits are paid. *See*, *e.g.*, *Boggs*, 520 U.S. at 852 (anti-alienation provision applies to "undistributed pension benefits"); *id.* at 862 (Breyer, J., dissenting); *Mackey*, 486 U.S. at 836 ("Section [1056(d)(1)] bars the assignment or alienation of pension plan *benefits*, and thus prohibits the use of state enforcement mechanisms *only insofar as they prevent those benefits from being paid to plan participants*") (second emphasis added).[12]

[12] Five circuits have held that the anti-alienation provision applies only to benefits not yet paid by the plan. *See* *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 974 (6th Cir. 2006),

(Cont'd)

In this regard, the ERISA anti-alienation provision differs from, and is narrower than, the anti-alienation section in other federal statutes.[13]

Accordingly, ERISA's anti-alienation provision does not preclude a claimant like petitioner from suing an ex-spouse like Liv on a theory of waiver to enforce her

(Cont'd)
cert. denied, 127 S.Ct. 2971 (2007); *Hoult v. Hoult*, 373 F.3d 47, 49-51 (1st Cir.) (collecting cases), *cert. denied*, 543 U.S. 1002 (2004). The Fourth Circuit alone has concluded that the anti-alienation provision continues to apply to annuity payments received after a participant reaches retirement age, but nevertheless agreed that the anti-alienation order applies to a lump-sum distribution like the one in this case. *United States v. Smith*, 47 F.3d 681, 682-84 (4th Cir. 1995).

[13] Congress knew how to draft an anti-alienation section that applies to benefits that have been distributed, but it did not do so in ERISA. Where Congress has intended the anti-alienation sections in other statutes to apply after distribution, the text of the statute makes that clear. For example, the Railroad Retirement Act, 45 U.S.C. § 231m(a), states that "no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 n.24 (1979) (holding that benefits are not community property and distinguishing the more limited scope of the ERISA provision). The Social Security Act, 42 U.S.C. § 407(a)(1), prohibits the attachment of "the moneys paid or payable" to the beneficiary. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973). The Veterans' Benefits Act, 38 U.S.C. § 5301(a), makes payments of benefits "made to, or on account of, a beneficiary . . . exempt from the claims of creditors . . . either before or after receipt of the beneficiary." *See Porter v. Aetna Casualty & Sur. Co.*, 370 U.S. 159 (1962)

interpretation of the divorce decree as a matter of state law in state court. Indeed, state courts have recognized such state-law claims and held that they are not barred by ERISA. *See*, *e.g.*, *Sweebe v. Sweebe*, 712 N.W.2d 708 (Mich. 2007); *Wichek v. Wichek*, 83 Pa. D. & C.4th 525, 2006 WL 5164943 (Pa. Com. Pl. Mar. 29, 2006); *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2005); *Sulzer v. Diedrich*, 664 N.W.2d 641 (Wis. 2003); *Brosamer v. Mark*, 561 N.E.2d 767 (Ind. 1990); *Hawxhurst v. Hawxhurst*, 723 A.2d 58 (N.J. Super. Ct. App. Div. 1998); *see also Brown v. Wright*, 511 F. Supp. 2d 850 (E.D. Mich. 2007). Such state-law litigation would allow the parties with a stake in the dispute to resolve their competing claims in a state-court forum without suing the plan.

c. *Petitioner's remaining arguments are without merit.*

Finally, petitioner raises a miscellany of arguments against the Fifth Circuit's decision. None of these arguments has merit.

Petitioner contends (Pet. Br. 55) that the decision below presents federalism issues and infringes on the authority of state law and state courts. As this Court has recognized, however, ERISA does not violate federalism principles. *See Egelhoff*, 532 U.S. at 151-52 & n.4; *Boggs*, *supra; see also Ridgeway v. Ridgeway*, 454 U.S. 46, 54 (1981); *Hisquierdo*, 439 U.S. at 581.

Petitioner also asserts (Pet. Br. 40, 57) that the decision below will invite improper forum shopping. This Court's decision, however, will be binding on federal and state courts alike and thus there will be no incentive to choose one court system over the other.

Petitioner next argues (Pet. Br. 65) that the Fifth Circuit's decision is incorrect in light of the availability of interpleader for plan administrators confronted with competing claims to benefits. However, interpleader is unavailable where a plan does not know that there are competing claimants because the non-qualified divorce decree (unlike a proposed QDRO) was not submitted to the plan before the payment of benefits to the designated beneficiary.

Furthermore, interpleader has no analytical bearing on the proper construction of ERISA. Even where interpleader is invoked, the court still would have to adjudicate the anti-alienation issue and interpret the non-qualified divorce decree in order to determine which claimant is the proper beneficiary; interpleader merely transfers responsibility for the decision from the plan administrator to a court. In this case, moreover, petitioner would have been no better off if the Plan had pursued interpleader.

In addition, interpleader is not an effective solution in ERISA cases. It entails significant legal costs for the competing parties and even for the interpleading plan.[14]

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[14] *See*, *e.g.*, *Rhoades v. Casey*, 196 F.3d 592, 595 (5th Cir. 1999) (plan administrator awarded legal fees of $24,000 in interpleader case where beneficiaries received $53,000), *cert. denied*, 531 U.S. 924 (2000); *Stobnicki*, 868 F.2d at 1464 ("[I]t will not take long to deplete a pension fund of some $72,000, so that the litigant declared the beneficiary by the court wins little more than a Pyrrhic victory. The victor, forced to pay attorney fees from the retirement proceeds, will be left with little or nothing to live on"); *MacInnes v. MacInnes*, 677 N.W.2d 889, 897 (Mich. Ct. App. 2004) (Murphy, J., concurring) (interpleader actions are "burdensome to plan administrators").

It also can lead to significant delays in the distribution of benefits to the rightful claimant – a substantial disadvantage under a statute that is intended to protect retirement benefits that many people need to live on. In the end, these burdens of expense and delay are borne by the beneficiaries of the plan. As this Court explained in *Egelhoff:*

> If [plan administrators] decide to await the results of litigation before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty. . . . [L]et[ting] courts . . . settle the matter . . . [means] the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA's objective of efficient plan administration.

532 U.S. at 149 & n.3. Thus, "Congress could not have intended that pension benefits . . . [would routinely] entail complex, expensive, and time-consuming litigation." *Boggs*, 520 U.S. at 853.

Lastly, petitioner argues (Pet. Br. 22, 34-35, 39, 60-63) that a decision refusing to create a federal common law of waiver in divorce cases will mean that common law does not apply in other areas such as so-called "settlement" and "slayer" cases. Of course, these other questions are not presented here and need not be resolved in order to decide this case. But at all events petitioner's concerns are unfounded.

The disposition of this case critically involves the express QDRO provision that Congress enacted in the

marital-dissolution context. There is no comparable provision for "settlement" or "slayer" cases. Whether or not in those cases there is a gap in the statute that may appropriately be filled in by common law, no such gap exists in this case.

Nor will the analysis underlying the "settlement" and "slayer" cases be affected by the decision in this case. The leading "settlement" case is *Stobnicki*, *supra*, in which the Fifth Circuit held that the settlement of a good-faith dispute between competing claimants for pension benefits does not violate the anti-alienation provision. Central to that decision was the fact that the right to benefits was contested and therefore the settlement did not involve an assignment or alienation of benefits to which either party was entitled under ERISA. *See* § 1056(d)(1). Thus, in settling the controversy, neither of the claimants alienated his benefits, but rather each agreed that he was not entitled to the full amount initially claimed. *Stobnicki*'s reasoning, coupled with the obvious and substantial public interest in the settlement of litigation, makes that decision both readily explicable and entirely distinguishable. Indeed, the Fifth Circuit below concluded that its ruling in the present case is not inconsistent with its previous decision in *Stobnicki*. *See* Pet. App. 9.

Likewise, the "slayer" cases rest on a rationale that will be unaffected by the decision here. As the Court explained in *Egelhoff*, and as the United States agrees (U.S. Am. Br. 30-31), the "slayer" principle was settled law at the time Congress enacted ERISA and may not conflict with the statute:

> [T]he principle underlying the [slayer] statutes – which have been adopted by nearly

> every State – is well established in the law and have a long historical pedigree predating ERISA. . . . And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

532 U.S. at 152. *See also* U.S. Am. Br. 30 ("the proper approach would be to interpret that background ['slayer'] rule to be implicit in ERISA" rather than create federal common law).

Accordingly, as the Court concluded in *Egelhoff* (532 U.S. at 152), and as the government urges here (U.S. Am. Br. 30), the Court need not and should not resolve the "slayer" issue in deciding the present case.

2. Even if Liv's purported waiver is not an "assignment" or "alienation," the Plan could not recognize it under the anti-alienation provision.

As demonstrated above, Liv's purported waiver is an "assignment" or "alienation" subject to the anti-alienation provision. However, even if the Court disagrees with that argument, the Plan still could not recognize Liv's purported waiver.

Under ERISA, it is not a prerequisite to the applicability of the anti-alienation provision that the purported waiver be a common-law assignment. By the explicit terms of the statute, the anti-alienation provision applies to "the creation, assignment, or recognition" of a benefit under a non-qualified order. § 1056(d)(3)(A).

Here, at the least, the divorce decree includes a "recognition" of William's rights regarding the pension benefits. The decree not only "divested" Liv of such benefits but affirmatively "awarded" them to William. Pet. App. 64. For this reason, the anti-alienation provision barred the Plan from following the decree.

The government's position seeks to distort the statute by ignoring the critical text:

> Although Section 1056(d)(3)(A) provides that ERISA's anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," unless the order is a QDRO, *there is no reason to conclude that Congress intended by using the terms "creation" and "recognition" to expand the prohibition against "assignment" and "alienation" beyond its ordinary meaning*.

U.S. Am. Br. 13 (emphasis added). The United States thus improperly reads the otherwise unrestricted term "recognition" as if it did not exist. Contrary to the government's argument, the statutory language on its face is sufficiently clear and encompassing to render the anti-alienation provision applicable to the decree in this case.

B. The QDRO Provision Prohibits Pension Plans From Following Non-Qualified Domestic Relations Orders.

Wholly apart from the anti-alienation provision, the QDRO provision prohibits pension plans from paying benefits based on non-qualified domestic relations orders. Where an order is not qualified, a plan cannot follow it under ERISA.

Section 1056(d)(3)(H)(iii) provides that if an order is not qualified, "the plan administrator *shall pay* the . . . [benefits] to the person or persons who would have been entitled to such amounts *if there had been no order*" (emphasis added). Thus, "[a] plan *cannot* obey a court order that *is not* qualified." Moss, *supra*, at 86 (emphasis in original). Section 1056(d)(3)(I) provides that if a plan administrator, acting in accordance with ERISA's fiduciary standards, determines that an order is not qualified, payment under subparagraph (H) as if there had been no order discharges the plan's payment obligation. Conversely, if the order is qualified, "the plan administrator shall pay the . . . [benefits] to the person or persons entitled thereto [under the order]." § 1056(d)(3)(H)(ii).

Here, because the divorce decree was a non-qualified order, the QDRO provisions prohibited the Plan from following the order and required it to pay benefits as if there were no order. In accordance with

William's beneficiary designation, therefore, Liv was the rightful beneficiary.[15]

C. The Preemption Provision Bars Recognition Of A Purported Waiver In A Non-Qualified Divorce Decree.

ERISA's preemption provision also prevents a plan from recognizing a purported waiver of benefits in a non-qualified domestic relations order. Because ERISA preempts a divorce decree that, as here, is not a QDRO, the Plan correctly paid benefits to the designated beneficiary.

ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 1144(a). This Court has "observed repeatedly that this broadly worded provision is 'clearly expansive'" (*Egelhoff*, 532 U.S. at 146 (citation omitted)) and "was 'designed to establish pension plan regulation as exclusively a federal concern.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (citations omitted).

A state divorce decree is subject to ERISA preemption. For purposes of ERISA preemption, "State law" includes "decisions" or other "State action having

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[15] The government attempts to avoid this by arguing that a divorce decree is a domestic relations order only if it creates or recognizes the existence "of *an alternate payee's right*" to benefits. U.S. Am. Br. 13, quoting § 1056(d)(3)(B)(i)(I). But "alternate payee" appears only in the definition of a "*qualified* domestic relations order"; the definition of "domestic relations order" does not refer to that term. § 1056(d)(3)(B)(ii).

the effect of law." § 1144(c)(1). Thus, "Congress used . . . broad language in defining the 'State law' that would be pre-empted." *Ingersoll-Rand*, 498 U.S. at 138-39. This provision comfortably encompasses state divorce decrees. As the Court has observed, "a state divorce decree, like any other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgeway*, 454 U.S. at 55.

Like the anti-alienation provision, the preemption provision contains an express exception for QDROs but not non-qualified orders. *See* § 1144(b)(7). Thus, non-qualified domestic relations orders are preempted by ERISA. *See Boggs*, 520 U.S. at 846-47 ("QDRO's, unlike domestic relations orders in general, are exempt from both the pension plan anti-alienation provision . . . and the general preemption clause").

The legislative history makes clear that *only* qualified domestic relations orders are excepted from preemption. The Senate Finance Committee explained "that conforming changes to the ERISA preemption provision are *necessary to ensure that only* those orders *that are exempted from the spendthrift provisions [i.e., QDROs] are not preempted by ERISA.*" S. Rep. No. 98-575, at 19 (emphasis added). As the Committee stated, a domestic relations order is excepted from the anti-alienation provision "*if and only if the order is a qualified domestic relations order*," and likewise a QDRO – and only a QDRO – is "exempt from federal preemption under ERISA." *Id.* (emphasis added).

Similarly, the House Report emphasized that the preemption section was being amended "to reflect the limited exception" for QDROs and only "to this limited extent." H.R. Rep. 98-655 (pt. 1), at 42. Thus, domestic relations orders "*have to meet* [the] specific requirements" for QDROs "*if they are to be honored by the plan*." *Id.* at 39 (emphasis added). Accordingly, "*except as expressly provided [for QDROs]*, *nothing in the bill is intended to limit or otherwise change the original broad intent behind ERISA's rule of preemption*." *Id.* at 42 (emphasis added).

Finally, the legislative record shows that Congress intended to preempt non-qualified domestic relations orders, and to exempt only QDROs from preemption, for the same reasons that it excepted only QDROs from the anti-alienation provision: to minimize the costs and burdens on covered plans in order to ensure the practical administrability of the plans. *See* pages 30-31, *supra*.

Under the foregoing principles, a state divorce decree is preempted under ERISA unless it is a QDRO. Because, as petitioner concedes, the Kennedys' divorce decree is not a QDRO, it is preempted, and the Plan could not follow it in paying the disputed pension benefits.

II. BECAUSE ERISA REQUIRES THAT A PLAN BE ADMINISTERED AND BENEFITS DETERMINED IN ACCORDANCE WITH THE PLAN DOCUMENTS, A PLAN CANNOT PAY BENEFITS PURSUANT TO A DIVORCE DECREE THAT IS NOT A QDRO.

As an alternative ground for affirmance, the judgment below should be upheld on the basis of the "plan documents" requirement of ERISA. It is well settled that "[t]he winning party below . . . can generally defend . . . the judgment in that party's favor on any ground properly raised in the court below . . . even though that court . . . ignored it." E. Gressman, *et al.*, SUPREME COURT PRACTICE § 6.26(c), at 465 (9th ed. 2007).

Respondents properly raised the "plan documents" argument in the court below. *See* DuPont Ct. of App. Br. 16-20, 30, 33-35; DuPont Ct. of App. Reply Br. 6-9. Likewise, they preserved it in their brief in opposition in this Court. *See* Br. in Opp. 13-14 & n.9. Moreover, although the Fifth Circuit did not address the "plan documents" issue here because it ruled in respondents' favor on the basis of the anti-alienation and QDRO provisions, the court has rejected that argument in other cases. *See* Pet. App. 5-7; *see also* Pet. 9-13.[16] Finally, in accordance with the usual procedure for a petitioner to address a respondent's alternative ground for affirmance, petitioner will be able to address the question in her reply brief.

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[16] Although those other cases involved, as the court below explained, welfare plans rather than pension plans, the "plan documents" requirement (unlike the anti-alienation provision) applies equally to both types of plans.

Respondents therefore agree with the Solicitor General that the Court should consider the "plan documents" issue without remanding the case to the court of appeals for a decision of the question in the first instance.

A. Under ERISA, Plans Must Be Administered In Accordance With The Terms Of The Plan Documents.

As the United States and AARP agree, ERISA's "plan documents" requirement fully supports the judgment below. As the government explains:

> A rule that would require plan administrators to recognize a waiver contained in a state-divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, and thus allow the decree to trump the beneficiary designated according to the plan, would conflict with the plan administrator's duties under ERISA and would undermine the principles of plan administrability that underlie the statute.

U.S. Am. Br. 25.

Under ERISA's "plan documents" provisions, a plan must be administered in accordance with the terms of the plan documents, including those governing beneficiary designations. Here, William designated Liv to be his beneficiary under the SIP and – although he could have done so by submitting a form at any time during the seven years between the divorce and his death – he never changed his designation. Because Liv

was the designated beneficiary pursuant to the terms of the Plan, and because the Kennedys' divorce decree was not a QDRO, payment to petitioner based on the non-qualified decree would have been inconsistent with the Plan and therefore was precluded by ERISA. *See McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("[a] plan participant is the master of his own ERISA plan").

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). The written instrument must "specify the basis on which [benefit] payments are made . . . from the plan" (§ 1102(b)(4)), and the administrator must make payments to the "'beneficiary' . . . designated by a participant, or by the terms of . . . [the] plan" (§ 1002(8)). And a plan administrator, acting as a fiduciary, must "discharge his duties . . . in accordance with the documents and instruments governing the plan." § 1104(a)(1)(D).

The "plan documents" requirement serves two principal purposes.

1. First, the "plan documents" requirement protects the interests of participants and beneficiaries. It ensures "'that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'" *Curtis-Wright Corp. v. Schoenejongen*, 514 U.S. 73, 83 (1995), quoting H.R. Rep. No. 93-1280, at 297 (1974). "[T]he payment of benefits . . . [is] a central matter of plan administration" (*Egelhoff*, 532 U.S. at 148), and the ERISA "scheme . . . is built around reliance on plan documents" (*Curtis-Wright*, 514

U.S. at 83). Thus, rightful beneficiaries are correctly determined and promptly paid.

2. Second, the "plan documents" requirement "enables plan administrators . . . [to] manage the plan on a day-to-day level" in a practical and efficient manner. *Curtis-Wright*, 514 U.S. at 82. "The most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). This is crucial to the workable operation of the benefit system.

The legislative history reflects this congressional policy. Congress recognized that employee benefit plans are not mandatory but rather are optional at the election of the employer. *See* H.R. Rep. No. 93-807, at 8, 14; H.R. Rep. No. 93-533, at 1, 9 (1973). Thus, Congress expressed concern that the costs of financing and administering a benefit plan could deter the establishment and growth of plans, and it understood the need to "strike a balance" between providing meaningful reform and keeping costs within reasonable limits." H.R. Rep. No. 93-807, at 15. Congress therefore "weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits." H.R. Rep. No. 93-779, at 2. *See Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2314 (2007) (benefit plans are voluntary); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (there is a "'public interest in encouraging the formation of employee benefit plans'") (citation omitted).

This Court has recognized "the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators." *Egelhoff*, 532 U.S. at 149-50, quoting *Ingersoll-Rand*, 498 U.S. at 142. Congress thus had "competing purposes": the "desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497. *See also Mertens*, 508 U.S. at 262-63 ("the text adopted by Congress has struck . . . the balance between th[e] competing goals . . . 'of benefiting employees and . . . of containing pension costs'") (citation omitted).

The "plan documents" requirement serves to ensure that administrators are able – efficiently, promptly, and correctly – to "make payments simply by identifying the beneficiary specified in the plan documents." *Egelhoff*, 532 U.S. at 148. For reasons of administrability, pension plans "rely heavily on forms, such as designations of beneficiaries." *Blue*, 160 F.3d at 385-86. The "plan documents" requirement manifests the importance of such forms under ERISA.

The QDRO provisions were designed to promote the same congressional policy of efficiency and simplicity through the same means of plan documents. As discussed above (*see* pages 30-31, *supra*), Congress enacted the QDRO provisions to require that plan administrators be furnished, in the proposed order itself, with all of the statutorily enumerated information necessary to determine whether the order is "qualified."

See Hamilton, 433 F.3d at 1097 (a QDRO must "'clearly contain[ ] the information specified in the statute that a plan administrator would need to make an informed decision'") (citation omitted). Thus, "Congress 'required that QDROs be specific and clear' because it was 'concerned with reducing the expense to plan providers.'" *Id.* at 1096-97 (citation omitted).

Furthermore, proposed QDROs are submitted to the plan administrator, and the administrator determines whether the order satisfies the statutory criteria to be a "qualified" order. *See* § 1056(d)(3)(G)(i)(II); *Hamilton*, 433 F.3d at 1097 & n.7; *Dorn v. International Bhd. of Elec. Workers*, 211 F.3d 938, 942, 943-44 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 783 (Easterbrook, J., dissenting). In this way, the plan "is on notice of its exact obligations" (*Hamilton*, 433 F.3d at 1097) to pay the alternate payee under a valid QDRO rather than the beneficiary designated by the participant on the plan form. Thus, QDROs further the congressional policy of "'protecting [plan administrators] from suits for making improper payments.'" *Id.* (citation omitted). In essence, a QDRO submitted to and approved by the plan becomes – like the completed beneficiary-designation form itself – a plan document. *See Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting); *Silber*, 786 N.E.2d at 1267; U.S. Am. Br. 25.

B. The Decisions That Have Rejected The "Plan Documents" Rule Are Incorrect.

The Sixth and Second Circuits, and the Michigan Supreme Court, have correctly adhered to ERISA's "plan documents" rule. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 420-21 (6th Cir. 1997); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993) (federal common law); *Sweebe v. Sweebe*, 712 N.W.2d 708, 711-14 (Mich. 2006). In addition, a number of judges have indicated their agreement with this argument. *See Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting); *Fox Valley*, 897 F.2d at 282, 283 (Easterbrook, J., dissenting); *id.* at 284 (Ripple, J., dissenting); *Strong*, 701 N.W.2d at 331 (Connolly, J., dissenting); *Keen*, 121 S.W.2d at 728 (Hecht, J., dissenting).

Admittedly, a majority of courts have held that a plan must recognize a waiver of benefits in a non-qualified divorce decree even if the plan documents designate a different beneficiary. *See* Pet. Br. 31-32 (collecting cases). These decisions, however, do not withstand scrutiny.

> [N]ot one of the courts in the majority has explained why the statutory analysis used by these courts adopting the plan-documents rule is flawed. . . . Because the waiver rule is based, at best, on throwaway, conclusory statements rather than a careful analysis of statutory language, . . . the fact that a majority of cases have adopted it is entitled to little weight.

Strong, 701 N.W.2d at 331 (Connolly, J., dissenting).

Those courts holding that plans must follow a purported waiver rather than the plan documents have stated that (1) ERISA already requires administrators to go beyond plan documents in paying benefits pursuant to a QDRO, and (2) following a non-qualified divorce decree imposes no greater burden on administrators than what Congress already has imposed in connection with QDROs. Both parts of this analysis are badly mistaken.

Payment of benefits under a QDRO is fully consistent with the "plan documents" requirement. ERISA expressly requires plans to "provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." § 1056(d)(3)(A). Because plans must provide for payment in accordance with QDROs, administrators are complying with rather than departing from the plan when they pay benefits pursuant to a QDRO.

These courts also are wrong that following non-qualified orders would impose no greater burden on plan administrators than do qualified orders. As explained above, the whole point of the QDRO provision is to *minimize* the burdens on plans. Following QDROs that conform to the strict requirements in the statute and are submitted to the plan is immeasurably easier than trying to follow non-qualified orders that need not comport with any legal standard (and in fact vary widely in content and form) and may not even be submitted until after benefits have been paid to the designated beneficiary. *See McGowan*, 423 F.3d at 247; U.S. Am. Br. 28. Furthermore, Congress itself, in enacting the QDRO provision, correctly recognized the enormous

difference between qualified and non-qualified orders and purposely limited the anti-alienation and preemption exceptions to QDROs precisely in order to avoid the vastly greater burdens that non-qualified orders would have on plans. *See* pages 30-32, *supra*; *Altobelli*, 77 F.3d at 83 (Wilkinson, C.J., dissenting) ("Congress was concerned with the very problems that face us here when it defined the requirements to establish a QDRO, and it took pains to ensure that enforcement of QDROs would not produce inefficiency and uncertainty").

ERISA therefore forecloses the analysis of those courts that have refused to follow the applicable plan documents. ERISA's "clear statutory command, together with the plan provisions, answer the question; the documents control, and those name [the ex-wife]." *McMillan*, 913 F.2d at 311-12. *See also Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting). As then-Chief Judge Wilkinson observed, "[w]hat seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate." *Id*. at 84 (dissenting opinion).

C. Under ERISA And The SIP Documents, The Plan Could Not Recognize The Purported Waiver In The Divorce Decree And Was Required To Pay Liv As The Designated Beneficiary.

Under the terms of the SIP, the Plan could not follow the purported waiver in the non-qualified divorce decree. Instead, it was required to pay William's account balance to Liv in accordance with his beneficiary designation.

The SIP documents are clear and not disputed by petitioner. The SIP entitled each participant to "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests . . . in case of his death." J.A. 48. The SIP also allowed him to "replace or revoke such designation." *Id.* Any designation, replacement, or revocation had to be made in the manner prescribed by the plan (*id.* at 52), and the company supplied forms for such purposes (*id.* at 34, 56-57). Moreover, the Plan's rules for paying benefits upon the participant's death were clearly communicated to employees in the Summary Plan Description: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. *See also* Summary Plan Description, p. 22 (D.I. 40, Ex. C, D0027) ("[g]enerally, plan benefits may be paid only to . . . your beneficiaries or survivors . . . [but] an exception to this may be made as a result of a qualified domestic relations order") (emphasis omitted).

Although he had ample opportunity, William never changed his beneficiary designation under the SIP. He did, however, make a post-divorce change in his beneficiary designation under the separate Pension and Retirement Plan (*see* page 9, *supra*), and thus was aware of his right to make such a change and the simple process for doing so.

Accordingly, the applicable plan documents obligated the Plan to pay William's SIP account balance to Liv as the designated beneficiary. Contrary to petitioner's contention, it would have violated ERISA for the Plan to disregard the beneficiary designated by William under the SIP. *See McMillan*, 913 F.3d at 312 ("it was [the participant's] designation which controls, not [his ex-wife's] intent").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX — RELEVANT STATUTORY PROVISIONS

Relevant Provisions of ERISA,
29 U.S.C. §§ 1001 *et seq.*

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee

organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits

of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of Title 26) making payments or supplements described in section 457(e)(11)(D)(i) of Title 26, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of Title 26) making payments of benefits described in section 457(f)(4)(A) of Title 26, shall, for purposes of this subchapter, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means 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.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam,

Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343)

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a

fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that—

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

*   *   *

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if

(A) under the plan, each participant—

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both),

(ii) if the participant elects a waiver under clause (i), may elect the qualified optional survivor annuity at any time during the applicable election period, and

(iii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless—

(A) (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits)

which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

(3)(A) Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of—

(i) the terms and conditions of the qualified joint and survivor annuity and of the qualified optional survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

(iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

(B)(i) Each plan shall provide to each participant, within the applicable period with respect to such participant (and consistent with such regulations as the Secretary may prescribe), a written explanation with respect to the qualified preretirement survivor annuity comparable to that required under subparagraph (A).

(ii) For purposes of clause (i), the term "applicable period" means, with respect to a participant, whichever of the following periods ends last:

(I) The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

(II) A reasonable period after the individual becomes a participant.

(III) A reasonable period ending after paragraph (5) ceases to apply to the participant.

(IV) A reasonable period ending after this section applies to the participant.

In the case of a participant who separates from service before attaining age 35, the applicable period shall be a reasonable period after separation.

(4) Each plan shall provide that, if this section applies to a participant when part or all of the participant's accrued benefit is to be used as security for a loan, no portion of the participant's accrued benefit may be used as security for such loan unless—

(A) the spouse of the participant (if any) consents in writing to such use during the 90-day period ending on the date on which the loan is to be so secured, and

(B) requirements comparable to the requirements of paragraph (2) are met with respect to such consent.

(5)(A) The requirements of this subsection shall not apply with respect to the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit,

as the case may be, if such benefit may not be waived (or another beneficiary selected) and if the plan fully subsidizes the costs of such benefit.

(B) For purposes of subparagraph (A), a plan fully subsidizes the costs of a benefit if under the plan the failure to waive such benefit by a participant would not result in a decrease in any plan benefits with respect to such participant and would not result in increased contributions from such participant.

(6) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(A) relying on a consent or revocation referred to in paragraph (1)(A), or

(B) making a determination under paragraph (2),

then such consent, revocation, or determination shall be treated as valid for purposes of discharging the plan from liability to the extent of payments made pursuant to such Act.

(7) For purposes of this subsection, the term “applicable election period” means—

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 180-day period ending on the annuity starting date, or

(B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

In the case of a participant who is separated from service, the applicable election period under subparagraph (B) with respect to benefits accrued before the date of such separation from service shall not begin later than such date.

(8) Notwithstanding any other provision of this subsection—

(A)(i) A plan may provide the written explanation described in paragraph (3)(A) after the annuity starting date. In any case to which this subparagraph applies, the applicable election period under paragraph (7) shall not end before the 30th day after the date on which such explanation is provided.

(ii) The Secretary of the Treasury may by regulations limit the application of clause (i), except that such regulations may not limit the period of time by which the annuity starting date precedes the provision of the written explanation other than by providing that the annuity starting date may not be earlier than termination of employment.

(B) A plan may permit a participant to elect (with any applicable spousal consent) to waive any requirement that the written explanation be provided at least 30 days before the annuity starting date (or to waive the 30-day requirement under subparagraph (A)) if the distribution commences more than 7 days after such explanation is provided.

§ 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and

is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term "qualified domestic relations order" means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order

(including approval of a property settlement agreement) which—

(I) 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, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee—

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin

under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term “earliest retirement age” means the earlier of—

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order—

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan—

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures—

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the

order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v)—

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subpara-graph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or

a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of Title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if—

(A) the order or requirement to pay arises—

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title], or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title] by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made—

(i) either—

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c) (2)(B) of this title), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if—

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

*   *   *

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary

> **(A)** by a person who is an employer or employee organization with respect to the plan or
>
> **(B)** by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and

administration of the plan (including any procedure described in section 1105 (c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105 (c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103 (c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107 (d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107 (d)(4) and (5) of this title).

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)

(A) Except as provided in subparagraph (B), nothing in this subchapter shall be

construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003 (a) of this title, which is not exempt under section 1003 (b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393–1 through 393–51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare

arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002 (1)

and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056 (d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169 (a)(2)(A) of this title), and the provisions of law referred to in section 1169 (a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

> **(A)** with respect to which the State exercises its acquired rights under section 1169 (b)(3) of this title with respect to a group health plan (as defined in section 1167 (1) of this title), or

> **(B)** for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137 (b) of this title) or any rule or regulation issued under any such law.