No. 07-636

In The
Supreme Court of the United States

KARI ELLEN KENNEDY, Independent Executrix of the Estate of William Patrick Kennedy, Deceased,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the American Benefits Council (the "Council"), The ERISA Industry Committee ("ERIC"), and the National Association of Manufacturers ("NAM") respectfully request leave of the Court to file the accompanying brief *amici curiae* in support of Respondents.

The Council is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 270 members, including E.I. du Pont de Nemours and Company ("DuPont"), are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

ERIC is a non-profit organization representing America's largest private employers, including DuPont, in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active and retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as

amended ("ERISA"), and other federal law. All of ERIC's members do business in more than one state, and many have employees in all fifty states.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers, including DuPont, in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Council, ERIC, and the NAM limit their *amicus* participation to cases that are of great significance to their member companies. This is such a case. The rule proposed by Petitioner – under which plan administrators would be required to recognize beneficiary waivers that are not contemplated in the applicable plan documentation – would wreak havoc on plan administration. Petitioner's rule would also impose enormous burdens and costs on plans and their participants and give rise to costly disputes, litigation, and the possibility of double payment of plan benefits. After a plan makes a payment to a beneficiary clearly designated pursuant to the plan document, other claims could be submitted based on extrinsic documents that could drag a plan into disputes and possibly force double payments. Such a system could well, in combination with other factors,

cause many employers not to maintain a retirement plan.

For these reasons, this case is of significant interest to the Council, ERIC, the NAM, and their member companies. The Council, ERIC, and the NAM provide a unique perspective that cannot be provided by the parties or by the other *Amici*. The three organizations are devoted to understanding and expressing the views and expertise of retirement plan sponsors across the country. No other party or *Amicus* can represent the retirement plan community in this comprehensive manner.

Respondents consented to the filing of this *amici curiae* brief, but Petitioner did not.

DATED: July 15, 2008

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans.[1] The Council's approximately 270 members, including E.I. du Pont de Nemours and Company ("DuPont"), are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

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[1] Respondents consented to the filing of this *amici curiae* brief, but Petitioner did not. Attached is a motion requesting leave of the Court to file this *amici curiae* brief. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and other federal law. All of ERIC's members do business in more than one state, and many have employees in all fifty states.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers, including DuPont, in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

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extrinsic documents that could drag a plan into disputes and possibly force double payments. Such a system could well, in combination with other factors, cause many employers not to maintain a retirement plan.

For these reasons, and others discussed herein, this case is of significant interest to the Council, ERIC, the NAM, and their member companies.

SUMMARY OF ARGUMENT

There are two distinct grounds on which the Fifth Circuit's judgment can and should be affirmed. First, the administrator of an ERISA plan is required by ERISA to pay benefits only to persons who are entitled to benefits pursuant to the plan document or ERISA.

The second argument on which the Fifth Circuit's judgment can be affirmed is that, pursuant to ERISA, a qualified domestic relations order ("QDRO") is the sole mechanism for the assignment of benefits in connection with a divorce or other marital dissolution. Thus, any benefit disbursements made pursuant to a domestic relations order that is not a QDRO ("non-qualified order") would violate ERISA's anti-assignment rule.

Any requirement that a plan be administered based on extrinsic documents not referenced in the plan documents would make ERISA plans extremely

difficult to administer. Moreover, any requirement based on extrinsic documents is inconsistent with ERISA and would thus undermine the congressional goals of "'nationally uniform plan administration'" and of "'minimiz[ing] the administrative and financial burden[s]' on plan administrators" with respect to ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148-50 (2001) (citations omitted).

For millions of American workers, ERISA plans provide a vital source of retirement income and death benefit coverage for their spouses and dependents. Given the important role that ERISA plans play in the lives of millions of America's families, the retirement plan system needs to continue to be improved by finding new and simpler ways for employers to provide retirement security for their employees. The rule proposed by Petitioner, however, would impose very large, new costs and burdens on plans. As companies determine whether to maintain existing plans or sponsor new ERISA plans, the costs and burdens imposed upon plans under Petitioner's rule would be one more factor militating against sponsorship or continued maintenance of ERISA plans.

Congress has provided a comprehensive, specific administrative regime regarding spousal rights and beneficiary designations with respect to ERISA plan benefits. Accordingly, it is clear that Congress did not intend for the courts to use their general powers to fashion a federal common law rule to require that plan administrators give effect to waivers based on extrinsic non-plan materials. Moreover, such a rule

would fly in the face of congressional intent that ERISA provide a clear mechanism for determining the payment of benefits.

ARGUMENT

The specific question before the Court is whether the Fifth Circuit was correct in concluding that a QDRO pursuant to section 206(d)(3)(B)(i) of ERISA is the only valid way a former spouse can waive his or her right to receive his or her former spouse's pension benefits from a plan.

As discussed below, we believe that a QDRO is the only valid way for a former spouse to waive his or her right to receive his or her former spouse's pension benefits from a plan. However, we think that there is a much more fundamental issue at stake, which provides an alternate means for affirming the Fifth Circuit's decision. ERISA requires plans to be administered based only on the written plan documents and other documents referenced therein. The Fifth Circuit's decision can and should be affirmed based on the application of this fundamental rule of ERISA.

Our argument below accordingly addresses both bases for affirming the Fifth Circuit's decision, starting with the more fundamental means of doing so.

I. REQUIRING PLAN ADMINISTRATORS TO RECOGNIZE WAIVERS BASED ON FEDERAL COMMON LAW WOULD UNDERMINE ERISA'S WRITTEN PLAN RULE AND THE IMPORTANT INTERESTS SUCH RULE SERVES.

ERISA requires that a plan be "maintained pursuant to a written instrument" and administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. §§ 1102(a), 1104(a)(1)(D). ERISA further requires that a plan "specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(b)(4). As the Court recognized in *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001), these requirements serve "[o]ne of the principal goals of ERISA," *i.e.*, to "enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits'" (citation omitted). Accordingly, the plan administrator is required by ERISA to pay death benefits only to a person who is (i) designated as a beneficiary pursuant to the plan document,[2] or (ii) deemed to be a beneficiary by operation of ERISA. To require a plan administrator to give effect to a designated beneficiary's waiver as a matter of federal common law would undermine the

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[2] A beneficiary may be designated pursuant to the plan document in several ways, such as (i) by a designation by a participant as provided in the document, (ii) by an express designation under the plan terms, or (iii) by a QDRO pursuant to the QDRO provision in a retirement plan.

rule in ERISA that plans be administered in accordance with written plan documents. As discussed below, any requirement that a plan be administered based on extrinsic documents not referenced in the plan documents would make ERISA plans very hard to administer.

A. THIS COURT HAS RECOGNIZED THAT ERISA REQUIRES THAT BENEFITS BE PAID TO BENEFICIARIES IN ACCORDANCE WITH THE TERMS OF THE WRITTEN PLAN DOCUMENT.

As this Court recognized in *Boggs v. Boggs*, 520 U.S. 837, 850-51 (1997), and *Egelhoff*, 532 U.S. at 147, the requirement that a plan be administered in accordance with the written plan terms also applies to beneficiaries. For purposes of ERISA, 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." 29 U.S.C. § 1002(8). In *Boggs*, the Court held that ERISA preempted a state community property law that allowed a non-participant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits to persons not otherwise designated as beneficiaries by the participant or under the terms of the written plan document. *See* 520 U.S. at 848-51. In so doing, the Court refused to, "through case law, create a new class of persons for whom plan assets are to be held and administered," in part

because "*[t]he statute is not amenable to this sweeping extratextual extension*." *Id.* at 850 (emphasis added).

Similarly, in *Egelhoff*, the Court held that a state law that automatically revoked certain spousal beneficiary designations following a divorce was preempted by ERISA, as applied to ERISA-governed plans. *Egelhoff*, 532 U.S. at 150. The Court reasoned that the law interfered with the statute's goal of "nationally uniform plan administration" because it required that plan administrators look beyond the terms of their plans to the laws of the fifty states to determine beneficiary status. *Id.* at 148-49. Accordingly, the Court recognized that unless preempted, the law would prevent plan administrators from making "payments simply by identifying the beneficiary specified by the plan documents," and "would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries." *Id.* at 148-50.

The reasoning applied by the Court in *Boggs* and *Egelhoff* is equally applicable to the instant case: to require a plan administrator to give effect to a waiver not contemplated by the written plan document[3] is

[3] As discussed in the *amicus curiae* brief of the United States, retirement plans may well permit qualified disclaimers of death benefits under section 2518(b) of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 2518(b). However, that is not an issue in this case, as Petitioner has never contended that the "waiver" was a qualified disclaimer. On the contrary, the

(Continued on following page)

inconsistent with ERISA and would thus undermine the congressional goals of "'nationally uniform plan administration'" and of "'minimiz[ing] the administrative and financial burden[s]' on plan administrators" with respect to ERISA plans. *Id.* at 148-50 (citations omitted).

B. REQUIRING PLAN ADMINISTRATORS TO FIND AND REVIEW EXTRINSIC EVIDENCE WOULD IMPOSE ENORMOUS BURDENS AND COSTS ON PLAN ADMINISTRATORS.

To require plan administrators to recognize a waiver based on federal common law (as opposed to valid plan provisions) would impose enormous burdens and costs on plans, which, as the Court recognized in *Egelhoff*, are "ultimately borne by the beneficiaries." *Id.* at 149-50.

Under the rule proposed by Petitioner, plan administrators would be required to find and review any extrinsic document that could potentially affect the distribution of plan benefits, such as divorce decrees, wills, and settlement agreements, among others. *See Estate of Altobelli v. IBM Corp.*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting) (stating that plan administrators should not be "[f]orc[ed] . . . to examine a multitude of external documents that

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issue in this case involves a purported waiver not contemplated in the applicable plan documents.

might purport to affect the dispensation of benefits").[4] Such a task would be an enormous undertaking without any real potential for comprehensive success. Under Petitioner's proposed rule, any time that a plan participant dies, the plan administrator would appear to have a fiduciary duty to seek all relevant information regarding the proper recipients of the participant's benefits. In the absence of such a search, a plan administrator would run a material risk of having to pay double benefits, once to a designated beneficiary and once to a party who subsequently demonstrates that the beneficiary waived his or her benefit. In the absence of a diligent search for such other party, the plan fiduciary could be liable for the second payment.

At a minimum, the plan administrator would need to send out inquiries to all of the participant's family members and designated beneficiaries requesting all documents related to the financial relationship among the parties to determine if any such documents could be interpreted to constitute a waiver of plan benefits by beneficiaries. (Asking only designated beneficiaries may fail to uncover documents that a beneficiary may not want to disclose.) Such an inquiry would be extremely problematic for several

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[4] Notably, pursuant to section 206(d)(3) of ERISA, 29 U.S.C. § 1056(d)(3), in order for a domestic relations order to qualify as a QDRO for purposes of ERISA, the domestic relations order must be delivered to the plan administrator and subsequently determined by the plan administrator to constitute a QDRO.

reasons. First, a plan administrator will, in many cases, not know the identities or addresses of all of a participant's family members. Second, there is no assurance that needed responses would be forthcoming. Third, such inquiries – requesting numerous financial documents from the participant's family – would constitute a very intrusive invasion of privacy, an invasion that is unnecessary when plan determinations are based exclusively on plan documents and other documents referenced therein, as contemplated by ERISA.

In addition, sending out these inquiries may not be enough. A plan administrator may well have a duty to seek out any court records of orders or settlements that could have a bearing on whether a beneficiary has waived a death benefit, thus requiring that plan administrators search in one or more, and potentially all, jurisdictions within the United States. Again, such a search would be unwieldy and expensive, as well as difficult to conduct with any certainty of success.

Under the rule proposed by Petitioner, any failure by a plan administrator to find extrinsic documents could subject the plan to costly disputes, litigation, and the possibility of double payment of plan benefits. Even if a plan administrator had the requisite knowledge of relevant extrinsic documentation, in many instances the administrator would likely have to seek legal review of the extrinsic documentation to determine its validity and effect, if any, on the disbursement of plan benefits. Reviewing each

extrinsic document could require the plan to expend significant plan resources, which, in turn, reduces the amount of plan assets available to pay benefits to participants and beneficiaries.

As aptly noted in the *amicus curiae* brief of the United States, a plan analyzing extrinsic documents "would have to decide among the 'myriad of tests' courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver." Brief for United States as *Amicus Curiae* at 27 (citation omitted). Also, in many cases, non-qualified orders and other purported waivers contained in settlements, wills, or other documents, are based on state law rules and incorporate specific terms of art that have special meaning under individual state laws. For the average plan administrator, let alone for a plan administrator of a plan that covers employees in more than one state, having to give effect to non-qualified orders and other documents based on individual state laws would impose substantial costs and burdens on the plan. In contrast, ERISA's QDRO provision provides a detailed and uniform framework for the administration of QDROs. *See* 29 U.S.C. § 1056(d)(3)(C)-(D). When a domestic relations order is delivered to a plan administrator for a QDRO determination, the plan administrator can compare the order to a uniform and enumerated set of requirements provided for under ERISA and can require clarity with respect to how the order applies to the plan.

In addition to the foregoing, even if all of the above issues could be resolved with respect to the use of extrinsic non-plan documents, the timing of death benefit payments from plans could be very adversely affected. Death benefit payments would have to be delayed – at least for months – while the factual and legal inquiries described above are conducted. This would be tremendously disruptive for the rightful beneficiaries who would be deprived of money that they may need to address the costs and burdens triggered by the participant's death.

Despite their best efforts, many plan administrators likely would be drawn into family disputes in which they have no interest. As noted above, many purported waivers will remain undiscovered. And basing plan decisions on advice from legal counsel will not prevent any "losing" party from disputing the conclusion reached by the plan's legal counsel. In short, despite all the time and expense associated with the process described above, far more time and money will be spent in resolving inevitable controversies. *See generally*, Charles Dickens, *Bleak House* (Norman Page ed., Penguin Books 1971) (1853) (describing the fate of those involved in the fictional case of *Jarndyce v. Jarndyce*, a family locked in a dispute over an inheritance that endlessly drags on, consuming all of the disputed assets in legal fees).

C. INTERPLEADER IS NOT A WORKABLE SOLUTION FOR PLANS.

Some have suggested that interpleader is the answer to the above challenges faced by plan administrators. The argument is that at the first sign of any controversy, a plan can simply deposit benefits with a court and let the court make determinations regarding the rightful recipient of the benefits. Unfortunately, for several reasons, this is clearly not the right answer.

First, and fundamentally, interpleader is not a solution when the plan administrator is not aware of a potential dispute. So the interpleader approach does not address the need to conduct expensive, time-consuming, and intrusive searches for extrinsic documents.

Second, interpleader actions can be a substantial burden on the court system. Under ERISA, entitlement to death benefits can generally be determined simply and easily by relying on the plan documents and other documents (such as beneficiary designations or QDROs) referenced in the plan documents. Under Petitioner's rule (using the interpleader approach), extrinsic documents become relevant and, at the first hint of controversy, the courts must decide benefit entitlement. In light of the huge number of death benefits payable from plans, this is a potentially enormous burden on the court system.

Third, use of interpleader on a regular basis will exacerbate the timing problem noted above. It may be

years before rightful beneficiaries receive their benefits while these disputes drag on through the courts. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp.*, 140 F. App'x. 860, 861 (11th Cir. 2005) (interpleader filed eleven years prior to court decision); *Trs. of Dirs. Guild of Am. v. Tise*, 234 F.3d 415, 418 (9th Cir. 2000) (interpleader filed five years prior to court decision); *Septembertide Publ'g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 677 (2d Cir. 1989) (interpleader filed at least two years prior to court decision); *Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1496 (11th Cir. 1986) (interpleader filed at least three years prior to court decision).

Fourth, having the courts make benefit determinations on a regular basis is contrary to the appropriate structure established by ERISA. Under ERISA, plan fiduciaries with intimate knowledge of the plan make benefit determinations based on plan terms with which they are very familiar. It is not consistent with ERISA to substitute the court system for plan fiduciaries as the arbiter of benefit entitlement on a regular basis.

Fifth, contrary to what Petitioner suggests, interpleader is not a painless and inexpensive alternative for plans. In many instances, the plan or other stakeholder may be required by the court to remain involved as a formal party or otherwise for the duration of an interpleader action. *See, e.g.*, *Tise*, 234 F.3d at 427; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61, 63 (5th Cir. 1976); *United States v. Wilson*, 333 F.2d 147, 149 (3d Cir. 1964). In some cases, a plan

may feel obligated to remain a party or otherwise involved in the action, due to the plan's interest in ensuring that its benefits are delivered in a manner consistent with the purposes underlying the plan. As interpleader actions play out in trial court and/or on appeal, often over the course of a multi-year period, the financial expenses borne by the stakeholder, *e.g.*, the plan and its participants (whether or not a party to the action), can become quite substantial. Additionally, although stakeholders are eligible to have incurred costs reimbursed by order of the court, interpleader is an equitable proceeding, and thus courts have substantial discretion in awarding costs. *See, e.g.*, *Tise*, 234 F.3d at 426-28; *Rhoades v. Casey*, 196 F.3d 592, 603 (5th Cir. 1999); *Septembertide*, 884 F.2d at 683; *Ferber Co. v. Ondrick*, 310 F.2d 462, 467 (1st Cir. 1962). Using this discretion, courts have frequently held that stakeholders are entitled to less than their full costs. *See, e.g.*, *Travelers Indem. Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965); *Unum Life Ins. Co. v. Kelling*, 170 F. Supp. 2d 792, 794 (M.D. Tenn. 2001).

For example, courts have often determined, almost *a priori*, that awards should be "of a relatively small amount, simply to compensate for initiating the proceedings," and thus should not encompass overall costs incurred during the litigation process. *Ferber*, 310 F.2d at 467. Since awards are typically charged to the interpled fund itself, courts may be reluctant to significantly drain plan benefits through a cost award. *See, e.g.*, *Tise*, 234 F.3d at 427; *Unum*, 170

F. Supp. 2d at 795. Accordingly, any cost award may fall substantially below the total expenses incurred by the plan. *See, e.g.*, *Tise*, 234 F.3d at 427 (holding that the party that initiated interpleader was eligible to receive cost award equal to $3,000 of $97,000 of incurred expenses); *Landmark Chems., S.A. v. Merrill Lynch & Co.*, 234 F.R.D. 62, 63-64 (S.D.N.Y. 2005) (holding that the stakeholder bears $16,708.30 of $67,708.30 incurred because court found number of hours billed "somewhat excessive"); *Estate of Ellington v. EMI Music Publ'g*, 282 F. Supp. 2d 192, 194-95 (S.D.N.Y. 2003) (holding that the stakeholder bears $28,000 of $37,000 incurred); *Unum*, 170 F. Supp. 2d at 793-95 (denying in whole the $4,967.58 of costs incurred by the stakeholder); *Chem. Bank v. Richmul Assoc.*, 666 F. Supp. 616, 619-20 (S.D.N.Y. 1987) (holding that the stakeholder bears $18,368 of $24,868 incurred).

In short, the use of interpleader as a regular answer to potential death benefit controversies (1) does not help with disputes that a plan administrator is unaware of; (2) would create a large burden on the court system; (3) would severely delay the payment of plan benefits; (4) would substitute the courts for the plan administrators as the arbiters of plan benefit disputes; and (5) would dramatically increase plan costs and burdens. Thus, interpleader should not be looked upon by the Court as a meaningful "backstop" or safeguard with respect to problems imposed by a waiver rule based on non-plan extrinsic materials.

D. A LARGE INCREASE IN PLAN COSTS AND BURDENS WILL DISCOURAGE COMPANIES FROM MAINTAINING PLANS.

When Congress enacted ERISA, it chose not to mandate employer sponsorship of ERISA-governed retirement or pension plans. Accordingly, employers are under no obligation to sponsor any such plan or provide any such benefit but may do so at their discretion. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (stating that "ERISA does not mandate that employers provide any particular benefits"); *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 972 (6th Cir. 2006) ("The statute does not require employers to provide any particular benefits to their employees, but sets forth uniform, federal standards that control their administration.").

Congress recognized that employers are more likely to sponsor an ERISA plan if the plan can be administered in an efficient fashion, so as to minimize unnecessary costs borne by both sponsors and participants. As noted by this Court in *Fort Halifax Packing Co. v. Coyne*, "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," which could, in turn, "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." 482 U.S. 1, 11 (1987).

The rule proposed by Petitioner would replace a comprehensive and clearly defined administrative

scheme regarding beneficiary designation – one based on the predictability and certainty of the written plan document – with an extremely unwieldy, costly, and time-consuming system requiring plans to find and analyze extrinsic information. Our country is already facing significant public policy challenges as we try to increase retirement plan coverage, especially among employees of small businesses. For example, as of 2006, only 26.6% of full-time workers in businesses with fewer than twenty-five employees were employed at firms that sponsored a retirement plan. *See* Patrick Purcell, Pension Sponsorship and Participation: Summary of Recent Trends 7 (Cong. Research Serv., CRS Report for Congress Order Code RL 30122, Sept. 6, 2007), *available at* http://assets.opencrs.com/rpts/RL30122_20070906.pdf. Thus, if plan administration costs and burdens were to substantially increase, as they would under the rule proposed by Petitioner, we are quite concerned that this, combined with other factors, could result in fewer companies sponsoring retirement plans, especially small businesses where the coverage problem is the most acute. The retirement plan system needs to continue to be improved by finding new and simpler ways for employers to provide retirement security for their employees. We do not need to go backwards, to undo basic principles of ERISA, and to create large new burdens and costs that discourage plan sponsorship.

E. COMPREHENSIVE LEGISLATION ELIMINATES THE NEED FOR FEDERAL COMMON LAW.

Contrary to Petitioner's proposed rule, Congress has provided a detailed and comprehensive administrative regime regarding spousal rights and beneficiary designations with respect to ERISA plan benefits. Moreover, as noted above, Congress has been careful to ensure that such regime adheres to the important principle that plan administrators only pay benefits to "participants" or "beneficiaries," as defined for purposes of, and in accordance with, written plan terms. To this end, ERISA plans provide a standard method for participants to void an existing beneficiary designation – by filing a change of beneficiary form with the plan administrator. Congress never intended the courts to use their general powers to fashion a federal common law rule to require that plan administrators give effect to waivers based on extrinsic non-plan materials. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993) (stating that "[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute") (citation omitted); *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 245 (3d Cir. 2005) (holding that "[w]e disagree with [claimant's] argument that the situation presented by this case is not resolved by looking to the express terms of ERISA, and we therefore decline to follow the federal common law approach").

Petitioner, like the respondents in *Egelhoff*, asserts that ERISA should not be read so as to override beneficiary waivers based on federal common law. Otherwise, Petitioner asserts, ERISA would also need to be construed by the Court to prohibit federal common law from giving effect to state "slayer" statutes that otherwise operate to invalidate the beneficiary status of a person who murders a plan participant.

Despite Petitioner's cry that the "sky is falling," the issue of state "slayer" statutes and their applicability under ERISA is a distinct issue that is not before the Court in this case and thus need not be addressed. It is a distinct issue in the following respects. First, as this Court has noted, the prohibition on rewarding "slayers" is "well established in the law and has a long historical pedigree predating ERISA." *Egelhoff*, 532 U.S. at 152 (citing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)). There is no similar history upholding the use of extrinsic documents to invalidate a clear and administrable system based on plan documents. Second, there is a very significant practical difference. Participant death is obviously far more common than participant murder – especially at the hand of the designated beneficiary. Thus, whereas an ERISA plan may look to or otherwise invoke the terms of a state "slayer" statute maybe once during the plan's multi-year existence, if at all, administering death benefits with respect to an ERISA plan is for many plans a very frequent, if not everyday, occurrence. Accordingly, any possible administrative

burdens imposed by a "slayer" rule are likely to be imposed upon a plan on a much less frequent basis, if ever. In contrast, as noted above, a waiver rule, such as the one proposed by Petitioner, would impose enormous administrative burdens on ERISA plans – burdens that likely would be encountered by plans on an everyday basis.

In summary, ERISA provides a simple and comprehensive system for determining beneficiary rights. There is no reason or any legal basis to replace that system with an expensive and burdensome system that will adversely affect plans, plan participants, and retirement security generally.

II. ERISA'S ANTI-ALIENATION AND QDRO PROVISIONS REQUIRE PLAN ADMINISTRATORS TO DISREGARD NON-QUALIFIED ORDERS.

In ERISA, Congress has imposed upon plans a comprehensive and detailed set of rules to ensure that ERISA retirement plans can be administered in a uniform and consistent manner, without significant expense and burden to plans and participants and beneficiaries thereof. To that end, Congress legislated several provisions – specifically the anti-alienation and QDRO provisions – that require all non-qualified domestic relations orders to be disregarded by plan administrators. As discussed below, important policy considerations reinforce the need to follow this clear rule.

A. PURPORTED WAIVERS BASED ON DOMESTIC RELATIONS ORDERS CONSTITUTE IMPERMISSIBLE ALIENATION IN VIOLATION OF ERISA.

Congress enacted section 206(d)(1) of ERISA, the anti-alienation provision, to ensure that ERISA pension plan "benefits are actually available for retirement purposes." H.R. Rep. No. 93-807 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4734. As this Court recognized in *Boggs*, "[t]he anti-alienation provision can 'be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.'" 520 U.S. at 851 (*quoting* John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 547 (2d ed. 1995)).

Specifically, section 206(d)(1) of ERISA states that "benefits provided under [an ERISA pension plan] may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Applicable Treasury regulations interpreting section 206(d)(1) define an "assignment" or "alienation" for purposes of this section to be a "direct or indirect arrangement . . . whereby a party acquires . . . 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).

When Congress enacted ERISA's QDRO provision, which can be found in section 206(d), Congress intended only to provide a "limited exception" to the

broad reach of ERISA's anti-alienation provision for those domestic relations orders that constitute QDROs. *See* S. Rep. No. 98-575, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2565 ("The Committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances."). Specifically, section 206(d)(3)(A) of ERISA provides that the anti-alienation provision of ERISA "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]." 29 U.S.C. § 1056(d)(3)(A) (emphasis added). Accordingly, to the extent that a domestic relations order does not constitute a QDRO – such as the domestic relations order at issue in this case – such order cannot be given effect by the plan. To do otherwise would result in an impermissible alienation or assignment in violation of ERISA.

Significantly, Petitioner asserts that the purported waiver at issue is not an impermissible assignment in violation of ERISA, because it does not result in a transfer of benefits to a third party. Brief of Petitioner-Appellant at 8-9. Petitioner's definition of "assignment" fails to acknowledge congressional intent. As noted above, the statutory text of section 206(d)(3)(A) of ERISA makes clear that in enacting the QDRO provision, Congress intended for the anti-alienation provision to apply to *all* non-qualified domestic relations orders, regardless of whether such

orders cause a third-party transfer of ERISA benefits. Moreover, section 206(d)(3) of ERISA goes on to broadly define a "domestic relations order" to mean "any judgment, decree, or order (including approval of a property settlement) which . . . relates to the provision of . . . marital property rights to a spouse [or] former spouse." 29 U.S.C. § 1056(d)(3)(B)(ii).

The broad definition of "domestic relations order" provided by Congress, coupled with the iron-clad statement that *all* domestic relations orders that are not QDROs are subject to ERISA's anti-alienation rules, indicates that Congress intended for *all* non-qualified domestic relations orders, regardless of the existence of third-party transfers, to be subject to ERISA's anti-alienation provision. Moreover, if Congress had intended to exempt two-party transfers from the reach of ERISA's anti-alienation provision, it could have done so – for example, by defining "domestic relations orders" more narrowly to exclude two-party transfers. However, Congress chose not to do so. Accordingly, we respectfully request that the Court not override congressional intent by reading such an exemption into the statute.

Even if Congress sought to exempt two-party transfers from the reach of ERISA's anti-alienation provision when it enacted section 206(d)(1), the purported waiver at issue here would result in a third-party transfer. This is because to the extent that a named beneficiary purportedly waives his or her rights to ERISA benefits under the plan, such waiver results in the benefits becoming payable to a

third party as determined under applicable plan terms, *i.e.*, they become payable to a default or designated contingent beneficiary. Accordingly, regardless of whether two-party transfers are subject to the anti-alienation provision, there can be only one answer – that the purported waiver is subject to and prohibited by ERISA's anti-alienation provision.

B. ERISA REQUIRES PLAN ADMINISTRATORS TO DISREGARD NON-QUALIFIED DOMESTIC RELATIONS ORDERS.

To require plan administrators to give effect to purported waivers in the absence of a qualified domestic relations order – and disburse ERISA plan benefits to non-participants and beneficiaries in accordance therewith – would be inconsistent with ERISA.

Section 206(d)(3)(H)(iii) of ERISA expressly states that, in the event a plan administrator receives a non-qualified domestic relations order, the plan administrator *must* pay benefits as if there had been no such order. 29 U.S.C. § 1056(d)(3)(H)(iii) (stating that in the event of a non-qualified domestic relations order, the plan administrator "shall pay [benefits] to the person or persons who would have been entitled to such amounts if there had been no order"). By contrast, however, where the order is qualified, section 206(d)(3)(H)(ii) of ERISA requires that "the plan administrator shall pay the . . . [benefits] to the

person or persons entitled thereto [under the order].” 29 U.S.C. § 1056(d)(3)(H)(ii).

The above rules make complete sense in light of sections 404(a)(1) and 206(d)(3)(J) of ERISA. As noted above, section 404(a)(1) generally requires that a plan administrator, as fiduciary of the plan, administer the plan “solely in the interest of the participants and beneficiaries. . . .” 29 U.S.C. § 1104. To this end, Congress added section 206(d)(3)(J) of ERISA, which expressly states that an alternate payee, as provided for in a QDRO, is deemed to be a plan beneficiary for purposes of complying with the QDRO. Significantly, Congress did not include any such language with respect to third-party payments made in connection with non-qualified orders. This clearly demonstrates that a plan administrator’s disbursement of benefits to a non-participant, non-beneficiary third party pursuant to a non-qualified order is prohibited by ERISA. Accordingly, to the extent that a domestic relations order is not qualified, plan administrators must disregard such order in disbursing plan benefits.

C. POLICY CONSIDERATIONS SUPPORT RULE REQUIRING MANDATORY DISREGARD OF NON-QUALIFIED ORDERS.

A contrary rule, such as that proposed by Petitioner, would wreak havoc on plan administration for many of the reasons addressed with respect to the plan document discussion. For example, a contrary

rule would elevate extrinsic information above the written plan document – information that in many instances may be unknown or otherwise unavailable to plan administrators. Accordingly, such a rule would be largely unworkable from a plan administration perspective and would impose enormous new costs and burdens on plans and their participants. Moreover, these new burdens could, in conjunction with other growing burdens, result in a significant number of employers choosing not to sponsor a retirement plan. In an era where half of American workers have less than $22,500 in total household retirement savings, we need to be enacting laws and enforcing policies that strengthen and encourage ERISA plan savings, not the other way around. *See* Press Release, Fidelity Research Institute, Fidelity Research Institute Retirement Index Finds Working Americans On Track To Replace 58 Percent Of Income in Retirement (Mar. 12, 2007) (citing retirement savings data compiled as part of Fidelity Research Institute Retirement 2007 Index) (on file with Counsel of Record). Petitioner's proposed rule would do incalculable harm to plans and plan sponsorship by injecting confusion into a system that has served its purpose well for over three decades.

Significantly, the Court's rejection of Petitioner's proposed rule would not leave Petitioner or similarly situated claimants without a remedy. For the reasons discussed above, although ERISA prohibits a plan administrator from recognizing a non-qualified order, one party to a non-qualified order may be able to

enforce the order against another party to the order under state laws based in equity or contract. Notably, because such actions would likely involve amounts already distributed from the plan, ERISA's preemption and anti-alienation provisions should not stand as an obstacle to such actions. *See, e.g.*, *Boggs*, 520 U.S. at 852 (stating that anti-alienation provision only applies to "undistributed pension benefits"). Accordingly, ERISA's preemption and anti-alienation provisions should not preclude a claimant, such as Petitioner, from suing in state court to enforce against a former spouse a non-qualified order.

In light of the express language of ERISA, as recognized previously by this Court, and the public policy considerations related thereto, there can be no doubt that a QDRO – a widely-known and widely-used arrangement – is the sole mechanism for the assignment of benefits in connection with a divorce or other marital dissolution. Thus, to the extent a participant and/or his or her non-participant former spouse fail to submit a domestic relations order to the respective ERISA plan, which is thereafter determined by the plan administrator to be a QDRO pursuant to section 206(d)(3)(G) of ERISA, any benefit disbursements must be made in accordance with existing written plan provisions, including those with respect to beneficiary designations.

CONCLUSION

For the reasons stated above, *Amici* respectfully submit that this Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

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