No. 14-1531

In the Supreme Court of the United States

KIMBERLY COWSER-GRIFFIN, EXECUTRIX OF THE ESTATE OF DAVID GRIFFIN, PETITIONER

v.

SANDRA D.T. GRIFFIN, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

J. ROGER GRIFFIN, JR.
CHRISTIE, KANTOR, GRIFFIN & SMITH, P.C.
477 VIKING DRIVE, SUITE 150
VIRGINIA BEACH, VA. 23452
(757) 499-9222
jrg@candklaw.net

STEPHEN B. KINNAIRD
Counsel of Record
SEAN M. SMITH
J. MARK POERIO
EMILY L. SEYMORE
PAUL HASTINGS LLP
875 15TH STREET, N.W.
WASHINGTON, D.C. 20005
stephenkinnaird@paulhastings.com

[Additional Counsel Listed on Inside Cover]

STEPHANOS BIBAS
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
sibibas@law.upenn.edu

QUESTION PRESENTED

ERISA requires that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A). The Pension Protection Act of 2006 directed the Department of Labor to promulgate regulations ensuring that "a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued," Pub. L. No. 109-280, § 1001, 120 Stat. 1052-1053 (2006), and the regulations implementing that directive provide that such orders shall not fail solely because they are issued after the participant's death. 29 C.F.R. § 2530.206.

Before his death, the plan participant removed his children as beneficiaries of his ERISA lump-sum benefits and substituted his current spouse, in violation of his divorce decree and Property Settlement Agreement. The Plan documents provide that "if you become divorced . . . [p]lans may be assigned . . . to satisfy a legal obligation . . . to a former spouse, child, or other dependent." Addendum 1a-2a (reproducing Summary Plan Documents at 7-27 and 11-7, Court of Appeals of Virginia App. 1177-13-1).

The question presented is:

Does ERISA bar the otherwise qualified state court domestic relations order that was issued after the death of the plan participant in this case from

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assigning his lump-sum benefits to his children in order to effectuate his prior divorce decree and Property Settlement Agreement?

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INTRODUCTION

Before his death, David Griffin "clearly breached the terms" of his divorce decree and property settlement agreement (entered at the time his children were four and eight years old) by removing his children as ERISA plan beneficiaries and substituting petitioner (then his current spouse) in their stead. Pet. App. 29a. The Virginia Supreme Court correctly determined that a state court may posthumously issue a qualified domestic relations order (QDRO) to distribute lump-sum death benefits to vindicate a prior divorce decree and property settlement. The purpose of a QDRO is to recognize, create, or assign rights to payable plan benefits to "an alternate payee"—that is, one different from the

person designated in plan documents. 29 U.S.C. § 1056(d)(3)(B) (2012). ERISA provides without exception that "[e]ach pension plan *shall* provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A) (emphasis added). At Congress's direction in the Pension Protection Act of 2006, the Department of Labor in 2010 issued regulations further providing that QDROs cannot fail solely because of their timing, including their issuance after the participant's death.

There is no conflict of authority. No federal court of appeals or state supreme court has held, in conflict with the decision below, that a posthumous QDRO assigning payable lump-sum benefits to an alternate payee is ineffective; the only court of appeals to have decided the issue sides with the court below. Petitioner identifies certain courts that have denied effect to retroactive QDROs in the unique context of *annuity benefits* (and typically post-retirement rather than survivor annuity benefits), relying on policy concerns against altering existing annuities that are based on beneficiary-specific actuarial calculations. The lump-sum benefits plan at issue here is exempt from the statute governing survivor and post-retirement annuities, 29 U.S.C. § 1055, and raises no such concerns. Thus, this case does not implicate the minimal conflict identified by petitioner. Moreover, petitioner relies almost entirely on cases that were decided well before the 2010 regulations; it is unknown whether any of the courts would decide the issue the same way now.

In particular, there is no intra-state conflict with the United States Court of Appeals for the Fourth Circuit, since that court addressed a post-retirement § 1055 annuity plan without the guidance of the 2010 regulations. *See Hopkins v. AT & T Glob. Info. Sols. Co.*, 105 F.3d 153, 154-55 (4th Cir. 1997). The Virginia court below specifically disclaimed any conflict with the Fourth Circuit because of the different considerations involved in § 1055 annuity plans. Pet. App. 41a-42a. To the extent there may be any disagreement in the lower courts over the application of QDROs to § 1055 annuities, this Court should await a case involving such benefits after the lower courts have had the opportunity to consider the effect of the 2010 regulations.

STATEMENT

I. STATUTORY BACKGROUND

Family support obligations are "deeply rooted moral responsibilities." *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (quoting *Rose v. Rose*, 481 U.S. 619, 632 (1987)). In developing ERISA's comprehensive regulation of pension plans, Congress recognized the primacy of state domestic relations law in ensuring equitable distribution of family assets to protect dependents, even after divorce. Accordingly, Congress exempted state domestic relations orders (DROs) that meet certain federal requirements from ERISA's anti-alienation provision. That exemption allows state courts, in appropriate circumstances (such as divorce proceedings), to bypass a plan participant's beneficiary designation and equitably distribute pension benefits. To ensure the efficacy of

these qualified orders, Congress in 2006 further directed the Department of Labor to promulgate regulations clarifying that the time at which such an order is entered is not dispositive of its validity. The Department of Labor issued those regulations (barely addressed by petitioner) in 2010, recognizing that QDROs are controlling even if they are entered posthumously.

A. The Origin of ERISA

Congress enacted ERISA in 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974), in part, to protect "employees and their dependents" from deprivation of anticipated pension benefits. 29 U.S.C. § 1001(a). "To further ensure that the employee's accrued benefits are actually available for retirement purposes," H.R. Rep. No. 93-807, at 68 (1974), Congress prohibited the alienation or assignment of plan assets, 29 U.S.C. § 1056(d)(1), "to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless)." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

ERISA's anti-alienation and anti-assignment provisions, together with its preemption of state law, *see* 29 U.S.C. § 1144(a), initially created confusion over whether ERISA prevented pension plans from complying with a state-court domestic relations order that divided a pension between divorcing spouses. Edmund Donovan, *The Retirement Equity Act of 1984: A Review*, 48 Soc. Sec. Bull., May 1985, at 38, 43. That confusion was especially significant because a family's pension is "often the most valuable asset a couple owns—earned together

during their years of marriage." 142 Cong. Rec. S5007 (daily ed. May 14, 1996) (statement of Ms. Moseley-Braun). It also struck at the heart of ERISA's reason for existence: many participants' spouses were homemakers, and denying those spouses access to retirement accounts after a divorce amounted to the sudden evaporation of their anticipated future source of support.[1]

B. The Retirement Equity Act of 1984

1. In response to this uncertainty, Congress passed the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (REA). To protect surviving spouses, the REA required certain plans to provide benefits in the form of a qualified "joint and survivor annuity" or "preretirement survivor annuity." 29 U.S.C. § 1055(a), (b). For the group of annuity plans to which § 1055 applies, the spouse must consent to departures from the annuity requirement. *Id.* § 1055(c)(2). Section 1055's requirements do not apply to certain lump-sum benefits plans, such as the plan here: namely, a plan where (i) "the participant's nonforfeitable accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse"; (ii) the "participant does not elect the payment of benefits in the form of a life annuity"; and (iii) the

[1] *See Pension Equity for Women, Hearings on H.R. 2100 Before the Subcomm. on Labor-Management Relations of the H. Comm. on Educ. and Labor*, 98th Cong., 1st Sess. 26 (1983) (statements of Rep. Geraldine Ferraro) ("[The homemaker] is dependent on her husband and his earnings and at the mercy of death or divorce.").

"plan is not a direct or indirect transferee" of certain statutorily described plans. *Id*. § 1055(b)(1)(C).

2. Separately, the REA provided for former spouses, children, and other dependents. Congress recognized that "[a]s a general matter, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs*, 520 U.S. at 848 (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). Accordingly, the REA amended ERISA to provide that the anti-assignment and anti-alienation provisions "shall not apply," 29 U.S.C. § 1056(d)(3), to certain "domestic relations order[s]" that designate an "alternate payee" (including a child) as entitled to ERISA benefits.[2]

Under the REA, only a "*qualified* domestic relations order" (QDRO) trumps ERISA's anti-alienation and anti-assignment provisions. 29 U.S.C. § 1056(d)(3) (emphasis added). Congress generally intended that state law and state courts would retain broad leeway to determine the content of domestic property settlements that would be valid under ERISA. A QDRO must be "made pursuant to a State domestic relations law." *Id*. § 1056(d)(3)(B)(ii). It may not "require a plan to provide any type or form of benefit . . . not otherwise

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[2] 29 U.S.C. § 1056(d)(3)(B)(i)(1). *See also id.* § 1056(d)(3)(B)(ii) (defining a "domestic relations order" as "any judgment, decree, or order (including approval of a property settlement agreement) which—(I) relates the provision of child support, alimony payments, or marital property rights to a . . . dependent of a participant, and (II) is made pursuant to a State domestic relations law . . . .").

provided," or "provide increased benefits." *Id.* § 1056(d)(3)(D)(i)-(ii). Otherwise, a QDRO must satisfy only certain formal requirements relating to the identification of the specific benefits, beneficiaries, and plans to be affected. *Id.* § 1056(d)(3)(C). For a domestic relations order that satisfies those requirements, ERISA does not stand as "a barrier to recovery of alimony, child support and property settlements." H.R. Rep. No. 98-655, pt. 1, at 39 (1984).

3. ERISA commands that plans must enforce QDROs: "Each pension plan *shall* provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A) (emphasis added). Any plan provision that contradicts that requirement is unenforceable. *See id.* § 1104(a)(1)(D). In that way, Congress protected the traditional role of the States to regulate domestic relations.

4. Congress contemplated that a QDRO may deny benefits to persons to whom they would otherwise be payable, and devised a scheme to balance the interests of those persons and the "alternate payee" under the QDRO. An "alternate payee" is "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." 29 U.S.C. § 1056(d)(3)(K) (emphasis added). For an "18-month period beginning with the date on which the first payment would be required to be made under the domestic

relations order," the plan administrator segregates and accounts separately for the amounts that would be payable to the alternate payee under the order. *Id*. § 1056(d)(3)(H)(i), (v).

If the plan administrator determines that there is a valid QDRO within those 18 months, it pays the segregated amounts to the alternate payee; if he makes the contrary determination, or fails to resolve the issue in the 18 months, it pays the segregated amount "to the person or persons who would have been entitled to such amounts if there had been no order." *Id.* § 1056(d)(3)(H)(ii), (iii). The alternate payee may still receive prospective benefits if the order is determined to be a QDRO after 18 months have passed. *Id.* § 1056(d)(3)(H)(iv).

C. The Pension Protection Act of 2006

Thus, following enactment of the REA, it was clear that state domestic relations orders could operate to apportion plan benefits to an alternate payee, such as a child or a former spouse, from the person designated in the plan. Pockets of uncertainty remained, however, with respect to the issue of whether the *timing* of a domestic relations order could affect its status as a QDRO. S. Rep. No. 109-174, at 124 (2005); Staff of J. Comm. on Taxation, 109th Cong., Gen. Explanation of Tax Legislation Enacted in the 109th Cong., 546 (Comm. Print 2007). In 2006, Congress moved to lay that issue to rest by directing the Secretary of Labor

> "to issue regulations . . . which clarify that . . . (1) a domestic relations order otherwise meeting the requirements to

> be a qualified domestic relations order, . . . shall not fail to be treated as a qualified domestic relations order solely because—
>
> (A) the order is issued after, or revises, another domestic relations order or qualified domestic relations order; or
>
> (B) of the time at which it is issued.

Pub. L. No. 109-280, § 1001, 120 Stat. 780, 1052-1053 (2006). The Secretary issued a final rule in 2010. 29 C.F.R. § 2530.206.

As Congress had directed, the new regulations expressly allow a court to issue a QDRO after the death of a plan participant. *See* 29 C.F.R. § 2530.206(c)(1) ("[A] domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued."). In particular, an example included in the regulations and entitled "Orders issued after death," explains that a domestic relations order "does not fail to be treated as a QDRO solely because it is issued after the death of the Participant." *Id.* § 2530.206(c)(2) (Example (1)).

II. STATEMENT OF FACTS AND PROCEEDINGS

A. Factual Background

David Griffin and respondent Sandra Griffin were married in 1987. Pet. App. 15a. Together they had a son, James, born in 1987; in 1992 their daughter Gloria made the family a quartet. *Id.*

During their marriage, Mr. Griffin was employed by Dominion Virginia Power ("Dominion"). Pet. App. 15a.

Mr. Griffin divorced respondent in 1998, when the children were six and eleven years old. As a part of the divorce proceedings, the Griffins reached a Property Settlement Agreement by which they divided certain of their marital assets. The agreement was incorporated into an order of the Circuit Court of Sussex County, Virginia granting the divorce. Pet. App. 15a.

Under the terms of the agreement, Mr. Griffin agreed to make certain financial arrangements to provide for his children: "The parties agree to name the children of the marriage as co-beneficiaries under all 401K Plans and other such plans which would be distributed upon the death of either party." Pet. App. 15a. Mr. Griffin agreed to do so until his younger child, Gloria, turned 21. Pet. 6-7.

Mr. Griffin participated in Dominion's Salaried Savings Plan (the Plan), a defined-contribution retirement plan that is subject to ERISA. Pet. App. 15a. The Plan documents provide that benefits may be paid in a lump sum to the proper beneficiaries. Pet. App. 36a. The Plan does not rely on actuarial analysis or life expectancy to determine benefits. As the Plan Administrator testified, the Plan benefits are strictly payable to the designated beneficiaries and not as a survivor annuity. Pet. App. 16a.

Petitioner quotes one provision of the Plan documents making clear that QDROs are enforceable, regardless of whether they contradict a

plan's terms: "[I]f you are divorced, benefit payments from the. . . Plan may be made to your former spouse, your child, or other dependent only in response to a [QDRO]." Pet. 6 n.2 (quoting Pet. App. 80a). But petitioner neglects to quote another provision that even more clearly provides that there are circumstances (here, the issuance of a valid QDRO) in which a court order may assign benefits to an alternate payee, such as a former spouse or child: "[I]f you become divorced, a portion of your benefit under the Pension or Savings Plans may be assigned to someone else to satisfy a legal obligation you may have to a former spouse, child or other dependent." Addendum 1a-2a.

In accordance with the terms of the Property Settlement Agreement, Mr. Griffin designated his children as beneficiaries under the Plan in 2002. Pet. App. 16a. In 2007, he married petitioner Kimberly Cowser-Griffin. Pet. App. 16a. The following year—when Gloria Griffin was still just sixteen years old—Mr. Griffin violated the Property Settlement Agreement and named petitioner as the beneficiary instead. Pet. App. 16a.

Mr. Griffin died on May 26, 2012. Pet. App. 17a. Upon learning of Mr. Griffin's death and his exclusion of their children in violation of the Property Settlement Agreement, respondent promptly sent a draft QDRO to the Dominion Plan Administrator, in October 2012. Pet. App. 17a. In accordance with ERISA's statutory segregation requirements, 29 U.S.C. § 1056(d)(3)(H) (2012), the administrator placed an administrative hold on the

Plan benefits subject to the proposed QDRO pending the outcome of this litigation. Pet. App. 17a.

B. Proceedings Below

Soon after Mr. Griffin's death, respondent filed a motion in state court to enter a QDRO in order to remedy Mr. Griffin's beneficiary designation under the Plan. The state trial court denied entry of respondent's proffered QDRO because it had not been perfected before Mr. Griffin died. Pet. App. 71a.

1. In a decision that was later summarily affirmed by the Virginia Supreme Court, the Court of Appeals of Virginia reversed and remanded, holding that the posthumous QDRO was valid and should be entered. Pet. App. 45a.

a. The court of appeals first rejected petitioner's contention that the order sought by respondent would have been invalid under 29 U.S.C. § 1055. The court noted that petitioner herself had conceded that the Plan comes within the exception in 29 U.S.C. § 1055(b)(1)(C) for individual accounts that provide for lump-sum payments. Pet. App. 21a; *see* Br. Appellee 6, No. 117-13-1 (Va. Ct. App.), Sept. 3, 2013. The court explained that the exception applies:

> [B]ecause (1) the Plan provides that the participant's benefits are payable in full to the surviving spouse upon the participant's death, (2) Mr. Griffin did not elect to receive benefits in the form of a life annuity, and (3) there is no

> evidence or allegations that the Salaried Savings Plan is a transferee of a previous plan.

Pet. App. 24a.

The court found petitioner's position that the substantive provisions of § 1055 apply to plans exempt from that statute "illogical." Pet. App. 23a. The court reasoned that *Hopkins*, a case relied on heavily by petitioner that involved benefits that "*were* a product of a joint and survivor annuity regulated by 29 U.S.C. § 1055," was inapplicable here. Pet. App. 42a (emphasis added). Here, unlike in *Hopkins*, "the Plan is *not* subject to the regulations that apply to joint and survivor annuities and pre-retirement survivor annuities pursuant to § 1055, nor does the case law interpreting the § 1055 annuity regulations apply." Pet. App. 24a (emphasis added).

b. Turning to § 1056, the court held that the order respondent requested in this case would be a valid QDRO. The court found that the proposed order would satisfy all of ERISA's specificity and other requirements found in 29 U.S.C. § 1056(d)(3). Pet. App. 32a. The fact that it would be issued after Mr. Griffin's death would not render it invalid, because the Pension Protection Act of 2006, as well as the subsequent Department of Labor regulations, make clear that a posthumous QDRO may be entered under ERISA. Pet. App. 34a-36a (citing 29 C.F.R. § 2530.206). In addition, Virginia law gives the Virginia circuit courts the power to make additional orders, as here, necessary to effectuate and enforce a

court order. Pet. App. 30a. The requested order would therefore be a permissible QDRO under both federal and state law. Pet. App. 32a. The court analogized Mr. Griffin's breach of the divorce decree to a breach of contract. Pet. App. 29a. In order to remedy that breach and protect the interests of James and Gloria Griffin, the court found that the trial court must issue the requested QDRO. *Id*.

Judge Huff dissented. Pet. App. 45a-61a. His principal grounds of dissent turned on an issue not within the question presented to this Court: namely, that "I depart from the analysis of the majority in their conclusion that the 'Dominion Salaried Savings Plan is . . . excepted by the statutory language' of 29 U.S.C. § 1055(b)(1)(C)(i), and is therefore alienable under state law." Pet. App. 46a.

2. The Virginia Supreme Court affirmed "[f]or the reasons stated in the majority opinion of the Court of Appeals." Pet. App. 1a. Justice Millette, joined by two other Justices, dissented. Pet. App. 2a-13a. Relying on the *Boggs* dicta, the dissent purported to divine "a systemic policy in ERISA that protects surviving spouses" and declared that it "applies equally to lump sum payments to 'surviving spouses excepted from 29 U.S.C. § 1055.'" Pet. App. 12a.

3. After the petition for certiorari was filed in this case, the Plan Administrator, which was not a party below, filed an interpleader action in the Eastern District of Virginia that has yet to be resolved. *See* Supp. Br. Pet'r App. 16a-30a.

REASONS FOR DENYING THE PETITION

The petition for certiorari does not warrant this Court's review. There is no conflict of authority on the question presented; the court below correctly decided the question in line with the plain language of ERISA, the 2006 Pension Protection Act, and the 2010 implementing regulations; and this case is a poor vehicle because it requires decision of an antecedent issue that is outside the question presented and is not itself the subject of any circuit conflict.

I. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

The decision of the Virginia Supreme Court does not conflict with the decision of any federal court of appeals or state supreme court. The cases cited by petitioner that have rejected QDROs involved annuities, which are governed by separate statutory provisions and trigger distinct policy concerns inapplicable where only lump-sum benefits are at issue. The lone circuit to consider squarely the effect of a posthumous QDRO on lump-sum benefits has enforced the QDRO while adopting a different rule for annuities. Moreover, all but one of the appellate decisions upon which petitioner relies that have rejected QDROs—even in annuity cases—did so before the Department of Labor issued its 2010 regulations that expressly permit such orders (and the one post-2010 case did not need to address the pertinent part of the regulation). None of those courts has had the opportunity to consider the effect of the regulations on its prior decisions. Their position on the validity of a posthumous QDRO in a

lump-sum case like this one is therefore doubly unclear. There is no conflict.

A. There Is No Conflict on the Validity of a Posthumous QDRO to Govern the Distribution of Lump-Sum Benefits

1. While petitioner cites a number of appellate decisions that have held that purported QDROs are invalid, each of those cases involved the redistribution of annuity benefits, not the lump-sum payments at issue here. *See* Pet. 11-12.

Hopkins v. AT & T Global Information Solutions Co., 105 F.3d 153 (4th Cir. 1997), turned on the fact that the putative QDRO would affect a surviving spouse annuity. The court held that amendments to ERISA—"especially the provisions governing joint and survivor annuities"—led to the conclusion that surviving spouse annuity benefits vest in a beneficiary on the day the participant retires. *Id.* at 156-57. The court relied on statutory provisions specific to annuities: "The fact that a participant can replace a joint and survivor annuity—along with its Surviving Spouse Benefits—only during the ninety-day period prior to retirement, and only with the consent of the current spouse, is further evidence that the participant's spouse at the time of retirement has a vested interest in the Surviving Spouse Benefits." *Id.* at 157. The Fourth Circuit also observed that:

> *Because the disbursement of plan benefits is based on actuarial computations*, the plan administrator must know the life expectancy of the

> person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits. As a result, the plan administrator needs to know, on the day the participant retires, to whom the Surviving Spouse Benefit is payable.

Id. at 157 n.7 (emphasis added). *Accord Rivers v. Cent. & S. W. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) (summarily adopting the rationale of *Hopkins* in an annuities case).

Similarly, in *Samaroo v. Samaroo*, 193 F.3d 185, 186 (3d Cir. 1999), "[t]he Plan sought a declaration that [the putative beneficiary] was not entitled to pre-retirement survivor's annuity benefits of her former husband . . . who died while still actively employed . . . ." *Id.* at 186. In resolving the question of whether the putative beneficiary could obtain a QDRO *nunc pro tunc*, the court stressed that "successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. The annuity provisions of a defined benefit plan are a sort of insurance, based on actuarial calculations predicting the future demands on the plan." *Id.* at 190.

Likewise, in adopting the annuity rule of *Hopkins* and a subsequent Ninth Circuit case discussed below, the Supreme Court of Minnesota emphasized concerns unique to qualified joint and survivor annuities (QJSA).

> The administration of a QJSA benefit requires that the plan make an

> actuarial calculation of benefits based on the life expectancy of the participant and the life expectancy of the participant's spouse. The calculation of benefits must be made before the participant begins receiving benefit payments. If a QDRO can serve as the basis to change the recipient of surviving spouse benefits after a participant has retired and begun receiving benefits, a pension plan's ability to rely on those actuarial calculations would be undermined, if not entirely defeated.

Langston v. Wilson McShane Corp., 828 N.W.2d 109, 116 (Minn. 2013) (internal quotation marks and citations omitted)); s*ee also id.* at 118 ("Moreover, to the extent it requires payment to [former spouse] over her lifetime, the 2005 DRO would require reannutization [sic] of benefits, and on that basis would require a type or form of benefit not otherwise provided by the Plan.").

Moreover, most of petitioner's cases involved post-retirement rather than posthumous, domestic relations orders. *See, e.g.*, *Hopkins*, 105 F.3d at 154; *Rivers*, 186 F.3d at 682; *Langston*, 828 N.W.2d at 112. Unlike here, the participants and their current beneficiaries had already begun to receive benefits before the issuance of the contested order, thus exacerbating the difficulties that would be caused by reassigning the annuities to new recipients.

Together, these cases demonstrate that annuity benefits trigger distinct ERISA requirements and present distinct policy concerns. Even if *arguendo* there were any conflict of authority with regard to the application of QDROs to annuity cases, that conflict is not implicated here.[3]

2. Cases, like this one that involve lump-sum benefits do not implicate the concerns or the rationales espoused by *Samaroo*, *Hopkins*, *Rivers*, and the like. Indeed, the lone circuit to consider the issue squarely has held, just as the court below did, that a domestic relations order may be a valid QDRO and determine the distribution of a lump-sum benefit to a former spouse or child, even if the order is issued after the death of a remarried plan participant.

In *Tise*, the Ninth Circuit affirmed the use of a posthumous QDRO to distribute lump-sum benefits

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[3] *See* Pet. 14-15 (claiming conflict of authority but not distinguishing annuity from lump-sum cases). Even among the annuity cases, the conflict is not clear. *Yale–New Haven Hospital v. Nicholls* explicitly distinguishes the allegedly conflicting cases such as *Hopkins*. *Yale–New Haven Hospital v. Nicholls,* 788 F.3d 79, 88 n.7 (2d Cir. 2015). Unlike the *Hopkins* and *Samaroo* line of cases, *Hogan v. Raytheon, Co.*, 302 F.3d 854, 856 (8th Cir. 2002), did not involve any competing claimants for the benefits, and it is not clear how the Eighth Circuit would have resolved the issue presented to the other circuits addressing annuity benefits. *Torres v. Torres*, 60 P.3d 798, 823 (Haw. 2002), relied heavily on the Ninth Circuit's opinion in *Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9th Cir. 2000), without the benefit of the Ninth Circuit's later decision in *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2008), which harmonized *Tise* and *Hopkins*.

to the deceased participant's children. 234 F.3d at 418, 426. The court directly held in that context that ERISA's "complex, carefully articulated statutory scheme . . . plainly contemplates, and accounts in detail for, the situation in which the event that triggers the payment of benefits occurs *before* the plan knows whether it will be obliged to make payments to an alternate payee." *Id.* at 422.

The *Tise* court was careful not to draw itself into conflict with the *Hopkins* line of authority, however. It reserved the question of whether a QDRO might affect the distribution of surviving spouse benefits governed by § 1055, saying that such cases "implicate[] statutory provisions and policy considerations other than those here applicable." *Id.* at 422 n.6.

Notably, the Ninth Circuit later had occasion to directly address precisely that issue in *Carmona v. Carmona*, 603 F.3d 1041, 1059-60 (9th Cir. 2010). In that case, a retired plan participant sought a QDRO divesting qualified joint and survivor annuity benefits from his former spouse, to whom he had been married at the time he retired, in favor of his new spouse. *Id.* at 1048-49. The court held that such a post-retirement order could not be a valid QDRO: "Allowing participants to change surviving spouse beneficiaries after the participant has retired and already begun receiving benefit payments would make it difficult for trustees to administer plans based on the actuarial value of both the participant and the surviving spouse." *Id.* at 1059-60.

The *Carmona* court held that its rule for § 1055 annuities was perfectly reconcilable with the lump-

sum rule it established in *Tise*. Distinguishing *Tise*, the court relied on a number of features unique to ERISA's treatment of annuities, including "ERISA's statutory scheme for QJSA benefits," under which spouses could decline the joint and survivor annuity only during a 180-day window leading up to the annuity start date. *Id.* at 1057. The court explained that such a start-date requirement is a creature of § 1055; no such restriction is imposed on plans, like the one at issue here, that pay out lump sums. Because "[f]undamentally, *Tise* answers a very different question from the one presented here," the court "d[id] not disturb [its] prior holding in *Tise*." *Id*. at 1060. *Accord Langston*, 828 N.W.2d at 116 (agreeing with *Carmona* and finding *Tise* "distinguishable" because it "did not involve QJSA benefits payable to the participant's spouse").

Like *Tise*, the decision below is not in conflict with any of the annuity decisions trumpeted by petitioner. The Virginia Court of Appeals simply upheld the enforceability of a posthumous QDRO that distributes lump-sum benefits to an alternate payee, and reserved the question of the proper rule for annuities governed by § 1055. Pet. App. 40a n.7 (noting that "[o]ur analysis is confined to the . . . Plan at issue . . . to which 29 U.S.C. § 1055 does not apply").[4]

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[4] *Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003), likewise enforced a posthumous QDRO. Although *Patton* is somewhat unclear, it appears to deal with lump-sum rather than annuitized benefits. According to the court, the putative beneficiary was given a one-half interest in her ex-husband's pension plan as part of a divorce settlement. *Patton*,

B. No Conflict Exists After the 2006 Pension Protection Act and Related 2010 Regulations

Even aside from the distinction between lump-sum payments and annuities, the circuit cases cited by petitioner as refusing QDROs do not conflict with the decision below, because each of them was decided without consideration of the change to the law wrought by the Pension Protection Act in 2006 and the regulations the Department of Labor adopted pursuant in 2010. *See* Pet. 11-12 (citing *Samaroo*, *Rivers*, and *Hopkins*, all of which were decided in 1999 or earlier).[5] Accordingly, it cannot be concluded that any of those courts would have rejected the Virginia Supreme Court's decision here. In fact, the only circuit court to consider the new regulations has relied upon them to permit a

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326 F.3d at 1150. Upon the ex-husband's death, she received a small lump sum and, after investigating, learned of a second plan with additional benefits that had merged into the first plan. *Id.* She then "asked that the second plan be divided in the same way as the disclosed plan had been," presumably meaning that lump-sum benefits were at issue. *Id.* The court permitted a posthumous QDRO to issue. *Id.* at 1154. Even if *Patton* possibly dealt with an annuity, however, "[n]either side argue[d] that the domestic relations order in this case divest[ed] any other beneficiary," *id.* at 1151-52, meaning that the rationales advanced in annuity cases like *Samaroo* and *Hopkins* would not have applied.

[5] *Langston*, a decision of the Minnesota Supreme Court dealing with annuity benefits, was decided in 2013 but did not address the regulation's authorization of posthumous QDROs; it addressed the regulation's treatment of QDROs received after an annuity's starting date. *Langston*, 828 N.W.2d at 117-18.

posthumous QDRO. *Yale–New Haven Hosp.*, 788 F.3d at 85-88.

The Pension Protection Act directed the Department of Labor to issue regulations clarifying that "a domestic relations order otherwise meeting the requirements to be a qualified domestic relations order . . . shall not fail to be treated as a qualified domestic relations order solely because . . . of the time at which it is issued . . . ." Pub. L. No. 109-280, § 1001, 120 Stat. 1052-53 (2006). Accordingly, the Department of Labor's final rule, issued in June of 2010, provides exactly that. 29 C.F.R. § 2530.206(c).

One of the examples chosen by the Department of Labor to illustrate that rule applies directly to the material facts of this case. In that example, a participant and spouse divorce, and a subsequent putative QDRO is rejected by the plan administrator as deficient. The participant then dies, and a corrected QDRO is submitted to the plan. According to the Department of Labor, "[t]he second order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant. The result would be the same even if no order had been issued before the Participant's death, in other words, the order issued after death were the only order." *Id.* In other words, an otherwise-proper but posthumously issued QDRO is sufficient to trigger the Plan's obligations.

None of the circuit courts cited by petitioner held that lump-sum payments could not be governed by a posthumous QDRO like the one in this case. But even if they had so held, they would likely alter their position in the face of the new regulation. It is not

plausible that cases that *relied* on the timing of QDROs to hold them invalid could escape unscathed from a change in the law *specifically prohibiting* a decision based on that factor. Accordingly, even if the older cases from the Third, Fourth, and Fifth Circuits could be deemed applicable to a lump-sum case like this one, they would retain no continued precedential force.

The Second Circuit's recent decision in *Yale–New Haven Hospital* in the annuity context illustrates the point. The court relied on those regulations to hold that, notwithstanding a plan participant's remarriage, *nunc pro tunc* QDROs issued after the participant's death were effective. *Yale–New Haven Hosp.*, 788 F.3d at 85-88. Indeed, the Second Circuit disputed the existence of a circuit conflict even in the annuity context because, among other things, *Hopkins* and *Rivers* "were decided before the Pension Protection Act of 2006" and did not account for these regulations. *Id.* at 88 n.7.

Intervention by this Court is not necessary before other circuits have had the opportunity to interpret the regulations or respond to the Second Circuit's analysis. Indeed, in order to disagree with the Second Circuit's conclusion, a court would likely have to hold that the Department of Labor regulations are for some reason not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Needless to say, no such argument has been suggested or developed in the cases petitioner cites. Because the regulations squarely resolve this case, this Court's review would certainly not be warranted

until the lower courts have had the opportunity to consider and analyze any arguments about the scope and validity of the 2010 regulations.

C. There Is No Conflict Between the Decision Below and the Fourth Circuit's *Hopkins* Decision

Petitioner places particular reliance on the Fourth Circuit's decision in *Hopkins*, which according to petitioner establishes that there is a "disagreement between the Virginia Supreme Court and the regional federal court of appeals for that State." Pet. 12. *Hopkins*, however, establishes no such disagreement. First, as noted above, unlike the lump-sum benefits at issue here, *Hopkins* involved a § 1055 annuity benefit, 105 F.3d at 154-55, and implicated "actuarial computations" not present in this case. *Id.* at 157 n.7. Second, *Hopkins* involved a post-retirement QDRO, unlike the posthumous QDRO in the instant case. *Id.* at 154. Third, *Hopkins* was decided in 1997, long before the enactment of the Pension Protection Act and subsequent promulgation of the implementing regulations. *Id.* The Fourth Circuit has not had the opportunity to consider the effect of those regulations on its ruling in *Hopkins*, much less on a case like this one involving a posthumous QDRO and a lump-sum benefit. The Virginia appellate courts simply found *Hopkins* inapplicable, and did not suggest disagreement with it. Pet. App. 40a-42a.

Petitioner argues that the decision below confronted the Plan Administrator with a "dilemma about whether to follow the decision of the Supreme Court of Virginia or the regional federal court of

appeals," and that it has been forced to "engage in ancillary litigation"—*i.e.*, the interpleader action it filed—"simply to clarify [its] legal obligations." Supp. Br. Pet'r 4. But interpleader actions are commonplace in ERISA actions, and the Plan Administrator (which was not a party to, nor bound by, the decision below) has simply sought relief "[d]ismissing [the Plan] Interpleader Plaintiffs from this action, with prejudice, and discharging [the Plan] from any further liability." Supp. Br. Pet'r App. 29a. Upon dismissal of a plan administrator, *res judicata* principles govern matters between the parties and those in privity with them. *See Rhoades v. Casey*, 196 F.3d 592, 602 (5th Cir. 1999); *Mack v. Kuckenmeister*, 619 F.3d 1010, 1022-23 (9th Cir. 2010). If the district court or the Fourth Circuit were to decide otherwise and reject the ruling of the Supreme Court of Virginia, then the Court could decide to intervene at that juncture. The existence of the interpleader action is irrelevant to this Court's disposition of this petition.

II. THIS CASE WAS PROPERLY DECIDED BY THE VIRGINIA SUPREME COURT

A. The Statutory Scheme Makes Clear That Posthumous QDROs Are Effective

The petition should also be denied because the case was correctly decided below. As the Virginia Court of Appeals held, at least for cases involving lump-sum benefits not governed by § 1055, this is a straightforward case dictated by the plain language of the statute. ERISA requires that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any

qualified domestic relations order." Pet. App. 25a (emphasis removed) (quoting 29 U.S.C. § 1056(d)(3)(A)). Nothing in the statute excludes posthumous QDROs.

For that reason, petitioner's complaint that the decision below undermines the Plan Administrator's ability to rely on the plan language, and improperly deprives petitioner of vested rights under the plan, rings hollow. Pet. 20-23. QDROs are by definition court orders that authorize payment of benefits to "an alternate payee" other than the designated or default beneficiary under the plan. 29 U.S.C. § 1056(d)(3)(B). As this Court has said, ERISA's "guarantee of simplicity is not absolute. The very enforceability of QDROs means that sometimes a plan administrator must look for the beneficiaries outside plan documents . . . ." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 301 (2009).

Moreover, enforcement of the QDRO is not inconsistent with the Plan documents here; the Plan has two different provisions making clear that QDROs will trump other beneficiary designations, whether made by the participant or established by the Plan itself. *See* Addendum 1a-2a. ERISA makes clear that administrators are obligated to follow plan terms only if those terms are not inconsistent with the statute, *see* 29 U.S.C. § 1104(a)(1)(D), and if the Plan had attempted to elevate the participant's designations or its own spousal consent provisions above a QDRO (which this Plan did not), the Plan Administrator could not follow such terms.

Nor is petitioner correct that "the benefits at issue vested in petitioner at the time of Mr. Griffin's death." Pet. 21. First, vesting as a technical matter refers to the right of the participant against the plan to benefits without risk of forfeiture, not the right of a beneficiary to payment.[6] Regardless, beneficiary designations are always contingent upon the existence of a QDRO. Revision/qualification of a QDRO that occurs after death does not destroy vested rights of any prior plan beneficiary; it simply permits judicial allocation of property among family members to trump the unilateral decisions of plan participants.[7]

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[6] *See* 29 C.F.R. § 2530.203-1(a) (referring to "an employee's nonforfeitable ('vested') right to his or her normal retirement benefit"). Per the Department of Labor, "[v]esting means the employee has earned the right to benefits without the risk of forfeiting them." *Frequently Asked Questions About Retirement Plans and ERISA*, United States Department of Labor, http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html.

[7] In making this argument, petitioner echoes the dissent in *Yale–New Haven Hospital*, which claimed that "[o]nce surviving spouse benefits vest, those benefits are no longer the participant's (or his estate's) and, thus, cannot be subsequently reassigned from the participant (or his estate) to an alternate payee through a posthumous QDRO or otherwise." 788 F.3d at 93 (Wesley, J., concurring in part and dissenting in part). Yet neither petitioner nor the dissent in *Yale–New Haven Hospital* adequately explains why this should be true. By definition, a QDRO affects "benefits payable *with respect to* a participant under a plan," 29 U.S.C. § 1056(d)(3)(B)(i)(I) (emphasis added), not benefits payable *to* a participant under a plan. Vested or not, plan benefits paid to anyone are surely benefits "with respect to" the participant inasmuch as any benefits that exist at all are initially created on account of the participant. *See Tise*, 234 F.3d at 424 (benefits remained "payable 'with respect

Indeed, "ERISA provides for certain procedures that require a plan administrator to protect an alternate payee's potential interest in plan funds," and thus "where a plan administrator must determine whether a domestic relations order is a QDRO, any interest in plan benefits does not vest automatically with a surviving spouse." *Yale–New Haven Hosp.*, 788 F.3d at 87. Pursuant to 29 U.S.C. § 1056(d)(3)(H), once a pension plan is on notice of a potential QDRO, the plan administrator has a full 18 months from the date of the proposed QDRO's first required payment in which to determine whether the QDRO must be given effect. During this time it must segregate the amounts that would be due to the alternate payee under the order during the first 18 months. In other words, ERISA explicitly recognizes that there are circumstances under which a plan administrator must make decisions regarding putative QDROs even if benefits would otherwise payable to different beneficiaries under plan documents. *See, e.g.*, *Tise*, 234 F.3d at 421-22 ("This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO."); *Files v. ExxonMobil Pension Plan*, 428 F.3d 478, 489 (3d Cir. 2005) ("[P]ursuit of a QDRO posthumously comes within the ambit of the 'qualification' process contemplated by 29 U.S.C. § 1056(d).").

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to' [participant] even after his death because they accrued for his benefit and that of his beneficiaries"). Hence a valid QDRO may affect benefits vested in a beneficiary just as it could affect those vested in a participant.

This provision also demonstrates that Congress expressly contemplated that further state court proceedings to cure any defects in a domestic relations order might ensue during the 18-month benefit segregation period. Pursuant to 29 U.S.C. § 1056(d)(3)(H), the alternate payee may, within the 18-month period, present the plan administrator, in lieu of the original court order, with a "modification thereof." *See Tise*, 234 F.3d at 422 ("[T]he evident purpose of the 18-month period was to provide a time in which any defect in the original [domestic relations order] could be cured."). This statutory scheme is inconsistent with the rigid rule that petitioner advocates.

Additionally, the nature of QDRO requirements is such that ERISA's specificity requirements can only be detailed at the time of eligibility to receive benefits (which is often the death of the participant). For example, some required information, like the last known mailing address of a minor, 29 U.S.C. § 1056(d)(3)(C)(i), will change over time and is only properly updated at the time of eligibility. Such statutory requirements primarily serve administrative convenience. Congress could not possibly have intended that a DRO's substantive allocation of critical pension assets to dependent family members would be defeated simply because ministerial information necessary to qualification of a DRO is missing at the time of death, and the plan documents happen to indicate a different beneficiary.

Indeed, the necessity of a valid QDRO is often not evident until after death. Neither Sandra Griffin

nor her children had any reason to seek a QDRO until after Mr. Griffin died; Mr. Griffin had previously provided for his children in compliance with the terms of a court order, until he unilaterally decided to breach that order and provide for his second spouse. *Nunc pro tunc* orders are intended to address exactly these types of situations, where a beneficiary with a rightful claim would otherwise be deprived of that claim through no fault of his or her own. "[A *nunc pro tunc* QDRO] is meant to clarify the entitlements already memorialized in the parties' judgment entry. In short, the *nunc pro tunc* QDRO is a necessary tool of the court to effectuate a previously awarded property right." *Yale–New Haven Hosp.*, 788 F.3d at 86 n.4 (quoting Gary A. Shulman, *Qualified Domestic Relations Order Handbook* § 7.06 (3d ed. 2014)). Any other rule would invite plan participants to breach state court orders, as Mr. Griffin did here, keeping family members in the dark until it was too late.[8]

Finally, nothing in the decision below trenches upon any federal policy to protect surviving spouses. Pet. 23-24. Protection of surviving spouses is the province of § 1055, which does not apply here, and does not trump rights under QDROs.

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[8] Furthermore, requiring plan administrators to follow state-court determinations with respect to the effect of state law ensures that pension benefits are paid equitably. *See Blue v. UAL Corp.*, 160 F.3d 383, 386 (7th Cir. 1998) ("Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-guessing state judges' decisions under state law would be repellent. . . . Far better to let the states' appellate courts take care of legal errors by trial judges.").

B. The Department of Labor Properly Determined That Posthumous QDROs Are Permissible in Regulations Entitled to *Chevron* Deference

If there were any doubt as to the viability of posthumous QDROs, it vanished after the Department of Labor's 2010 regulations expressly permitted them. The Virginia court of appeals properly gave *Chevron* deference to these regulations. Pet. App. 34a-35a. Congress expressly delegated to the Secretary of Labor the authority to issue regulations with the binding force of law to clarify that QDROs could not be rejected solely on the basis of timing. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1001, 120 Stat. 1052-53 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (discussing requisites of *Chevron* deference). Pursuant to *Chevron*, the Department's interpretation of QDRO provisions "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

Illustrations of the rule within the regulations also merit *Chevron* deference. The examples that the Department of Labor chose to illustrate the new regulations were included in the language of the Code of Federal Regulations, and were subject to notice-and-comment before being issued. *Mead*, 533 U.S. at 229-31 (discussing the importance of "notice-and-comment . . . in pointing to *Chevron* authority").

As such, they hold the same force of law as the rest of the Department of Labor regulation.

The dissent below suggested that the Department's regulation permitting posthumous QDROs would apply only if the plan provides for no beneficiaries: *i.e.*, if the participant were "unmarried at the time of his death with no designated beneficiaries." Pet. App. 3a. If that were so, the regulations would have virtually no operative force. ERISA plans almost invariably designate default beneficiaries. Advisory Council on Employee Welfare and Pension Benefit Plans, *Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans*, at 5 (2012). Moreover, QDROs by their nature direct benefits to "alternate payees," and ERISA contemplates partial payment to designated or default plan beneficiaries if the QDRO does not address the entirety of plan benefits during the 18-month period. The Department's regulations cannot be reasonably construed to apply only in relatively rare circumstances. The regulations clearly direct that plan administrators must pay benefits according to posthumous QDROs even if there is a designated or default beneficiary under the plan. Here, it is indisputable that the QDRO would have been effective if it were recognized before Mr. Griffin's death; therefore, petitioner seeks to defeat the QDRO solely because of its timing, something the Pension Protection Act and the 2010 regulations forbid.

Petitioner never directly addresses the Department of Labor regulation on posthumous

orders, nor the deference that a court would apply to interpreting the Department of Labor regulations. Petitioner attempts to skirt the Pension Protection Act and the effect of the 2010 regulations merely by repeating the observation of a dissenting judge in *Yale–New Haven Hospital* that the Department of Labor continues to rely on *Hopkins* and other cases. Pet. 19. But this references the Department's citation of certain pre-2010 cases on the question of how to resolve competing claims to annuities after annuity payments have begun—a circumstance not present here, and one controlled by 29 U.S.C. § 1055. *See* 788 F.3d at 93 n.4 (Wesley, J., concurring in part and dissenting in part) (arguing that "the Department employs both *Hopkins* and *Rivers* as relevant authority in . . . annuity benefits" (emphasis omitted)). Petitioner never addresses the dispositive regulation recognizing the validity of posthumous QDROs because she cannot reconcile her position with it.

IV. THIS CASE IS A POOR VEHICLE

This case is also a poor vehicle for addressing the alleged circuit conflict. Because this case involves lump-sum benefits, this Court must resolve an antecedent question decided by the court below: namely, whether the strictures of § 1055 apply even to a lump-sum plan exempt from that statute. Petitioner insists that they do, offering an idiosyncratic reading of dicta from this Court's decision in *Boggs* that has not been adopted by any court. She relies, Pet. 18 & n.6, on a partial quotation of the following statement in *Boggs*, but

omits the italicized portion of the full quotation that follows:

> While some individual account plans escape § 1055's surviving spouse annuity requirements under certain conditions, Congress still protects the interests of the surviving spouse by requiring those plans to pay the spouse the nonforfeitable accrued benefits, *reduced by certain security interests, in a lump sum payment. § 1055(b)(1)(C).*

Boggs, 520 U.S. at 843 (emphasis added). Petitioner deduces that this Court thereby "rejected the suggestion that the protections Congress provided for surviving spouses through ERISA depend on the form of the spousal benefit." Pet. 18.

The presence of this threshold question of whether annuity and lump-sum plans receive equivalent treatment under § 1055 should disqualify this petition from consideration. It is not within the question presented as framed, [9] and it is both splitless and meritless. Petitioner does not cite any authority supporting its position that this Court's dicta in *Boggs* has overridden the statutory exceptions to § 1055 or abolished the different regulatory treatment of annuity and lump-sum plans. Indeed the italicized language omitted by the petitioner makes clear that the Court was simply

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[9] "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(1)(a).

observing that the statute provides a *different* form of protection to surviving spouses under exempt plans: namely, the right to receive nonforfeitable accrued benefits in a lump sum (albeit subject to QDROs pursuant to § 1056). Neither this Court nor any circuit court has applied § 1055, its restrictions, or policy rationales to an exempt lump-sum plan. This Court would not have to resolve this issue if it were in the future to grant review of a case that involved annuity benefits that were expressly governed by § 1055.

For all the foregoing reasons, even if this Court were interested in the question of enforceability of posthumous QDROs, it should await a case involving § 1055 annuities after the lower courts have duly considered the implications of the Pension Protection Act of 2006 and the 2010 implementing regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. ROGER GRIFFIN, JR.
CHRISTIE, KANTOR, GRIFFIN & SMITH, P.C.
477 VIKING DRIVE, SUITE 150
VIRGINIA BEACH, VA. 23452
(757) 499-9222
jrg@candklaw.net

STEPHEN B. KINNAIRD
Counsel of Record
SEAN M. SMITH
J. MARK POERIO
EMILY L. SEYMORE
PAUL HASTINGS LLP
875 15TH STREET, N.W.
WASHINGTON, D.C. 20005
stephenkinnaird@paulhastings.com

STEPHANOS BIBAS
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746-2297
sibibas@law.upenn.edu

NOVEMBER 10, 2015

ADDENDUM

ADDENDUM

EXCERPTS FROM JANUARY 2011 DOMINION SALARIED SAVINGS PLAN REPRODUCED FROM COURT OF APPEALS OF VIRGINIA APP. 1177-13-1

ASSIGNMENT OF ACCOUNT

You cannot assign, pledge, or sell your account balance. Your creditors cannot claim or levy upon your account to satisfy your debts. However, a court may order that all or part of your account be paid to an "alternate payee" (*e.g.*, an ex-spouse, minor child, etc.) under a qualified domestic relations order. Although the Plan Administrator must obey a qualified domestic relations order issued by a court, the Plan Administrator will inform you of the Savings Plan's procedures and provide you with a copy of those procedures, without charge, if an attempt is made to claim all or a portion of the benefits from your account.

Before any action is taken, the court's order must be determined to meet all applicable legal requirements with respect to such orders.

* * *

QUALIFIED DOMESTIC RELATIONS ORDERS

A Qualified Domestic Relations Order is a legal judgment, decree or order that recognizes the rights of an alternate payee under the Pension or Savings Plans with respect to child or other dependent support, alimony or marital property rights. For example, if you become divorced, a portion of your benefit under the Pension or Savings Plans may be

assigned to someone else to satisfy a legal obligation you may have to a former spouse, child or other dependent.

There are specific requirements the domestic relations order must meet to be recognized by the Plan Administrator, and specific procedures regarding the amount and timing of payments. Information about these requirements and procedures is available without charge by contacting the Plan Administrator. If the Plan Administrator receives such an order relating to your benefit under the Pension or Savings Plan, the Plan Administrator will notify you.