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.

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

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH PRATT
MEHAFFYWEBER, P.C.
2615 Calder Avenue,
Suite 800
Beaumont, TX 77702
409/835-5011

RAYMOND MICHAEL RIPPLE
(Counsel of Record)
DONNA L. GOODMAN
Legal D-7012
E. I. DU PONT DE NEMOURS AND COMPANY
1007 Market Street
Wilmington, DE 19898
302/773-3072
Counsel for Respondents

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Under ERISA, benefits provided under a pension plan cannot be assigned or alienated. 29 U.S.C. § 1056(d)(1). An express exception to this prohibition exists where a state domestic relations order is submitted to the plan and meets ERISA's detailed requirements of a Qualified domestic Relations Order ("QDRO"). 29 U.S.C. § 1056(d)(3)(A).

The narrow question presented in this case is whether the court of appeals was correct in holding that ERISA's anti-alienation provision bars the use of a state divorce decree, which is not a QDRO, to reassign pension plan benefits to participant's estate upon his death.

2. Whether both courts below erred in denying an award of attorney's fees to petitioner under ERISA pursuant to a five-factor test that has been adopted by every circuit to consider the issue and does not present a conflict among the circuits warranting this Court's review.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than ten percent of its stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

This case involves a very narrow issue of the application of ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), which bars the direct or indirect alienation of pension benefits subject to ERISA. Specifically, the court below found that the anti-alienation provision prohibited a pension plan from treating a state divorce decree that is not a QDRO as a waiver of pension benefits of a spouse.

Each employee benefit plan covered by ERISA is classified as either a pension plan or a welfare plan. 29 U.S.C. § 1002(1), (2). ERISA's anti-alienation provision applies *only* to pension plans; it does not apply to life insurance and other welfare plans. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836-37 (1988). The parties agree that the DuPont Savings and Investment Plan ("SIP") at issue here is a pension plan and is therefore subject to ERISA's anti-alienation provision. Petitioner urges the Court to grant her petition to resolve what she contends is a division of authority on whether ERISA's anti-alienation provision prohibits a pension plan from giving effect to a beneficiary's divorce court order regarding the beneficiary's right to benefits under the pension plan.

Most of the cases that Petitioner invokes to support her assertion that there is a circuit split on this issue involve life insurance and other welfare

plans that are not subject to ERISA's anti-alienation provision. Although Petitioner also refers to circuit court cases involving pension plans, only two of them hold that the anti-alienation provision does not bar a pension plan from giving effect to a waiver by a beneficiary. Both decisions were based on the view that ERISA's anti-alienation provision did not apply to a waiver by a pension plan beneficiary. However, that view was superseded by the Court in *Boggs v. Boggs*, 520 U.S. 833, 846 (1997), which made clear that ERISA's anti-alienation provision applies to beneficiaries as well as to participants under pension plans.

ERISA allows benefits to be paid only to participants or their beneficiaries.[1] Specifically, ERISA § 403(c) requires that assets of the plan be used only for those purposes and for the payment of plan expenses. 29 U.S.C. § 1103(c). Furthermore, the Act requires the administrator-fiduciary to act solely for the benefit of the participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i); *Cent. States, Southeast*

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[1] The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by the participant or by the terms of the plan. 29 U.S.C. § 1002(8).

and Southwest Areas Pension Fund. v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985).

STATEMENT

The Estate of William Patrick Kennedy ("Estate") seeks review of a final decision of the Fifth Circuit that ERISA's anti-alienation provision applied and that because ERISA includes detailed, careful, and comprehensive provisions for changing the beneficiaries under a pension plan – provisions that were not invoked by the parties in this case – there was no basis for creating a federal common-law rule to address an issue that Congress had already addressed in ERISA. The court of appeals also concluded that while a Qualified Domestic Relations Order ("QDRO"), 29 U.S.C. § 1056(d)(3)(B)(i), provided a means of effecting a waiver, none was filed for the SIP benefits.

Decedent, William Kennedy, was a DuPont employee and participated in its SIP. There is no dispute that the SIP is an "employee pension benefit plan," as defined by ERISA. 29 U.S.C. § 1002(2). (Pet. App. 37). In 1971, during his DuPont employment, decedent married Liv Kennedy. Decedent signed beneficiary-designation forms in 1974, identifying Liv Kennedy as the SIP's sole beneficiary. Decedent did not name a contingent beneficiary. (Pet. App. 2).

Decedent and Liv Kennedy divorced in 1994. Pursuant to the decree, Liv Kennedy agreed to be

divested of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] . . . employment." (Pet. App. 64-65). In 1997, a QDRO was approved by the state divorce court. It provided benefit disbursement instructions for some of decedent's non-SIP employee benefit plans. (Pet. App. 54). No QDRO for the SIP, however, was ever submitted. Both William and Liv Kennedy were represented by counsel.

Decedent retired from DuPont in 1998 and died in 2001. Although permitted to do so, decedent never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary. (Pet. App. 3).

Kari Kennedy, the daughter of the decedent and Liv Kennedy, was appointed executrix of decedent's estate. By letter to DuPont, the Estate demanded the SIP funds be distributed to the Estate, claiming the beneficiary designation of Liv Kennedy was invalid. DuPont refused, relying on the SIP beneficiary designation. The Estate also requested Liv Kennedy to relinquish her SIP interest. She did not do so; instead, pursuant to requests to DuPont, Liv collected the SIP balance (approximately $400,000). (Pet. App. 3, 33).

The Estate filed this action, seeking to recover the SIP benefits by presenting an ERISA claim, under 29 U.S.C. § 1132(a)(1)(B), and a state-law breach-of-contract claim. The Estate basically claimed that Liv

Kennedy had waived her rights to the SIP benefits through the divorce decree, thus invalidating the SIP beneficiary designation, and that DuPont incorrectly distributed the SIP benefits.[2] (Pet. App. 3).

The district court, *inter alia*, granted summary judgment for the Estate on its ERISA claim, holding that the Estate was entitled to the value of the SIP benefits existing at the time of decedent's death, and for DuPont on the Estate's breach-of-contract claim, holding it was preempted by ERISA. (Pet. App. 52).

In awarding summary judgment to the Estate, the district court concluded, *inter alia*, that federal common-law applied to determine whether Liv Kennedy's executing the divorce decree waived her right to the SIP benefits, and that under federal common-law, the divorce decree constituted a valid waiver.

The district court denied DuPont's subsequent motion for judgment as a matter of law or, alternatively, a new trial. Also denied was the Estate's ERISA-based motion for attorney's fees.

The court of appeals reversed the district court's holding that there was a common-law waiver of pension benefits by Liv Kennedy. A unanimous panel of the Fifth Circuit held that ERISA's anti-alienation

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[2] DuPont filed a third-party claim against Liv Kennedy, asserting that, in the event she was not the correct beneficiary, the SIP was entitled to return of the SIP benefits. This claim was settled without any recovery to the SIP.

provision, 29 U.S.C. § 1056(d)(1), controlled because the benefits involved were pension benefits to which that provision specifically attached and that Liv Kennedy's "waiver" was an impermissible "assignment or alienation" within the meaning of the applicable Treasury Department regulations. (Pet. App. 8-9). The court concluded that there was no statutory gap that may allow a resort to a common-law theory of waiver. (Pet. App. 7). The court also concluded that the explicit exceptions to the anti-alienation provision for a QDRO did not apply here because the plan participant and beneficiary did not seek to obtain a QDRO for the SIP benefit. (Pet. App. 11).

The court of appeals also affirmed the district court's decision not to award attorney's fees to the Estate, finding that the district court had applied the correct standard and had not abused its discretion. (Pet. App. 11-14).

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVISION OF AUTHORITY ON WHETHER ERISA'S ANTI-ALIENATION PROVISION BARS A BENEFICIARY'S WAIVER OF PENSION PLAN BENEFITS.

A. The very narrow ground on which the court of appeals decided this case does not create or add to a split of authority among the courts of appeals nor does it present a question requiring a decision by this Court. In the present case, the Fifth Circuit correctly

held that the anti-alienation provision of ERISA controls and prohibits resort to a federal common-law waiver in pension benefit cases.[3] The court noted that although ERISA provides for an exception to such a prohibition through the device of obtaining a QDRO, the parties to the divorce never sought such an order for the SIP benefits at issue here. (Pet. App. 11). The Fifth Circuit's decision is consistent with the text of ERISA's anti-alienation provision, the applicable Treasury Department regulations, and this Court's precedent.[4]

There is no present division of authority among the courts of appeals as to the application of the statutory mechanism employed by the Fifth Circuit in the instant case. Petitioner relies on two out-dated decisions by the Seventh and Fourth Circuits which took the position that the ERISA anti-alienation provision did not apply to beneficiaries of a pension plan in connection with the dissolution of a marriage. (Pet. 10). However, those decisions were prior to this Court's decision in *Boggs*, 520 U.S. at 851-52, which applied the anti-alienation provision to pension plan beneficiaries.

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[3] In that the anti-alienation provision applies to more than domestic relations orders, the issue presented here is exceedingly narrow. *See Mackey*, *supra*.

[4] Petitioner cites to an IRS General Counsel Memorandum as authority. (Pet. 25-26). However, an internal memorandum may not be used or cited as precedent. *See* 26 U.S.C. § 6110(j)(3); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 n.2 (7th Cir. 1990) (en banc).

In *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (en banc), the Seventh Circuit found that ERISA's anti-alienation provision did not apply to a non-participating spouse's pension benefit where the waiver was given in connection with the dissolution of their marriage. The Fourth Circuit in *Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996), adopted the Seventh Circuit's approach that the anti-alienation clause does not apply to beneficiaries. The *Altobelli* Court proceeded to apply a common-law theory of waiver to find that a former wife had given up her pension benefits under a marital settlement agreement that had been incorporated into the state divorce decree. *Id.* at 81-82.

Fox Valley and *Altobelli* do not reflect current law. Since this Court in *Boggs* settled that the anti-alienation clause *does* apply to beneficiaries, the Seventh and Fourth Circuits have not revisited or reaffirmed their prior opinions as to the applicability of the anti-alienation provision to beneficiaries, such as Liv Kennedy in this case.

Petitioner also maintains (Pet. 24, 25) that this decision is contrary to earlier Fifth Circuit decisions. However, the cases cited by Petitioner do not involve waivers in conjunction with martial dissolutions. Further, Petitioner never sought re-hearing before the Fifth Circuit to resolve this perceived conflict.

No reported decision of any circuits that have considered the application of the anti-alienation and

QDRO provisions of ERISA have found contrary to the decision before this Court. Far from creating or adding to a split of authority among the circuits, the Fifth Circuit's opinion in this case finds substantial support from a recent opinion of the Third Circuit in *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied,* ___ U.S. ___, 127 S. Ct. 1118 (2007). There, a retiree sought declaratory relief to direct the employer's benefit plan to recognize his former wife's waiver of beneficiary rights. The court of appeals dismissed the retiree's action finding that ERISA's anti-alienation provision applied to bar a waiver by the former wife and noted that a QDRO had not been filed. *Id.* at 250.

Petitioner's reliance on state jurisprudence is equally unavailing. Petitioner relies on state court decisions involving facts and ERISA provisions markedly different from the present case. Petitioner claims at some length that *Kennedy* conflicts with the Texas Supreme Court's decision in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003). (Pet. 27-32). Petitioner is badly mistaken. There is no conflict between the two decisions.

Keen involved a claim by a pension plan participant's former wife to the surviving spouse benefits that ERISA requires to be provided to the surviving spouse of a married participant. Although the participant's former wife executed a waiver in connection with the divorce, and although the court relied on the waiver in reaching its decision, the waiver was entirely beside the point: the participant in *Keen* had

subsequently remarried, and ERISA's surviving spouse provisions treat only the participant's spouse at the time of the participant's death (the second wife in *Keen)* as the participant's surviving spouse. As a result, *regardless of the waiver*, the former wife had no right to surviving spouse benefits under the pension plan.[5] There is thus no conflict between the outcome in *Keen* and the outcome in this case,[6] and the Court should not grant certiorari on the basis of Petitioner's claim that the Fifth Circuit's decision in this case conflicts with the decision in *Keen*.[7]

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[5] Under ERISA's surviving spouse provisions, where a participant dies before his benefits are paid or begin to be paid, the participant's spouse on the date of the participant's death is the spouse who is entitled to receive the surviving spouse benefits, subject to a limited number of exceptions (*e.g.*, where the spouse and the participant have been married for less than a year, where a QDRO provides otherwise, or where the spouse consents to the participant's designation of someone else as the beneficiary). *See* 29 U.S.C. § 1055; 26 C.F.R. §§ 1.401(a)-11 and 1.401(a)-20, Q&A-25-31; S. Rep. No. 575, 98th Cong., 2d Sess. 11-18 (1984).

[6] If the Texas courts are faced in the future with a case like this one, where the divorced participant does *not* remarry, it is likely that the Texas courts will follow the Fifth Circuit's decision in this case. In *Keen*, the Texas Supreme Court relied heavily on Fifth Circuit decisions. *See Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994). *Keen* also relied on a number of other courts' decisions that are now obsolete as a result of *Boggs*.

[7] Other state court cases cited by Petitioner (Pet. 10) are also inapplicable. For example, *MacInnes v. Rowley*, 677 N.W. 2d 889 (Mich. CV. App. 2004) (welfare benefits case to

(Continued on following page)

In the final analysis, not only is the decision by the Fifth Circuit not part of a split of authority among the circuits, but also the case was rightly decided. Petitioner does not dispute that the SIP is a pension plan, that ERISA's anti-alienation provision applies to the SIP and its beneficiaries, that Liv Kennedy was decedent's sole beneficiary under the SIP, and that decedent never replaced Liv as his beneficiary under the SIP. (Pet. at 2-3). Petitioner acknowledges that the divorce decree is a domestic relations order within the meaning of § 1056(d)(3)(B)(ii) and that although the divorce court issued a QDRO, the QDRO did not apply to the SIP. (Pet. at 3-4).

Although ERISA exempts QDROs from the anti-alienation provision, ERISA provides that if a domestic relations order is determined *not* to be a QDRO the plan *must* pay the benefit in question to the person who would have been entitled to receive the benefit in question if there had been no order. *See* 29 U.S.C. § 1056(d)(3)(H)(iii). Petitioner has acknowledged that the divorce court's order was not a QDRO. Thus, the QDRO provisions did not merely prohibit the SIP from giving effect to the divorce order; they also *required* the SIP to distribute decedent's account balance to decedent's designated beneficiary.

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which anti-alienation provision does not apply); *Strong v. Omaha Constr. Ind. Pension Plan*, 701 N.W. 2d 320 (Nebr. 2005) largely ignoring the anti-alienation provision).

There are three alternative approaches that the parties could have taken to assure that the SIP death benefit would be paid to someone other than Liv Kennedy:

- The parties could have asked the divorce court to issue a QDRO directing the SIP to pay decedent's account balance to one or more alternate payees;
- At any time during the roughly seven-year period between the divorce and decedent's death, decedent could have designated someone else as his beneficiary under the SIP; or
- Before the date of the divorce, if decedent had been able to obtain his wife's consent, decedent could have designated someone else as his beneficiary under the SIP.

Liv Kennedy's status as decedent's beneficiary under the SIP following the divorce was thus not the result of a "gap" in the statute; it was due to the parties' failure to take any of the approaches that ERISA offered them. In the absence of a gap in the statute, there is no justification for formulating a common-law rule, as Petitioner proposes, and no need for the Court to grant the petition for a writ of certiorari.

B. In an effort to show that this case is worthy of review, Petitioner attempts at some length (Pet. 9-12) to construct a series of conflicts among the

circuits. Although conflicts do exist, that division of authority does not affect the narrow holding of the Fifth Circuit in this case.[8]

More specifically, the courts have developed two theories to deal with a claim of waiver of benefits by a designated beneficiary. One theory addresses whether ERISA authorizes courts to adopt common-law rules that give effect to a waiver of benefits if the waiver meets certain requirements, including specificity, voluntariness, and good faith. *See*, *e.g.*, *Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268, 271 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 281.

The other theory is usually called the "plan documents" approach, which requires *all* employee benefit plans to be administered in accordance with the terms of the plan and the forms on file with the administrator. Thus, no alteration of beneficiaries would be permitted except in accordance with terms of the plan and not by other documents such as private agreements between participants and beneficiaries. *See*, *e.g.*, *McMillan v. Parrott*, 913 F.2d 310

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[8] In his amicus brief upon invitation from this Court in *McGowan*, the Solicitor General did not sufficiently focus on the difference between welfare and pension cases and their relation to the anti-alienation provision in concluding that there is a split of authority among the circuits.

(6th Cir. 1990); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993).[9]

In the case at bar, the Fifth Circuit did not need to resort to either of these theories because it based its decision exclusively on the anti-alienation provision. Since a QDRO was prepared and submitted to the state court in the divorce proceedings but did not cover the SIP, the court of appeals reasoned that the alienation or waiver of beneficiary rights was statutorily barred. Finding no gap in the statutory regime, there was no need to resort to either the waiver theory or the plan documents approach.

Indeed, the Fifth Circuit emphasized that prior Fifth Circuit decisions that adopted the other theories were simply inapposite because they involved welfare benefits to which the anti-alienation provision of ERISA does not apply. (Pet. App. 5-6) Thus, any case involving welfare benefits is not in conflict with the ruling below on pension benefits.[10]

The anti-alienation provision applies only to pension benefits and not to welfare benefits. Therefore,

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[9] In the event this Court grants certiorari DuPont would argue, in the alternative, that it also should prevail under this "plan documents" approach.

[10] Most of the cases to which the anti-alienation provision was not applicable involved insurance disputes, as noted by the Fifth Circuit. (Pet. App. 5-6). *See also*, *Krishna*, *supra*; *Metro. Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Metro. Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996); *Metro. Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991).

any case involving welfare benefits is fully outside the scope of the anti-alienation and QDRO provisions that are the basis of the Fifth Circuit's decision in this case.

The difference of opinion among the circuits as to the correct analysis of a beneficiary's waiver of benefits may be necessary in a future case that presents the correct factual context for its resolution. However, the instant case is not an appropriate vehicle to resolve any such division of authority on common-law theories of waiver. In this case, the Fifth Circuit simply did not choose between these different theories but rather based its decision solely on the anti-alienation provision that applies only to pension plans.

II. THERE IS NO DIVISION OF AUTHORITY REGARDING THE STANDARD GOVERNING ATTORNEY'S FEE AWARDS IN ERISA CASES.

There is no circuit split regarding the standard governing the award of attorney's fees in ERISA cases. Petitioner's argument to the contrary (Pet. 36-37) relies upon overruled authority and is completely wrong.

In deciding whether to grant the Estate attorney's fees, both the district court (Pet. App. 23) and the court of appeals (Pet. App. 12) applied a five-factor test set out by the Fifth Circuit in *Iron Workers*

Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980).[11]

Petitioner argued in both the district court and the court of appeals that the five-factor test was the correct test. Now, for the first time, Petitioner challenges the use of the five-factor test, and claims that there is a division of authority on this point among the courts of appeals. Petitioner has waived that argument.

Petitioner argues that the courts of appeals view the standard governing the award of attorney's fees in ERISA cases in two distinct ways. (Pet. 35-36). Petitioner claims that some circuits utilize the five-factor test first developed in *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978) (same five-factor test later adopted by the Fifth Circuit in *Bowen*, *supra*). (Pet. 35-36), while other circuits utilize the standard applied in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1978. (Pet. 36). Under the Civil Rights Fees Act, attorney's fees are to be

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[11] The five factors are:

1) degree of culpability or bad faith;
2) ability to satisfy an award;
3) deterrence value;
4) whether plaintiff sought to benefit all parties to the ERISA plan or to resolve a significant legal question regarding ERISA;
4) relative merits of parties' positions.

(Pet. App. 23).

awarded to a prevailing party unless special circumstances would render the award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Petitioner urges the adoption of the standard used in civil rights cases to ERISA cases, stating that the civil rights standard is "more consistent with ERISA's purposes" than the five-factor test. (Pet. 37). In support of this argument, Petitioner relies on the Eighth Circuit's decision in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), and the Ninth Circuit's decision in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), categorizing these cases as the side which utilizes the civil rights standard. (Pet. 36-37).

However, Petitioner is grossly misguided. The Eighth Circuit overturned *Landro* in *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002) (en banc), and now currently applies the *Eaves* five-factor test. *See also*, *Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1041 (8th Cir. 2006) (recent case following *Martin* and applying five-factor test).[12]

In *Martin*, the Eighth Circuit stated that while, in *Landro*, it was the first circuit to apply the civil rights standard to an ERISA case, it now agreed, for many reasons, "with the overwhelming majority of circuits that have considered this issue and concluded

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[12] Petitioner also heavily relies on two student-written law review comments and an article written for a business publication by two lawyers, all of which pre-date *Martin*. (Pet. 36, 37).

that the presumption should not be employed in ERISA cases." *Martin*, 299 F.3d at 971-72. The Eighth Circuit found that the five-factor test best facilitated the exercise of the district court's discretion, and "overrule[d] *Landro's* holding to the contrary." *Id.* at 972. Consequently, Petitioner's argument rests largely on an overruled decision.

The Ninth Circuit has always applied the five-factor test, *see Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980),[13] and did so even in *Smith*. In *Smith*, the Ninth Circuit also decided to incorporate the civil rights standard on top of the five-factor test, while noting that the five-factor test still applied. *Smith*, 746 F.2d at 589-90 (holding that the *Hummell* five-factor test applies, but should be taken in light of remedial purpose of ERISA); *see also McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999) (noting that the Ninth Circuit applies the five-factor test and also applies the special circumstances rule used in civil rights cases).

However, *Smith*, which was the genesis of the civil rights standard "overlay" on the five-factor test in the Ninth Circuit, relied exclusively on the subsequently overruled decision in *Landro* as authority for

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[13] *Hummell* was the first case in which the Ninth Circuit considered the award of attorney's fees in an ERISA case. The court determined that the Fifth and Tenth Circuits in *Bowen*, 624 F.2d 1255 and *Eaves*, 587 F.2d 453, respectively, were correct in using the five-factor test as a guideline for the district courts and consequently adopted that standard. *Hummell*, 634 F.2d at 450.

superimposing the civil rights standard on top of the five-factor test. *Smith*, 746 F.2d at 589. It is noteworthy that the Ninth Circuit has, on occasion, also applied the five-factor test without incorporating the civil rights standard. *See, e.g., Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908 (9th Cir. 1992).

Consequently, contrary to Petitioner's argument (Pet. 35-39), every court of appeals, including the Eighth and the Ninth Circuits, employs some version of the five-factor test.[14] Accordingly, there is no circuit split, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ELIZABETH PRATT
MEHAFFYWEBER, P.C.
2615 Calder Avenue,
Suite 800
Beaumont, TX 77702
409/835-5011

RAYMOND MICHAEL RIPPLE
(Counsel of Record)
DONNA L. GOODMAN
Legal D-7012
E. I. DU PONT DE NEMOURS
AND COMPANY
1007 Market Street
Wilmington, DE 19898
302/773-3072
Counsel for Respondents

[14] *See Sullivan v. Randolph*, 504 F.3d 665, 670 (7th Cir. 2007), and *Martin, supra* (collecting authorities).

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