No. 13-29

IN THE

Supreme Court of the United States

SCOTT ANDOCHICK, M.D.,

PETITIONER,

v.

RONALD BYRD, INDIVIDUALLY; JUNE BYRD, INDIVIDUALLY; AND RONALD AND JUNE BYRD, AS CO-ADMINISTRATORS OF THE ESTATE OF ERIKA L. BYRD,

RESPONDENTS.

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents are incorrect that there is no compelling reason for this Court to grant *certiorari.* As set forth in the Petition for *Certiorari* ("Petition") and below, this Petition presents the opportunity for this Court to close the door on an issue expressly left open by its decision in *Kennedy v. Plan Admin. DuPont Savings and Investment Plan,* 555 U.S. 285 (2009). Resolving the issue will have broad impact on plan administrators, plan beneficiaries and competing claimants to ERISA-governed benefits.

I. The Broad Preemption Principle In This Court's Prior Cases is at Odds With the Narrow Ruling of the Fourth Circuit's Distinction Between Pre-Distribution and Post-Distribution Claims to ERISA Benefits

Respondents are correct that the Fourth Circuit's decision below, does not directly conflict with *Boggs v. Boggs*, 520 U.S. 833 (1997). If *Boggs,* which pre-dates *Kennedy,* directly spoke to the issue, the Court would not have needed to expressly reserve the issue. Yet when this Court in *Kennedy* expressly declined to rule upon the very issue presented here, it cited to *Boggs* and compared it with two contrary state cases.

The narrow reading of ERISA preemption by the Fourth Circuit conflicts with the broad principles of preemption set forth in *Boggs*. *See* Petition, p. 9-12. Respondents fail to address the

fact that *Boggs* dealt with state law claims against ERISA benefits both received and payable in the future. *Boggs*, at 837. Respondents blithely suggest that *Boggs* does not conflict with the decision below because the "core principles of ERISA plans" are administrative uniformity. Brief in Opposition ("Opp."), p. 8. That may have been the emphasis of *Kennedy*, which dealt only with claims against a plan administrator, but it ignores this Court's precedent in a beneficiary versus claimant case such as *Boggs*, which stated that the "[t]he principal object of the statute is to protect plan participants and beneficiaries." *Boggs,* at 845. Respondents' view of ERISA appears to be that its protections reach no further than the point at which it no longer impacts the administrative convenience of plan administrators. But the Court in *Boggs* rejected two similar arguments made by the respondents in that case. *See* Petition, p. 11-12.

Respondents attempt to draw a distinction between *Boggs* and the present case because *Boggs* dealt with state statutes rather than state-law based lawsuits. Opp., p. 8-9. Respondents, however, fail to note is that this Court granted *certiorari* in *Boggs* to resolve the conflict over ERISA preemption as it intersected with various states' "community property" laws. *Boggs*, at 839. State community property laws, although codified in the State of Louisiana, have their origin in common law. *Id*. at 840 (describing origins of law). Moreover, the scope of ERISA preemption has never been a line between claims based on state statutory authority and state-based common law claims. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (state common law

wrongful discharge claim preempted); and *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (state common-law breach of contract and tort claims preempted by ERISA). Respondents, therefore, are drawing a distinction that does not exist in the body of this Court's ERISA preemption cases.

Respondents also miss the point of Petitioner's reliance upon *Egelhoff v. Egelhoff ex rel. Breiner*, 531 U.S. 141 (2001). Specifically, the Court rejected the notion that a plan administrator could simply interplead funds into a court for a determination of competing claims to ERISA-governed benefits stating such a solution "only presents an example of how costs of delay and uncertainty can be passed on to beneficiaries." *Id.* at 150, fn 3. Respondents do not identify how the present case does not implicate the very same concern.

II. Respondents Incorrectly Suggest The Sixth Circuit's Pre-*Kennedy* Decisions Do Not Conflict with the Fourth Circuit or the Michigan Courts

Respondents suggest that *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) and *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996), did not decide "whether ERISA preemption prohibits suits against plan beneficiaries who receive plan benefits." Opp. at 4. They are incorrect in their interpretation.

Respondents ignore what was actually decided by the Sixth Circuit. *McMillan* was a declaratory judgment action filed by the plan administrator seeking a declaration as to who was entitled to the

proceeds of the plans. *Id.* at 311. The trial court ruled that the ex-wife named as the beneficiary of the ERISA-governed plans had "waived her rights as a beneficiary by the divorce settlement," and the plan participant's new wife, children and estate separately resolved how those funds would be divided. *Id.* at 311. The Sixth Circuit reversed, finding that the plan participant "was master of his own ERISA plan" and did not change the beneficiary designation in the four years following his ex-spouse's purported waiver. *Id.* 312. The Court stated "[s]imply put, it was [the plan participant's] designation which controls, not [the ex-wife's] intent. *Id.* As presented on appeal, the Sixth Circuit was broadly determining the rights of the ex-spouse to the proceeds despite the purported waiver. That result conflicts with the decision by the Fourth Circuit.

Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126 (6th Cir. 1996), provides a clearer conflict. That interpleader action was initiated by the plan administrator. The dispute on appeal was presented between the plan participant's estate and the ex-spouse. Regardless of whether the funds were deposited into the registry of the court or whether the funds were actually received by the named beneficiary, the Court was deciding the right and entitlement to those funds under ERISA. The plan participant's estate, having lost before the Sixth Circuit, was certainly not free to then turn around and sue the ex-spouse for retaining the benefits once paid.

Contrary to Respondents' position, the "distinction" between post-distribution and pre-

distribution claims under ERISA preemption was not eliminated with *Central States, Southeast and Southwest Areas Pension Fund v. Howell*, 227 F.3d 672 (6th Cir. 2000). *Howell* began life as an interpleader action after competing claims over the insurance proceeds arose between the widow of the plan participant and the children of the plan participant from a previous marriage. Glossed over by the Respondents is the fact that the plan participant was in the midst of divorce proceedings with the widow, and the state court had entered an order enjoining the plan participant from changing his beneficiary designation from the widow. *Id*. at 677.[1] At issue, however, was the plan participant's violation of the state court order and whether "his wrongdoing" entitled the widow to assert a constructive trust over the proceeds. *Id*. at 678. The Court ruled only that ERISA did not preclude a potential state-law based claim for a constructive trust premised upon the plan participant's inequitable conduct and remanded the case for further consideration. *Id*. at 679. The decision says nothing about the circumstances of the present case where a plan participant, like Erika, could have changed her beneficiary designation at any time in the three years before she died, but chose not to do so.

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[1] The Court stated that it did not matter whether the divorce-related order was to maintain the status quo or to ensure the ex-spouse was removed, calling it a "distinction[] without a difference." *Id*. at 677. The Court referenced this in relation to analyzing whether the order was a qualified domestic relations order ("QDRO") for the purposes of ERISA and not on whether an equitable cause of action could be asserted post-distribution.

Respondents assert that *Starling v. Starling*, 2009 WL3628014 (E.D. Mich. 2009), as an unreported case, is not binding precedent and otherwise misconstrues the Sixth Circuit's decisions in *McMillan* and *Pressley*. Opp. p. 6-7. Respondents do not identify how *Starling* misconstrued prior precedent. Nor do they make any effort to rebut the main point of Petitioner's citation to *Starling* – to show the current manifestation of the conflict between the Sixth Circuit and Michigan state courts on the issue left open by this Court in *Kennedy*. Without reiterating the facts in *Starling* (*see* Petition, p. 17-18), that case falls squarely within the question presented in the instant Petition. Both the district court in *Starling* and the Michigan Court of Appeals in *Moore v. Moore*, 266 Mich. App. 96, 700 N.W.2d 414 (2005), acknowledged a recognized split on this issue; a split that can be resolved by this Court should it grant review.

III. Contrary to Respondents' View, the Present Issue Is Sufficiently Important to Warrant This Court's Review

Respondents conflate the erroneous view that there is no conflict among the lower courts with respect to the question presented in the Petition with the notion that this issue lacks sufficient importance to warrant review. *See* Opp., § V. As demonstrated above, Respondents are incorrect in their analysis of a lack of conflict over the question presented. But in conflating the two issues, Respondents miss the point of why resolving this issue will have broad impact on ERISA plan

participants, plan beneficiaries and plan administrators.

A. Plan Administrators Are Still Embroiled in Litigation Post-Kennedy

Respondents argue that the "*Kennedy* decision, by adopting the plan documents rule, has given plan administrators all the guidance needed to determine" to whom the ERISA plan benefits should be distributed. *See* Opp., p. 10.[2] But the record in this case demonstrates that not to be the case. First, it should be noted that this was not Respondents' position throughout the course of the proceedings. *See Andochick v. Byrd*, 709 F.3d 296, 299, fn. 3 (4th Cir. 2013) ("The Byrds argued before the district court that Ms. Byrd should receive some of the plan proceeds as a second named beneficiary on one of the plans. We agree with the district court that *Kennedy* forecloses this result.").

In fact, it was the Respondents' insistence on their entitlement to pre-distribution payment of

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[2] As outlined in the recent report of the Advisory Council on Employee Welfare Pension Benefits Plans (established under Section 515 of ERISA) titled "Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement Life Insurance Plans" this issue, as presented in the Petition, represents a significantly wide-spread challenge for plan administrators. The report can be found at:

http://www.dol.gov/ebsa/publications/2012ACreport1.html

ERISA benefits that led the Venable, LLP Life Insurance Plan ("Life Insurance Plan") Administrator to delay payment in accordance with Erika's beneficiary designation, advise the competing claimants that it would interplead the funds, and ultimately file an interpleader action. *See Principal Life Insurance Co. v. Andochick, et al.*, Case No. 1:12-cv-00536-TSE/TCB ("Interpleader Action"). Those ERISA-governed life insurance benefits rest with the clerk of the United States District Court for the Eastern District of Virginia to this day.

To bolster their position, Respondents suggest that Petitioner is relying upon "facts outside of the record" and asking this Court to speculate on the Life Insurance Plan's motives for filing the Interpleader Action. Opp., p. 9-10. But such is not the case. Respondents themselves put in the record before the trial court a Status Report of Defendants Regarding ERISA Administrative Appeals advising the Court that the Administrator of the Life Insurance Plan was "unable to make" a determination as to the proper payee and advised that it would be filing an interpleader action. *See* Joint Appendix before the Fourth Circuit, JA 212-223. The letter from the Administrator of the Life Insurance Plan is found at JA 222-223. The Administrator of the Life Insurance Plan carried through by filing the Interpleader Action.[3]

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[3] To the extent that Respondents assert the actual complaint initiating the Interpleader Action is not within the record, the pleadings filed in that case are subject to judicial notice. *See* Fed. R. Evid. 201; *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (appellate court taking

Nor is Petitioner asking this Court to speculate on the Life Insurance Plan Administrator's motivations for filing the Interpleader Action. The Administrator of the Life Insurance Plan expressly averred in its lawsuit, after identifying the dispute between Petitioner and Respondents, that "[a]s such, Principal Life may be exposed to multiple liability should it make payment of the Proceeds to any claimant." *See* Interpleader Action, Complaint, ¶ 29. Even without resort to a review of the Life Insurance Plan Administrator's Complaint, one would infer that the only reason a stakeholder would bring an interpleader action is to avoid litigation risk or multiple liability from competing claimants to a fund.

The suggestion, therefore, that the *Kennedy* decision has given ERISA plan administrators "all the guidance needed" is not empirically correct given that the precise issue presented in the Petition has been left open. One need look no further than the procedural machinations in one of the key cases relied upon by Respondents on the merits of their position to see that their view is incorrect. *See Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 132 (3d Cir. 2012). In *Kensinger*, the plan administrator retained funds for nearly two and ½ years before depositing the funds into the trial court, despite the clarity of its plan documents. The plan

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judicial notice of state court proceedings not before the district court); *Coney v. Smith,* 738 F.2d 1199, 1200 (11th Cir.1984) (same).

participant passed away in March 2009.[4] *Id*. at 133. The plan participant's estate brought suit against the plan administrator and plan beneficiary on November 9, 2009. *Id*. The plan administrator ultimately paid the disputed funds into the trial court on October 11, 2011. *Id*. at 133, fn. 1. If *Kennedy* had provided such clear guidance to plan administrators, then the plan administrator would have paid the funds as required by its plan documents well before the suit was initiated by the estate.

Moreover, if *Kennedy* had provided such clear direction to plan administrators then one would assume that there would be very little reason for a plan administrator to interplead funds in to a court. If Respondents' view was correct, then the plan administrator, armed with the *Kennedy* decision, would merely pay the benefits according to its plan documents and move along, allowing the plan beneficiary and the opposing claimant to resolve their differences post-distribution of funds. Yet even following *Kennedy*, there remains a substantial number of cases where the plan administrator has interpleaded funds into a court rather than rely on *Kennedy*. *See*, as examples, the following:

> *Sun Life Assur. Co. of Canada v. Wasko*, 4:09-CV-00324-RAW, 2013 WL 1620681 (S.D. Iowa Mar. 12, 2013) (plan administrator filed interpleader action when presented with competing claims to ERISA-governed life

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[4] *Kennedy* was decided on January 26, 2009 which was before the decedent died in *Kensinger* and before any lawsuits were filed.

insurance benefits, despite clarity of plan documents).

Companion Life Ins. Co. v. Hopson, CIV.A. 3:10-63-JFA, 2012 WL 527581 (D.S.C. Jan. 23, 2012) *report and recommendation adopted,* 3:10-CV-00063, 2012 WL 527579 (D.S.C. Feb. 16, 2012) (plan administrator filed interpleader action when presented with competing claims despite plan documents requiring payment to named beneficiary).

Estate of Kevin L. Strickland v. Kimberly Nichole Strickland, et al., 2013 WL 673513 (D. Az. 2013) (although the estate initiated the action, the ERISA plan administrator interpleaded the funds into the court after removal to federal court).

Unum Life Insurance Company, et al. v. Scott, et al., 2012 WL 1068979 (D. Conn. 2012) (plan administrators for ERISA-governed plan filed interpleader action after competing claims despite clarity of plan documents)

Hallman, et al. v. Hallman, et al., 2013 WL 820377 (M.D. Ga. 2013) (ERISA plan administrator removes case to federal court and files interpleader action after competing claim to ERISA-governed benefits).

Trustees of Local 1, IBEW Pension Ben. Trust Fund v. Wright, (E.D. Miss. 2011) (ERISA plan administrator filed interpleader action after competing claims to benefits*).*

CIGNA Life Ins. Co. v. Gambuit, et al., 2011 WL 3424106 (S.D. N.Y. 2011) (ERISA plan administrator filed interpleader action after receiving conflicting claims to ERISA benefits despite broad discretionary authority under plan documents).

Becker v. May-Williams, 2012 WL 6150561 (W.D. Wash. 2012) (plan fiduciary filed interpleader action after conflicting claim to ERISA benefits despite clear wording in plan documents).

To be sure, the preceding cases do not fall within the current question presented. But each was filed after *Kennedy* was decided and they demonstrate quite clearly that the Respondents' view that *Kennedy* "has given plan administrators all the guidance needed to determine" to whom benefits should be paid is incorrect. Opp., p. 10. If such were the case, then there would be little reason to see administrators of ERISA plans entangled in legal disputes post-*Kennedy* over the proper beneficiary of ERISA benefits. A broad ruling on the issue presented in this case as to the scope of ERISA preemption, however, could provide plan administrators with sufficient clarity to eliminate the need to resort to legal action when presented with conflicting claims among beneficiaries and putative beneficiaries.

B. Plan Beneficiaries and Competing Claimants Lack Clear Direction from This Court on an Issue That Repeatedly Presents Itself

Setting aside the merits of the dispute, the undeniable fact is the question presented in this Petition came up repeatedly before *Kennedy* and continues to come up repeatedly post-*Kennedy* given that this Court expressly reserved ruling on the issue. This case presents a clear opportunity to close the door on this dispute. Leaving the matter unresolved will lead to "cost of delay and uncertainty" that is "passed to beneficiaries" of ERISA plans. *Egelhoff* at 150, fn. 3 (2001).

IV. The Court Should Consider Calling for the View of the Solicitor General

Petitioner re-iterates his initial suggestion that this Court should consider calling for the view of the Office of the Solicitor General due to the Department of Labor's substantial interest in this matter.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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