No. 11-1221

IN THE
Supreme Court of the United States

JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Group Life Insurance Act ("FEGLIA"), 5 U.S.C. § 8701, *et seq*., provides life insurance to federal employees. FEGLIA contains a statutory order of precedence for payment of benefits identical to the one considered by this Court in *Ridgway v. Ridgway*, 454 U.S. 46 (1981) under the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"). Unlike SGLIA, FEGLIA contains an express preemption provision. Federal regulations, similar to those considered in *Ridgway*, state that the right of a federal employee to designate the person of his or her choosing cannot be restricted in any way.

In 2007, the Virginia General Assembly, similar to only eleven other states, amended its statute that automatically revokes a beneficiary designation for death benefits upon entry of a decree of divorce to provide a statutory cause of action if the application of the statute is otherwise preempted by federal law. The Virginia Supreme Court, as the only state or federal appellate court to address this particular statutory provision, held that the statute was preempted by FEGLIA.

Within that framework, the question is:

Whether a state legislature may create a statutory cause of action that imposes absolute liability against the designated beneficiary of FEGLIA benefits when FEGLIA otherwise preempts application of a state's statutory scheme to automatically revoke a beneficiary designation.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Virginia Supreme Court interpreted the scope of federal preemption under FEGLIA consistent with this Court's decision in *Ridgway*, the unanimous federal courts and the Supreme Court of Alabama. While the Virginia Supreme Court's decisions may be at odds with other (mostly intermediate) state appellate court decisions on the scope of FEGLIA preemption, this case is not the appropriate vehicle for this Court to weigh in on the issue.

Petitioner casts the issue presented in this case far too wide. While she does an admirable job of suggesting that the Virginia Supreme Court's decision fits within an apparent split of authority between consistent federal case law and other, mostly intermediate state appellate court decisions, the present case is entirely unique as it is the sole case addressing FEGLIA preemption of a state statutory cause of action. The Virginia Supreme Court's decision, while consonant with this Court's guidance in *Ridgway* and unanimous federal case law, was based on an interpretation of a very specific statutory scheme shared by only eleven other states. The Virginia Supreme Court, however, is the only state appellate court or federal court, to rule on this particular statutory scheme and there is no reason to believe that other courts reviewing the handful of similar statutes in other states will not arrive at the same conclusion as the Virginia Supreme Court.

Petitioner fails to address the key distinction between the Virginia Supreme Court's decision and

nearly every case she cites related to FEGLIA preemption. In almost all instances, those cases were based on either a property settlement agreement or divorce decree to which the deceased federal employee was a party. None of the cases cited involve a statutory scheme similar, or even dissimilar, to the one ruled upon by the Virginia Supreme Court. Given the propensity for this Court, and properly so, to rule upon only the issues that are presently before it, a review of the Virginia Supreme Court's decision in this case is not likely to settle or resolve the particular issues that have been the subject of conflicts between unanimous federal court decisions and some state decisions on the scope of FEGLIA preemption. The question in those cases, as opposed to the present one, would be properly cast as:

> Whether a former spouse or child can maintain a post-payment remedy when a federal employee disregards a contractual obligation or a court order and changes the beneficiary designation on his or her FEGLI life insurance policy.

That is a far different question than the one presented by this case. Put simply and plainly, this Court's decision, upholding or reversing a finding of federal preemption, on whether a state legislature can statutorily mandate a result different from the preemptive effect of federal law is not likely to provide any overarching guidance to state and federal courts in the typical scenario. Those cases dealt with whether a court can fashion a post-

payment remedy to enforce the bargain made by a federal employee in a contract or marital settlement agreement or uphold the requirements of an obligation of the decedent set forth in a divorce decree. In this light, this case presents a poor vehicle for this Court to address the scope of FEGLIA's preemptive effect.

While the Petitioner fails to appropriately acknowledge the distinction between the present case and the other federal and state FEGLIA preemption decisions, she goes entirely too far in suggesting that this Court invited the instant petition in footnote 10 of *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 299 (2009). *See* Pet. p. 6, 20-22. To be clear, the Virginia Supreme Court's ruling was limited to whether FEGLIA preempted application of a Virginia statutory provision. It did not rule on any other federal law, nor could it have since the Virginia Supreme Court's analysis was necessarily premised on the particulars of FEGLIA preemption. *Kennedy* involved a wholly different statutory scheme of the Employee Retirement Income Security Act of 1974 ("ERISA"). The case was about the interpretation of the "plan document rule" under ERISA and whether a plan administrator was required to look beyond its own plan documents to pay death benefits.[1]

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[1] The Virginia Supreme Court was not called upon to determine whether ERISA preempted Virginia Code § 20-111.1 (D) and, given that its determination was limited to the statutory framework of FEGLIA, it is all but certain how the Virginia Supreme Court would rule in the context of a properly appealed ERISA case. A determination of whether ERISA preempts application of Virginia Code § 20-111.1(D) would likely entail a careful review of the actual plan documents at

Consistent with this Court's approach of deciding only the issue before it, the Court simply stated in footnote 10 in *Kennedy* that it was leaving open the question of whether an aggrieved party might maintain a post-payment action for proceeds of an ERISA-governed benefits plan once those benefits were paid in accordance with the ERISA-based "plan documents." That footnote can hardly be seen as an invitation from this Court to decide application of federal preemption to the payment of FEGLIA benefits. More importantly, a decision on whether federal law preempts application of a Virginia statutory scheme is not likely to settle the issue left open in *Kennedy* as it relates to the separate and distinct laws of ERISA, particularly given the unique fact pattern in which those cases tend to arise. Any vehicle for settling that question ought to percolate among the lower courts in the discrete context of ERISA and based upon the separate reach of its statutory scheme.

Finally, assuming that this Court views the Virginia Supreme Court's sole interpretation of this unique statutory scheme as being worthy of granting *certiorari*, this Court should do so understanding that the Virginia Supreme Court's decision was unquestionably correct. Absent from section IV of the Petition for Certiorari is a recognition of the absolute right of a federal employee to designate the beneficiary of his or her choosing under federal law and regulation. Coupled with the statutory order of

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issue and the scope of ERISA preemption as intended by Congress.

precedence in FEGLIA and the express preemption provision in FEGLIA, the absolute right of a federal employee to designate the beneficiary of his or her choosing compels a finding that federal law preempts Virginia's statutory scheme as it relates to FEGLIA.

STATEMENT OF THE CASE

I. Background on The Federal Group Life Insurance Act

FEGLIA was passed by Congress in 1954 to provide low-cost group life insurance to federal employees. H.R.Rep. No. 2579, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 3052. FEGLIA authorizes the United States Office of Personnel Management (OPM) to purchase a group policy through private life insurance companies. 5 U.S.C. § 8709(a). As part of the act, Congress authorized the OPM to "prescribe regulations necessary to carry out" FEGLIA's purposes. 5 U.S.C. § 8716.

FEGLIA contains a statutory "order of precedence" which mandates how proceeds of life insurance benefits must be paid. 5 U.S.C. § 8705. That statutory order of precedence, in relevant part, states as follows:

> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in [the employing office or, in some cases, the OPM]. *For this purpose,*

> *a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.*
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
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> …

5 U.S.C. § 8705(a) (emphasis added). The OPM promulgated a regulation underscoring a federal employee's unrestricted right to designate or change his policy's beneficiary: "A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary. *This right cannot be waived or restricted.*" 5 C.F.R. § 870.802(f)[2] (emphasis added).

FEGLIA itself also contains an express preemption clause which provides that

> [t]he provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is

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[2] This particular regulation has been redesignated as 5 C.F.R. § 870.802(f). The cases cited below, however, were based on the identical regulation prior to being redesignated.

> inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).

II. Virginia Code § 20-111.1 and Automatic Revocation of Beneficiary Designations

Prior to 2007, federal law clearly preempted the operation of Virginia Code § 20-111.1 as to death benefits paid under FEGLIA. Specifically, when applied to ordinary insurance contracts § 20-111.1 operates to write a spouse out of a beneficiary designation for death benefits upon entry of a divorce decree.[3] As conceded by the Petitioner in all stages of the litigation, but for the 2007 amendment to Virginia Code § 20-111.1, that section would have been preempted as to any insurance proceeds paid under FEGLIA.

Borrowing from a revision of the Uniform Probate Code published by the National Conference of Commissioners on Uniform State Law, the Virginia General Assembly amended the statute to include subsection D, which states:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is

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[3] The only exception to the statute, at least as to non-FEGLIA death benefits, was if the divorce decree provided for a contrary result or the designation was in favor of a trust. Neither of those circumstances is applicable here.

> not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

In essence, subsection D purports to create a cause of action where federal preemption would bar application of the statute; and the purported cause of action dictates the same result as if federal preemption had no meaning or effect at all.

The statutory cause of action in subsection D ignores the intent of the deceased federal employee in regards to FEGLIA benefits and simply overrides the effect of a deceased federal employee's beneficiary designation.

The purported cause of action birthed by § 20-111.1(D) is the basis upon which the Complaint initiating the action below was premised.

III. Facts Underlying the Present Case and Case Below

Warren Hillman ("Decedent"), a federal employee, was afforded life insurance coverage under FEGLIA. On December 2, 1996, seven years into their marriage, Decedent designated Judy A. Maretta ("Respondent") as the beneficiary of his FEGLIA policy. Appendix to Petition ("App.") 4a. Decedent and Respondent divorced in 1998. *Id*. Their property settlement agreement and the divorce decree were silent as to either party maintaining the other as a beneficiary of life insurance.

In October 2002, Decedent then married Jacqueline Hillman ("Petitioner"). App. 4a. The Decedent never changed his beneficiary designation from Respondent. Decedent died in July 2008, while still married to Petitioner. *Id.* Petitioner filed a claim for the death benefit ("Death Benefit") from the Decedent's FEGLIA policy, but was notified that the benefit would be paid in accordance with the Decedent's 1996 designation as required by federal law. *Id.*

In her Complaint for Recovery of Death Benefit from Federal Employees' Group Life Insurance Policy ("Complaint") filed in the Circuit Court of Fairfax County, Virginia, Petitioner asserted that while the Death Benefit must be paid to Respondent pursuant to federal law, she could nonetheless maintain a cause of action against Respondent for the amount of the proceeds under Virginia Code § 20-111.1(D).

In response to the Complaint, Respondent maintained that FEGLIA contained a broad and express preemption provision which barred Petitioner's claims under Virginia Code § 20-111.1(D). Respondent relied upon FEGLIA's "order of precedence" for payment to beneficiaries, which specifically states that policy proceeds should be paid first to the designated beneficiary of the policy, and then to the widow "if there is no designated beneficiary." 5 U.S.C. § 8705. Respondent also asserted that federal law specifically recognized that the Decedent had an absolute right to name the beneficiary of his choosing, 5 C.F.R. § 870.802(f), and

therefore the scope of FEGLIA's "order of precedence" went beyond mere administrative convenience to the OPM.

The Circuit Court of Fairfax County rejected Respondent's position. The Virginia Supreme Court reversed the Fairfax County Circuit Court and found that federal law preempted application of Virginia Code § 20-111.1(D) on January 13, 2012.

Although eleven other states have a similar statutory provision,[4] the Virginia Supreme Court is the only court (state appellate court or federal court) to address federal preemption in the context of this particular statutory scheme.

REASONS FOR DENYING THE PETITION

I. No Other Court Has Ruled Upon FEGLIA Preemption Based Upon a Statute Similar to Virginia's Provision and Any Decision In This Case Is Not Likely to Settle The Issue Raised in Various FEGLIA Preemption Cases Cited by Petitioner

The narrow issue decided by the Virginia Supreme Court was whether Virginia Code § 20-111.1(D) was preempted by the terms of FEGLIA. None of the FEGLIA preemption cases cited by Petitioner arise out of a statute, similar or

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[4] Neither Maryland nor the District of Columbia, both with a high concentration of federal employees, has a statutory provision that automatically revokes a beneficiary designation for a life insurance policy upon divorce.

dissimilar, to Virginia Code § 20-111.1(D) and the impact of this Court's ruling upon Virginia's particular statutory scheme is not likely to settle the issues raised in those other cases. Although only eleven other states have a statute similar to Virginia Code § 20-111.1(D), the Virginia Supreme Court is the first court, state or federal, to address the issue and therefore, contrary to the position of the Petitioner, there is no split of authority on application of FEGLIA preemption to the statute in question here.

A. Petitioner Fails to Acknowledge That Nearly Every Other FEGLIA Preemption Case Cited Dealt With An Instance Where the Deceased Federal Employee Was Contractually Bound or Ordered in a Divorce Decree to Maintain a FEGLIA Beneficiary Designation, As Opposed to the Instant Case Which Dealt With a Statutory Scheme

Petitioner cites nine, mostly federal, cases finding that FEGLIA preempts application of state common law remedies and ten state cases finding otherwise. Petitioner omits discussion of eight additional federal cases that are adverse to her position on the scope of FEGLIA preemption. None of the cases cited by Petitioner (or omitted by Petitioner) dealing with FEGLIA preemption of state law or regulation, however, arise from a statute as the present case does.

In almost every instance the prior FEGLIA preemption cases dealt with a circumstance where a federal employee had a contractual obligation to maintain a FEGLIA beneficiary designation in favor of a former spouse or was under a court order to maintain that designation. The seeming split between unanimous federal court cases finding preemption and majority of state court cases finding against preemption is a product of this distinct scenario.

That is not to say that the Virginia Supreme Court was wrong. It followed the guidance of this Court, the unanimous federal court authority and its sister court in Alabama in reaching its decision. But this case is not likely to be the appropriate vehicle for resolving the specific issue in which nearly all other FEGLIA preemption cases have arisen. Even if this Court weighed in on the scope of preemption as applied to this particular statute in Virginia, it is certainly conceivable that a state court bound and determined to ignore the scope of FEGLIA preemption would simply distinguish this Court's decision based upon the typical fact pattern in which the other FEGLIA preemption cases have arisen, i.e. this case involved an automatic statute whereas a subsequent case involved a federal employee who violated a contractual obligation to an ex-spouse or child or state court order.

A review of each and every other FEGLIA preemption case decided by lower federal courts and state appellate courts reveals that they arose in dissimilar contexts such that even if this Court construed the nature of FEGLIA preemption in the

context of Virginia's unique statutory scheme, it would not necessarily resolve the broader issue of FEGLIA preemption.

Those cases can be catalogued as follows:

1. Factual Scenario in Cases Finding FEGLIA Preemption:[5]

Metro. Life Ins. Co. v. Zaldivar, 413 F.3d 119 (1st Cir. 2005) (children's claim preempted by FEGLIA despite federal employee agreeing to maintain children as beneficiaries of life insurance policy and court order directing the same)

Metro. Life Ins. Co. v. Christ, 979 F. 2d 575 (7th Cir. 1992) (children's claims preempted by FEGLIA despite deceased federal employee being under court order requiring federal employee to maintain his children as beneficiaries; proceeds payable to new wife since federal employee failed to file any beneficiary designation)

Dean v. Johnson, 881 F.2d 948 (10th Cir. 1989) (wife's claim preempted by FEGLIA where state domestic relations order mandated deceased husband maintain her as beneficiary during pendency of divorce); *see also Metro. Life Ins. Co. v.*

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[5] Petitioners parenthetical citation to *Fernbaugh v. Metro Life Ins. Co.*, CV-061361, 2006 U.S. Dist. Lexis 67765 (M.D. Pa. Sept. 21, 2006) on p. 20 of the Petition is misleading. That case rested on whether or not a plaintiff's statutory claim for bad faith against Metropolitan Life Insurance Co. under Pennsylvania law was preempted. The case did not deal with a state law "equitable claim" or an issue of FEGLIA preemption remotely similar to any of other cited case.

McMorris by McMorris, 786 F.2d 379 (10th Cir. 1986) (similar decision by Court of Appeals for the 10th Circuit) (neither are cited by Petitioner)

O'Neal v. Gonzalez, 839 F.2d 1437 (11th Cir. 1988) (FEGLIA preemption of claim as to decedent's non-domestic relations contractual obligation)

Faris v. Long, 2008 WL 2117243 (E.D. Tenn. May 20, 2008) (not cited by Petitioner) (claim preempted by FEGLIA despite state court order barring deceased federal employee from changing beneficiary designation)

Metro. Life Ins. Co. v. Barber, CIV.A.5:01-CV-025-C, 2001 WL 1683253 (N.D. Tex. Sept. 7, 2001) (FEGLIA preemption of state court order requiring deceased federal employee to designate ex-spouse and children as beneficiaries)

Metro. Life Ins. Co. v. Pearson, 6 F. Supp. 2d 469 (D. Md. 1998) (constructive trust remedy preempted despite property settlement agreement requiring ex-wife and children to be designated as beneficiaries of life insurance)

Metro. Life Ins. Co. v. Armstrong-Lofton, 19 F. Supp. 2d 1134, 1135-36 (C.D. Cal. 1998) (FEGLIA preemption of spouse's claim that she was never legally divorced and that she was entitled to share of life insurance proceeds because premiums paid from community property funds)

Metro. Life Ins. Co. v. Thompson, 968 F. Supp. 312 (S.D. Miss. 1997) (not cited by Petitioner) (claims by deceased federal employee's children preempted

despite beneficiary of FEGLIA policy waiving rights in a prenuptial agreement)

Matthews v. Matthews, 926 F. Supp. 650 (N.D. Ohio 1996) (not cited by Petitioner) (FEGLIA preempted ex-wife's claim despite the fact that separation agreement as incorporated into divorce decree required federal employee to maintain ex-wife as beneficiary)

Metro. Life Ins. Co. v. Bell, 924 F. Supp. 63, 64 (E.D. Tex. 1995) (ex-spouse's claim preempted by FEGLIA despite California state court declaration that policy was "overlooked as a community property asset")

Lewkowicz v. Lewkowicz, 761 F. Supp. 48 (E.D. Mich. 1991) (not cited by Petitioner) (FEGLIA preempted estate's claims despite divorce decree extinguishing ex-wife's claims to deceased federal employee's life insurance proceeds)

Mercier v. Mercier, 721 F. Supp. 1124 (D. N.D. 1989) (minor child's claim preempted by FEGLIA despite divorce decree requiring deceased federal employee to maintain beneficiary designation in favor of child)

Metro. Life Ins. Co. v. McShan, 577 F. Supp. 165 (N.D. Cal. 1983) (not cited by Petitioner) (children's claims preempted by FEGLIA despite state court divorce decree requiring deceased federal employee to maintain children as beneficiaries)

Knowles v. Metro. Life Ins. Co., 514 F. Supp. 515 (N.D. Ga. 1981) (not cited by Petitioner) (ex-spouse's claim preempted as to federal employee's FEGLIA proceeds despite property settlement agreement and

divorce decree requiring decedent to designate ex-spouse as beneficiary)

Metro. Life Ins. Co. v. Potter, 533 So. 2d 589 (Ala. 1988) (FEGLIA preemption despite state court order requiring deceased federal employee to maintain ex-wife as beneficiary)

2. Factual Scenario in Cases Finding No FEGLIA Preemption:

Hardy v. Hardy, 963 N.E.2d 470 (Ind. 2012) (no FEGLIA preemption where property settlement agreement incorporated into final decree of divorce required deceased federal employee to maintain FEGLI policy in favor of ex-wife and grandchildren)

Bell Estate ex rel. Bell v. Bell, 2007-CA-001050-MR, 2009 WL 350607 (Ky. Ct. App. Feb. 13, 2009) (unpublished intermediate state appellate court decision finding FEGLIA did not preempt new wife's claim that deceased federal employee intended to change his beneficiary designation)[6]

Fagan v. Chaisson, 179 S.W.3d 35, 38 (Tex. App. 2005) (intermediate state appellate court decision finding no FEGLIA preemption of ex-spouse's claim where property settlement agreement incorporated

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[6] It is somewhat surprising Petitioner would cite this particular unpublished opinion other than to perhaps bolster an incorrect suggestion that there are an equal number of cases for and against her position. The case is so clearly contrary to federal law and it is not even supported by the other state cases finding no preemption.

into decree of divorce awarded ex-spouse 50% of deceased federal employee's retirement benefits)

McCord v. Spradling, 830 So. 2d 1188 (Miss. 2002) (estate could maintain breach of contract action against widow for receipt of FEGLI proceeds where she waived rights in antenuptial agreement and beneficiary designation on file named decease's pre-deceased first wife as beneficiary)

Kidd v. Pritzel, 821 S.W.2d 566 (Mo. Ct. App. 1991) (intermediate state appellate court decision finding no FEGLIA preemption where deceased federal employee agreed in property settlement agreement to maintain his four children as beneficiaries of his life insurance)

Eonda v. Affinito, 15 Pa. D. & C.4th 142 (Com. Pl. 1991) *aff'd,* 427 Pa. Super. 317, 629 A.2d 119 (1993) (intermediate state appellate court decision finding no FEGLIA preemption where deceased federal employee agreed in property settlement agreement to maintain beneficiary designation)

In re Estate of Anderson, 195 Ill. App. 3d 644, 552 N.E.2d 429 (1990) (intermediate state appellate court decision finding no FEGLIA preemption of executor's claim where widow agreed in antenuptial agreement to waive rights to insurance proceeds)

Barden v. Metro. Life Ins. Co., 41 N.C. App. 135, 254 S.E.2d 271 (1979) (intermediate state court appellate decision finding no FEGLIA preemption where deceased federal employee agreed in separation

agreement to maintain ex-spouse as beneficiary of FEGLI policy)

Roberts v. Roberts, 560 S.W.2d 438 (Tex. Civ. App. 1977) (no FEGLIA preemption where deceased federal employee ordered in divorce decree to maintain children as FEGLI beneficiaries)

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Based on the pattern in which nearly all of the of previous FEGLIA preemption cases have arisen, the present case arising solely out of an automatic statutory scheme regardless of the deceased federal employee's intent is unlikely to be the appropriate vehicle for deciding the larger issue of FEGLIA preemption.

Put simply, if this Court were to take this case and uphold the Virginia Supreme Court's decision that FEGLIA preempts application of Virginia Code § 20-111.1(D), a subsequent state court wrestling with the distinct issue of whether a former spouse or child whom the deceased federal employee was obligated by contract or court order to designate as a beneficiary can maintain a cause of action could base its decision on the distinction between the issue in this case and the fact that the deceased federal employee shirked a contractual obligation or duty imposed by a court order.

The motivation behind the contrary state court decisions finding no preemption can most clearly be seen in *Eonda v. Affinito*, in which the court stated:

> we are confident that Congress did not intend that the vast number of federal employees in this country be permitted to enter into voluntary, state court-sanctioned agreements concerning the care and welfare of their children and then shirk completely the duties imposed by those agreements.

Id. at 325-326.[7] But the similar factual patterns from the other state court cases cited by Petitioner suggest their decisions were similarly motivated by a desire to protect a party who had expectations from the deceased federal employee's contractual obligations or obligations imposed by a state divorce decree.

While those states finding no preemption have done so based upon an incorrect view of federal law, the motivation behind the contrary state court decisions is not present in this instance where a state's statute purports to automatically override by legislative fiat the federal employee's right to designate the beneficiary of his or her choosing. Given the potential, however, for a subsequent state court to find a way to distinguish a ruling by this Court in this case, this Petition presents a poor

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[7] This same rationale was rejected by this Court in *Ridgway* where it dealt with nearly identical statutory and regulatory language to the present case. 454 U.S. at 53, 102 S. Ct. at 54 (characterizing the Supreme Judicial Court of Maine rationale).

vehicle for deciding the broader issue of FEGLIA preemption.[8]

B. While It Is Correct That Eleven Other States Have Similar Statutory Provisions to the One Under Review By the Virginia Supreme Court, No Other State Appellate Court or Federal Court Has Addressed This Type of Statutory Scheme

Petitioner suggests that there is a widespread potential for the particular statutory scheme before the Virginia Supreme Court to come up in other jurisdictions. In reality, the number of states having similar statutory provisions is limited and there is hardly a nationwide movement toward additional states adopting this particular provision of the Uniform Probate Code. As of the filing of this Opposition, only eleven other states have a similar provision to the Virginia statute in question and there is no pending legislation in other states to adopt such a provision.[9]

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[8] Respondent will concede that this Court reversing the Virginia Supreme Court's decision in this case would likely mean that the unanimous federal court decisions and the Alabama Supreme Court finding preemption were wrongly decided. The reason being is that if this Court were to rule that a state's automatic statutory provisions can override FEGLIA, then the justification for finding FEGLIA preemption where a deceased federal employee was contractually obligated or under a court divorce decree to maintain a beneficiary designation would be on substantially less firm ground.

[9] NCCUSL tracks pending legislation and reports no states currently have pending legislation toward adoption. http://www.nccusl.org/Act.aspx?title=Probate%20Code.

Moreover, if the issue does come up in other jurisdictions, it is likely to come up in the context of ERISA. A review of the particular provision of the Uniform Probate Code, as embodied in Virginia Code § 20-111.1(D), reveals that the goal of the NCCUSL was not to address all federal laws in particular, but to address a potential way to get around this Court's ruling in *Eglehoff v. Eglehoff*, 532 U.S. 141 (2001).[10] The commentary to this particular section of the Uniform Probate Code (last amended in 2006) is as follows:

> Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

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[10] Interestingly, *Eglehoff* found ERISA preemption of a statute nearly identical to Virginia Code § 20-111.1 prior to the addition of Subsection D of the statute.

See Uniform Probate Code §2-804(h)(2).[11]

Notably the commentary limits the application and justification of this particular section to ERISA. While § 2-804(h)(2) is not limited on its face to ERISA preemption, the discussion in the commentary is exclusive to that particular federal law and the "unintended" results from application of ERISA. In the context of FEGLIA, which is not discussed in the commentary, it becomes rather difficult to reconcile the view that following a FEGLIA beneficiary designation somehow leads to "unintended" consequences when federal law expressly acknowledges the absolute right of a federal employee to designate the beneficiary of his or her choosing. *See* 5 U.S.C. § 8705(a); 5 C.F.R. § 870.802(f).

Even in regards to ERISA, the NCCUSL's rationale is flawed. The preceding paragraph to the commentary to subsection (h)(2) should call into question the entire analytical approach adopted by the NCCUSL on the proposed legislation.

The paragraph states as follows:

> It is to be hoped that the federal Courts will continue to show sensitivity to the primary role of state law in the field of

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[11] The Commentaries can be found at: http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.pdf, p. 188-190.

> probate and nonprobate transfers. To the extent that the federal Courts think themselves unable to craft exceptions to ERISA's preemption language, *it is open to them to apply local law concepts as federal common law*. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

(emphasis added).

As this Court is aware, the notion of applying "federal common law" in the scenario identified in the above-referenced commentary of the Uniform Probate Code was firmly rejected by this Court in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 at 303. The analytical approach by the NCCUSL in this field is questionable at best.

In any event, the fact that eleven other states have a similar provisions to Virginia Code § 20-111.1(D) is hardly a reason to take this case when no other state or federal appellate court has addressed this statutory scheme as to FEGLIA. There is no reason to believe that another court addressing the same issue will come to a conclusion different than the Virginia Supreme Court.

II. Petitioners Attempt to Cast This Case As Answering The Question Left Open By This Court's Decision in *Kennedy v. DuPont Savings and Investment Plan* Is Unavailing

While this Court left open the issue of whether post-payment claims could be maintained after payment of benefits by a plan administrator of ERISA benefits in footnote 10 of *Kennedy*, this can hardly be construed as a broad invitation by this Court to petition for a writ of certiorari on the conflict between a state statute and an entirely distinct federal statute. As bears repeating, the Virginia Supreme Court was not called upon to address whether Virginia Code § 20-111.1(D) is preempted by ERISA.

Its analysis was limited to the distinct federal statutory scheme under FEGLIA. A review of the Virginia Supreme Court's decision shows that the Court's analysis of whether FEGLIA preempted application of the Virginia statute at issue was grounded solely on FEGLIA, the unanimous federal court precedent and this Court's own guidance on this issue in *Ridgway v. Ridgway*.

Should this Court decide to resolve that which was left open by *Kennedy*, it seems elemental that the appropriate vehicle would be an ERISA-based case that has resulted in a significant appellate split among the lower courts.[12] Ruling on the issue in the

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[12] As of the filing of this brief, only one federal court of appeals has addressed footnote 10 of *Kennedy*. *See Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (3d Cir. 2012).

context of FEGLIA, particularly in this case, is not the appropriate vehicle to make broad pronouncements about the reach of ERISA preemption.

III. The Virginia Supreme Court Followed the Precedent Of This Court and the Unanimous Body of Federal Case Law Interpreting the Scope of FEGLIA to Find Virginia Code § 20-111.1(D) Was Preempted as to FEGLIA

Assuming that this Court views the narrow issue decided by the Virginia Supreme Court as worthy of certiorari, it should grant the writ to affirm the Virginia Supreme Court's decision.

A. This Court Has Already Weighed In On The Key Statutory Language at Issue

This Court dealt with a statute identical to FEGLIA's statutory order of precedence in *Ridgway v. Ridgway*.[13] That case, similar to nearly every FEGLIA preemption case cited by either Petitioner or Respondent, dealt with a state divorce decree that mandated a service member maintain benefits under a SGLIA policy in favor of his children. 454 U.S. at 48. The service member, contrary to the command of

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[13] SGLIA's statutory order of precedence was modeled after FEGLIA's statutory order of precedence. *Metro. Life Ins. Co. v. Christ*, 979 F.2d at 580. In other words, FEGLIA came first.

the divorce order, changed the beneficiary designation to his new wife. *Id*. The ex-wife filed suit asking for a constructive trust to be placed over the proceeds. The Supreme Judicial Court of Maine ruled in favor of the ex-wife. *Id*. at 50.

This Court granted a writ of certiorari and reversed. The focus of this Court's decision was the identical statutory order of precedence at issue in FEGLIA. Given that SGLIA, at issue in *Ridgway*, did not contain an express preemption provision like FEGLIA, this Court's analysis initially examined the Congressional record behind the statutory order of precedence. 454 U.S. at 50-53.

Despite the lack of an express preemption provision in SGLIA, this Court – looking at the statutory order of precedence and regulations found in both SGLIA (which are nearly identical to those found in FEGLIA) – stated of SGLIA that "[f]ederal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary." 454 U.S. at 59. Based upon a review of the statute at issue, this Court further stated that "Congress had spoken with force and clarity in directing that the proceeds [of a SGLIA policy] belong to the named beneficiary and no other." *Id*. 454 U.S. at 56.[14]

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[14] As a secondary and distinct basis, the Court relied upon the anti-attachment provision found in SGLIA. As discussed below in section III(D), the courts that have found no preemption have ignored the fact that the anti-attachment provision in SGLIA was a separate and distinct holding.

The same statutory analysis should be applied in this case.

B. The Unanimous Federal Courts, and the Supreme Courts of Alabama and Virginia Have Properly Followed This Court's Precedence in Finding Preemption Under FEGLIA

The seventeen other cases finding FEGLIA preemption have been catalogued previously. With the exception of *Knowles v. Metro. Life Ins. Co.*,[15] which was decided six months before this Court's decision in *Ridgway*, each of those cases have properly relied upon this Court's holding in *Ridgway* to find FEGLIA preempted post-payment claims.

Illustrative of this strong line of cases is the court's decision in *Metropolitan Life Ins. Co. v. Zaldivar*, 413 F.3d 119 (1st Cir. 2005), which noted:

> Because the applicable language of FEGLIA and SGLIA are very similar, a case construing the latter, such as *Ridgway*, is highly persuasive, if not binding, in construing the former.

Id. at 120. *See also*, *Maretta v. Hillman*, 283 Va. 34, 42, 722 S.E.2d 32, 35 (2012) ("We thus agree with those courts that have considered *Ridgway* to be 'highly persuasive, if not binding, in construing [FEGLIA].'").

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[15] *Knowles* relied upon a plain statutory analysis in concluding such claims were preempted by FEGLIA.

Petitioner attempts to distinguish the very clear precedent set by this Court in *Ridgway* by improperly focusing on the Court's discernment of Congressional intent in order to find SGLIA preempted the state-based cause of action at issue. But Petitioner's arguments fall short. First, as noted in *Metropolitan Life Ins. Co. v. Christ*, while this Court's decision in *Ridgway* mentioned "federal interests in military morale and national defense", *Ridgway's* "holding was grounded ultimately not on any perceived 'interests' that Congress was trying to pursue, but on the statutory language giving force to those interests." *Id.* at 580. A review of this Court's language in *Ridgway* demonstrates this to be unquestionably correct. 454 U.S. at 59.

Second, the apparent reason this Court in *Ridgway* referenced the legislative history was because SGLIA, unlike FEGLIA at issue here, does not contain an express preemption clause. *See Maretta v. Hillman*, 238 Va. at 44, S.E.2d at 37, fn. 3 ("In fact, Congress' preemption intent is more apparent in FEGLIA than in SGLIA, which contains no provision similar to 5 U.SC. § 8709(d)(1), citing *Metropolitan Life Ins. Co. v. Potter*, 533 So.2d at 594.[16]

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[16] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002) ("Because the FBSA contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

Petitioner notably omits a discussion of the absolute right of an insured under FEGLIA to name the beneficiary of his choosing as set forth in 5 C.F.R. § 870.802(f). Yet nearly an identical regulation was under consideration in *Ridgway* as set forth in 38 C.F.R. § 9.16(e) (now 38 C.F.R. § 9.4(b)). 454 U.S. at 53, 102 S. Ct. at 54 ("[f]ederal law *and federal regulations* bestow upon the service member an absolute right to designate the policy beneficiary") (emphasis added). The only difference between the two provisions is that FEGLIA's regulation goes further by adding the sentence: "This right cannot be waived or restricted."

Construed properly, it is clear that the Virginia Supreme Court's decision properly followed the precedent of this Court.

C. Petitioner's Arguments With Respect to the Scope of Preemption Miss the Point

Petitioner is in the unenviable position of asking this Court to view the nearly identical statutory and regulatory provisions between SGLIA and FEGLIA as somehow subject to differing interpretations. This Court premised preemption in *Ridgway* on virtually the same language under review in this case. Since SGLIA contained no express preemption provision, one would have to infer that the same interpretation would have to be given to identical language found in FEGLIA. A contrary conclusion would mean that Congress using the identical language in two similar statutory schemes intended different results.

If there were any doubt about whether Congress intended to preempt inconsistent state laws with respect to FEGLIA benefits (or payment of those benefits), the fact that Congress enacted an express preemption provision in FEGLIA should put that to rest. The express preemption provision found in FEGLIA was aptly described by *Metropolitan Life Ins. Co. v. Christ* as follows:

> This clause broadly preempts any state law that is inconsistent with the FEGLIA master policy.[17] The ordinary meaning of the term "relates to" is broad: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales,* 504 U.S. at ----, 112 S.Ct. at 2037 (quoting Black's Law Dictionary 1158 (5th ed. 1979). Moreover, a state law need not specifically address the subject of the federal law to relate to that subject: "[A] state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Id.* at ----, 112 S.Ct. at 2038 (quoting *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, ----, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990)).

979 F.2d at 579.

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[17] Petitioner's argument with respect to the "master policy" is addressed below in section III(D)(1).

Petitioner cites several cases for the proposition that this Court has been reluctant to find preemption of state domestic relations law. But *McCarty v. McCarty*, 453 U.S. 210 (1981) and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), relied upon by *Ridgway* for this proposition, were conflict preemption cases rather than express preemption cases. All three cases, however, found that state domestic relations law was preempted as conflicting with federal law. Moreover, Petitioner cannot answer the very simple question: if FEGLIA's express preemption provision was not primarily designed to preempt state law with respect to domestic relations, then what area of state law was Congress intending to preempt? Contextually these controversies would almost only arise in the domestic relations arena. It is no coincidence that in 24 of the FEGLIA preemption cases cited, 22 dealt with domestic relations agreements or divorce decrees.

Finally, Petitioner, as she did below, continues to misinterpret the effect of this Court's decision in *Empire Healthchoice Assurance Inc. v. McVeigh*, 547 U.S. 677 (2006). *See* Pet. p. 37-38. But that case does not support Petitioner's contention that Virginia Code § 20-111.1(D) is not preempted. The issue in *McVeigh*

> *concerns the proper forum* for reimbursement claims when a Plan beneficiary [under Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. § 8901] injured in an accident, whose medical bills have been paid by the Plan administrator, recovers

> damages (unaided by the carrier-administrator) in a state-court tort action against a third party alleged to have caused the accident.

McVeigh, 547 U.S. at 682 (emphasis added). Although FEHBA contained a preemption clause "displacing state law on issues relating to 'coverage or benefits'" under the plan, *id.* at 683, there was no express provision in FEHBA that addressed the forum for vindicating the insurance carrier's reimbursement rights. *Id.* at 693.[18] Ultimately, the carrier waited for the state court personal injury suit to settle and then filed suit in federal court for the full amount the carrier paid for the beneficiary's medical care. *Id.* The sole issue before the Court was whether the insurer's claim could be said to arise under federal law such that 28 U.S.C. § 1331[19] conferred federal court jurisdiction.

After finding no express provision in FEHBA authorizing federal court jurisdiction, this Court examined the argument that FEHBA's preemption clause was a jurisdiction-conferring provision. *McVeigh*, 547 U.S. at 697. This Court found that the preemption provision was not "sufficiently broad to confer federal jurisdiction." *Id.* at 698. At best, *McVeigh* stands for the proposition that a

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[18] This Court stated "[i]t is undisputed that Congress has not expressly created a federal right of action enabling insurance carriers like Empire to sue health-care beneficiaries in federal court to enforce reimbursement rights under contracts contemplated by FEHBA." *McVeigh*, 547 U.S. at 693.

[19] Section 1331 authorizes federal court jurisdiction over "civil actions arising under … laws of the United States."

preemption clause in a federally enacted statute is not sufficient to confer federal court jurisdiction absent an explicit directive from Congress. It does not, as Petitioner suggests, address the breadth of the express preemption provision in FEGLIA as applied to Virginia Code § 20-111.1(D).

D. The State Courts That Have Found Against FEGLIA Preemption Have Misapplied This Court's Precedence

Petitioner concedes, as she must, that *Ridgway* had a distinct and separate ground for finding preemption based upon the anti-attachment provision found in SGLIA. FEGLIA has no anti-attachment provision. Petitioner's concession that the anti-attachment provision in SGLIA was a separate and distinct holding is inescapable based on a clear reading of this Court's decision in *Ridgway*. In section III of the Court's opinion, the Court already held that the statutory language and regulatory language in SGLIA compelled a finding of preemption. In section IV of this Court's opinion, it examined the anti-attachment provision in SGLIA and prefaced as follows:

> [t]he imposition of a constructive trust upon the insurance proceeds is *also* inconsistent with the anti-attachment provisions [in SGLIA].

454 U.S. 57. (emphasis added).

Notably, the state court decisions finding against preemption under FEGLIA have generally

done so by improperly relying upon the lack of an anti-attachment provision in FEGLIA to distinguish *Ridgway*. *See Maretta v. Hillman*, 283 Va. at 46, 722 S.E.2d at 38 ("State courts distinguishing *Ridgway* also fail to acknowledge what is apparent from a plain reading of the decision, i.e., that its holding based on SGLIA's anti–attachment provision was a separate, independent basis for the result.")

Petitioner plainly recognizes the state court precedent (mostly intermediate appellate courts) she relies upon is problematic, and therefore suggests an unsupportable reading of this Court's decision in *Ridgway*. *See* Pet. p. 32-35. According to Petitioner, all can be reconciled by making a distinction between pre-payment and post-payment claims. Yet there is nothing in *Ridgway's* analysis of the nearly identical statutory order of precedence or regulations under consideration in SGLIA that lends any support to that argument. In point of fact it is a distinction without any real difference. To the contrary of Petitioner's assertion, this Court hinted (in the section of the opinion preceding the discussion of the anti-attachment provision in SGLIA) that the ex-wife might have a claim against her deceased ex-husband's estate for shirking his obligation under the state court divorce decree. *See* 454 U.S. at 59 ("As the trial court intimated, respondents may have a claim against the insured's estate for that breach....."). Such a claim against the decedent's estate would necessarily require the actual proceeds of the SGLIA policy to have been paid to another.

Notably, no federal court has found that purported distinction of any significance. For

instance, in *Metropolitan Life Insurance Co. v. Bell*, the Eastern District of Texas stated, "[h]owever, there is an argument to be made that a constructive trust placed on the proceeds after a beneficiary received them would not be inconsistent with [Section 8709(d)(1)]. Notably, other courts have *not* interpreted FEGLIA in this manner." 924 F. Supp. 2d 63, 65 (E.D. Tex. 1995) (emphasis added).

Instead, a number of courts have rejected the view that a state law claim could be made for the proceeds once paid. In *Lewkowicz v. Lewkowicz*, 761 F. Supp. 48 (E.D. Mich. 1991), a decedent's ex-wife was paid FEGLI insurance proceeds despite a divorce decree expressly stating that all beneficiary designations for insurance contracts or policies were extinguished. The decedent's surviving spouse then sued the ex-wife for the proceeds. The Court applied the preemption provision in FEGLIA and awarded summary judgment in favor the ex-wife. *Id.* at 49-50. Similarly, a claim for a decedent's FEGLIA policy proceeds after they were paid was rejected in *Mercier v. Mercier*, 721 F. Supp. 1124 (D. N.D. 1989). In *Mercier* the plaintiff asserted that a state divorce decree mandated the decedent to maintain life insurance for the benefit of his minor children. The Court rejected that theory as it violated the decedent's absolute right to designate the beneficiary of his choosing. *Id.* at 1127.

Petitioner's view of the case ignores this Court's holding in *Ridgway* and the Court's actual focus on the textual words in the statute and regulations. Petitioner would ask this Court to ignore the scope of federal law and regulations by

suggesting the right of a federal employee to name the beneficiary of choosing without restriction goes no further than writing a name on a piece of paper. But the absolute right must necessarily go beyond the mere ability to write a name on a piece of paper. The right must have some actual effect and substance. As the Alabama Supreme Court recognized in *Metropolitan Life Insurance Company v. Potter*:

> It must be assumed that the federal provisions regarding designation of beneficiaries were intended to confer on the insured more than the right to do a meaningless act. If the proceeds are to go to someone other than the designated beneficiary the act of so designating serves no purpose.

Id. 533 So.2d at 597.

E. Petitioner's Remaining Contentions Are Without Merit

Petitioner makes a series of passing assertions toward the end of the Petition. Each is without merit.

1. OPM Policy

Petitioner suggests that the Virginia Supreme Court "refused to acknowledge the 50-page contract which OPM negotiated with Metropolitan Life Insurance Company." Pet. p. 37-38. Petitioner then goes on to broadly stated "[t]herefore, the Supreme

Court of Virginia could not have possible applied 5 U.S.C. § 8709(d)(1) in this case properly…" Pet. p. 38. Petitioner, however, is incorrect. The Virginia Supreme Court, citing *O'Neal v. Gonzalez*, 839 F.2d at 1440, noted in footnote 1 of its opinion that the "insurance policy is not a traditional contract between an insured and the insurer but a federal policy governed by federal law." *Id*. 283 Va. 38, 722 S.E.2d at 39. *See also*; *Knowles v. Metro. Life Ins. Co*., 514 F. Supp. 515, 516 (N.D. Ga. 1981). Accordingly, the Virginia Supreme Court properly understood the contractual provisions at issue were actually the embodiment of federal law.

In any event, the absence of the OPM Master Policy from the record would not have helped Petitioner as the contract expressly incorporates all federal statutes and regulations.[20] It would seem somewhat absurd to think that OPM was authorized under 5 U.S.C. § 8709 to acquire life insurance for federal employees, but somehow the contract for life insurance would not incorporate the requirements of federal law or regulations promulgated by OPM.

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[20] Should the Court take up Petitioner's offer to provide a copy of the contract, Respondent would direct the Court to Section 23, on page 39 of the contract, which states:

CONFORMITY WITH LAW. -- If any provisions required by chapter 87 of title 5, United States Code, 5 CFR Part 870 to be contained in this Policy are not specifically contained herein, then such provisions shall be deemed to part of this Policy as though set forth herein at length.

2. 1998 Amendment to FEGLIA

Petitioner remarkably makes the assertion that somehow the 1998 amendment to FEGLIA supports the conclusion that Congress did not intend to preempt "all state equitable remedies." Pet. p. 35-36. The amendment at issue is found in 5 U.S.C. § 8705(e). Essentially, it says that the if a divorce decree requires a federal employee to designate a beneficiary, then the sole way in which that designation can be protected is by filing the divorce decree with OPM before the decedent's death.

But far from suggesting Congress intended to express a view that post-payment equitable remedies were free from the preemptive force of FEGLIA, this amendment states a very limited exception to the statutory order of precedence. The Court in *Metro. Life Ins. Co. v. Zaldivar*, 337 F. Supp. 2d 343, 348 (D. Mass. 2004) *aff'd*, 413 F.3d 119 (1st Cir. 2005), recognized and rejected a similar argument, stating:

> In amending FEGLIA to permit court decrees in divorce settlements to govern the designation of beneficiaries to FEGLIA life insurance policies, Congress recognized the importance of allowing state courts to have power over the disbursement of FEGLIA insurance proceeds for the benefit of families and children *under specific, limited conditions.* Congress could just as easily have amended FEGLIA to allow *all* state court decrees in divorce

> settlements, as well as other equitable remedies, to change the designation of beneficiaries, regardless of whether the employing agency received notice of the order. Congress did not do so. The language of the statute explicitly and clearly provides that the employing agency must (1) receive a copy of the court order (2) before the death of the insured.

337 F. Supp. 2d at 348. *See also*, *Metro. Life Ins. Co. v. Holland*, 134 F. Supp. 2d 1197, 1200 (D. Or. 2001). Accordingly, the stronger view is that Congress intended only to apply a very limited exception to the federal employee's absolute right to designate the person of his or her choosing.

CONCLUSION

For the foregoing reasons, the Petition for Writ or Certiorari should be denied.

Respectfully submitted,

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