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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Ex-Wife understandably does not want this Court to grant Widow's Petition for a Writ of Certiorari. However, her arguments suggesting that this case does not fall within the split of authority among federal and state courts with regard to Federal Employees Group Life Insurance Act of 1954 ("FEGLIA") preemption and that this case does not raise an important national issue are weak, at best.

Ex-Wife is simply attempting to confuse the important widespread issue raised in this case - that this Court has not directly ruled on FEGLIA preemption. Accordingly, lower courts are left to look to either this Court's opinion in *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (analyzing the Servicemen's Group Life Insurance Act of 1965 ("SGLIA")) or this Court's opinions in *Egelhoff v. Egelhoff*, 532 U.S. 131 (2001) and *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 299 (2009) (analyzing the Employee Retirement Income Security Act of 1974 ("ERISA")) for guidance. A lower court could rationally apply either line of reasoning to FEGLIA cases, which is why there is such a pervasive split in authority. This Court needs to put an end to this needless nationwide litigation by opining in this case, so federal and state courts across the country will know which analysis to

apply in FEGLIA cases. At a minimum, this Court should Call for the Views of the Solicitor General with regard to whether the question presented in this case raises an important enough issue to warrant the granting Widow's Petition for a Writ of Certiorari.

I. THIS COURT ADDRESSING THE QUESTION PRESENTED IN THIS CASE WOULD RESOLVE THE SPLIT IN AUTHORITY AMONG THE FEDERAL AND STATE COURTS WITH REGARD TO FEGLIA PREEMPTION.

It is reasonable for Ex-Wife not to highlight the split in authority among the federal and state cases which have addressed FEGLIA preemption (the "FEGLIA Cases") as such a split makes this case a strong candidate for review.[1] However, Ex-Wife goes entirely too far when she, at great length, tries to use meaningless "distinctions" between this case and the FEGLIA Cases in an attempt to discourage this Court from granting

[1] On May 21, 2012, yet another opinion regarding FEGLIA preemption of an equitable remedy, *Parrott-Horjes v. Rice*, --- P.3d ---, 2012 WL 1816189 (Wash. App. Div. 1), was published adding to the nationwide split of authority. This case followed the line of cases that applied the *Ridgway* analysis to FEGLIA. *But see Herrera v. Metro. Life Ins. Co*., 2011 WL 6415058 (S.D.N.Y.) (Congress did not intend "to occupy the field and thus to foreclose any state law role with respect to federal employee group life insurance.")

Widow's petition. Ex-Wife's Brief, 1-3, 10-20. Her main "distinction", is that the equitable remedy in this case arises out of a statute instead of common law. *Id*. at 10-11. Firstly and most importantly, it is entirely irrelevant whether or not an equitable remedy is based on a statutory right or common law.

Secondly, many, if not most of the equitable remedies in the FEGLIA Cases are grounded in statutory rights. In *Metro. Life Ins. Co. v. McShan*, the state equitable remedy arose under "California Civil Code section 2223 and 2224 which provide that one who detains or gains a thing by a wrongful act is an involuntary trustee of the thing gained." 577 F.Supp. 165, 166-167 (N.D. Cal. 1983). In *Metro. Life Ins. Co. v. Bell*, the state equitable remedy was grounded in California community property and intestate succession statutes. 924 F.Supp. 63, 64-65 (E.D. Tex. 1995). The state equitable remedy in *Metro. Life Ins. Co. v. Armstrong-Lofton*, was also based on California's community property laws which grant statutory property rights to a spouse. 19 F.Supp. 2d 1134, 1136 (C.D. Cal. 1998). Furthermore, a court's authority to divide up marital assets in a

divorce decree or similar order generally comes from a statute.[2]

Ex-Wife then tries to suggest that the legislative intent behind the equitable remedies in the FEGLIA Cases is somehow nobler than the legislative intent behind UNIF. PROBATE CODE § 2-804(h)(2).[3] *Id*. at 18-19. Accordingly, she argues, if this Court rules that FEGLIA preempts UNIF. PROBATE CODE § 2-804(h)(2), lower state courts will disregard this Court's opinion in cases that arise out of divorce decrees, property settlement agreements, etc. on the grounds that the intent behind those state equitable remedies is more important. *Id*.

Ex-Wife bases her argument on the theory that the intent behind the equitable remedies in the FEGLIA Cases is solely to prevent an insured from entering into an agreement with an ex-spouse and then using preemption to get around the insured's

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[2] For example, in Virginia, the Court's power to divide up marital property rights is derived from the Virginia code section titled "Court may decree as to property of the parties." VA. CODE ANN. § 20-107.3 (2011).

[3] VA. CODE ANN. § 20-111.1 (2011) is based on UNIF. PROBATE CODE § 2-804 (amended 2008). 12 states (i.e., 24% of the country) have already adopted UNIF. PROBATE CODE § 2-804, making this a nationwide issue. Therefore, statutory references herein will be to UNIF. PROBATE CODE § 2-804(b) (amended 2008) instead of VA. CODE ANN. § 20-111.1(A) (2011) and to UNIF. PROBATE CODE § 2-804(h)(2) (amended 2008) instead of VA. CODE ANN. § 20-111.1(D) (2011).

obligations under the agreement. *Id*. This, of course, ignores all the rights granted ex-spouses based on community property laws or divorce laws in which an ex-spouse is granted rights by the state instead of the insured. More importantly however, the intent behind UNIF. PROBATE CODE § 2-804(h)(2) is to protect an insured and his or her family from an ex-spouse. This intent is widely accepted as a legitimate and important interest for states to protect.[4] A lower court would be hard pressed to ignore this Court's ruling in this case because it feels the intent behind a divorce decree is more important than the intent behind UNIF. PROBATE CODE § 2-804(h)(2).

Despite her claims that the equitable remedy in this case is completely different than the equitable remedies in the FEGLIA Cases, she argues that the Virginia Supreme Court correctly ruled that this case was governed by the federal FEGLIA Cases. Ex-Wife's Brief, 12. So according to Ex-Wife, the Virginia Supreme Court properly followed the federal FEGLIA Cases, but, for purposes of reviewing the Virginia Supreme

[4] Almost every state in the country has a statute that revokes dispositions of property in a will in favor of an ex-spouse upon a divorce. UNIF. PROBATE CODE § 2-804(b); MD. CODE ANN., EST. & TRUSTS § 4-105 (2012); CAL. PROB. CODE § 6122 (2012); TEX. PROB. CODE ANN. § 69 (2012); N.Y. EST. POWERS & TRUSTS LAW §5-1.4 (2012). 44 other states also have similar laws.

Court's opinion, this case is not governed by the FEGLIA Cases. Ex-Wife clearly wants to have her proverbial cake and eat it too.

Moreover, the courts which have ruled on UNIF. PROBATE CODE § 2-804(h)(2), the Virginia Supreme Court and the Circuit Court of Virginia for Fairfax County, are of the opinion that this case falls squarely within the split of authority among the FEGLIA Cases. *Maretta v. Hillman*, 722 S.E.2d 32, 37 (Va. 2012). ("We are aware, as Hillman argues on brief, that our decision today stands in contrast to a majority of state court decisions."); *Hillman v. Maretta*, 80 Va. Cir. 439, 2010 WL 7373701, 7 (Va.Cir.Ct.), *rev'd* 722 S.E.2d 32 (Va. 2012).

That all being said, there is a meaningful distinction between the equitable remedy in this case and those in the FEGLIA cases. However, this distinction makes this case an ideal candidate for review. The only distinction which matters between the FEGLIA Cases and this case is that the FEGLIA Cases all "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." Ex-Wife's Brief, 12. In other words, these cases all dealt with attempts by states to restrict an

insured's right to designate and/or change a beneficiary designation. This is quite different than the equitable remedy contained in UNIF. PROBATE CODE § 2-804(b), which does not at all restrict the insured's rights.

UNIF. PROBATE CODE § 2-804(b) is designed to protect the insured's interests from an ex-spouse. It does not force an insured to designate or maintain anyone as a beneficiary. It simply voids a then existing beneficiary designation of an ex-spouse at a moment in time (i.e., upon a divorce). At any time before or thereafter, the insured is free to designate anyone he or she chooses, including an ex-spouse. UNIF. PROBATE CODE § 2-804(b) merely creates a presumption that an insured would rather have his or her insurance proceeds go to the natural objects of his affection (i.e., his family), instead of an ex-spouse. As noted above, this is a well-grounded assumption which has been accepted at some level by almost every state in the country. Accordingly, UNIF. PROBATE CODE § 2-804(b) is not a restriction of an insured's right to freely "designate the beneficiary and to alter that choice at any time." *Kidd v. Pritzel*, 821 S.W.2d 566, 571-572 (Mo. Ct. App. 1991); *Barden v. Metro. Life Ins. Co.*, 41 N.C. App. 135, 138 (1979); *Roberts v. Roberts*, 560 S.W.2d 438, 440 (Tex. Civ. App. 1977).

The distinction between UNIF. PROBATE CODE § 2-804(b) and equitable remedies which restrict an insured's rights to designate a beneficiary, in no way takes this case out of the split of authority in the FEGLIA Cases. However, it does make this case a much better vehicle for resolving the preemption issue than a case that arises from a restriction of an insured's right, such as under a divorce decree.

Most likely, this Court will rule on FEGLIA preemption one of two ways – either it will apply the *Ridgway* analysis or it will apply the *Egelhoff* and *Kennedy* analyses. If this Court determines that the *Ridgway* analysis applies to FEGLI policies, this Court will rule that an insured has an absolute right to designate and/or change a FEGLI beneficiary designation, and state law cannot restrict that right. *Ridgway*, 454 U.S. at 55-57. If this Court applies the *Ridgway* analysis in a case where the equitable remedy clearly restricts an insured's right to designate or maintain a beneficiary designation, such as with a divorce decree, it will make it clear that such equitable remedies are preempted. However, the question as to whether UNIF. PROBATE CODE § 2-804(h)(2) amounts to such a restriction will still be left open for the 12 states (or 24% of the country) which have adopted it since, as previously discussed, UNIF. PROBATE CODE § 2-804(h)(2) does not restrict

an insured from designating or changing a beneficiary at any time. On the other hand, with this case, this Court could resolve the matter for the entire country by ruling that equitable remedies cannot restrict an insured's right to designate a beneficiary (which would resolve the matter for such divorce decree based cases), and then determining whether or not UNIF. PROBATE CODE § 2-804(h)(2) amounts to such a restriction.

Conversely, if this Court determines that the *Egelhoff* and *Kennedy* analyses apply to FEGLI policies instead of the *Ridgway* analysis, then this Court will clearly establish that FEGLI proceeds must be paid in accordance with FEGLIA's statutory order of precedence. *Egelhoff*, 532 U.S. at 149-150; *Kennedy*, 129 S. Ct. at 875-876. However, as *Kennedy* expressly noted in footnote 10, this Court would then need to determine if an action could be brought against the recipient of those proceeds after they have been paid. *Kennedy*, 129 S. Ct. at 875 n. 10.

Surely, Congress did not intend for ex-spouses of the vast number of federal employees in this country to have an absolute right to FEGLI proceeds when an insured neglected to change a beneficiary designation following a divorce. This contention is supported by a considerable and almost unanimous body of federal and state courts

which have held that post-payment claims are permitted in ERISA cases.[5] Nevertheless, this Court has clearly not ruled on this subject for FEGLIA or ERISA cases, and this case gives this Court an opportunity to do so. This will not only resolve the matter for all FEGLIA preemption cases, but it will, despite Ex-Wife's claim to the contrary, also give significant guidance to, if not control, lower courts dealing with ERISA cases.

II. TWENTY-FOUR PERCENT OF THE COUNTRY IS A SIGNIFICANT PORTION OF THE COUNTRY.

[5] *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 136-139 (3rd Cir. 2012); *Central States Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000); *Sweebe v. Sweebe*, 712 N.W.2d 708, 710-11 (Mich. 2006); *Guildry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-83 (10th Cir. 1994); *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004); *Wright v. Riveland*, 219 F.3d 905, 919-21 (9th Cir. 2000); *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 211 (2nd Cir. 2009); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54-56 (3rd Cir. 1994); *Alcorn v. Appleton*, 708 S.E.2d 390 (Ga. App. 2011); *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004), *Estate of Sauers*, 971 A.2d 1265 (Pa. Super. 2009); *Reed Estate v. Reed*, 810 N.W.2d 284 (Mich. App. 2011); *Partlow v. Person*, 798 F.Supp.2d 878 (E.D. Mich. 2011); *Morris v. Met. Life Ins. Co.*, 751 F.Supp.2d 955 (E.D. Mich. 2010); *Hall v. Hall*, 2009 WL 2837720 (E.D.Pa.); *Brandenberg v. Watson*, 2011 WL 609796 (S.D. Ohio); *McCalip v. Met. Life Ins. Co.*, 2009 WL 1883533 (E.D. Mich.); *Brown v. Wright*, 2009 WL 2952682 (Mich. App. Unpub.); *but see Langevin v. McMorrow*, 79 Mass. App.Ct. 1126 (2011 Unpub.).

Ex-Wife also makes the incredibly farfetched argument that, in and of itself, preemption of UNIF. PROBATE CODE § 2-804(h)(2) does not raise a nationwide issue, but in fact raises a very limited and narrow issue since "only" 12 states have adopted UNIF. PROBATE CODE § 2-804(h)(2) so far. Ex-Wife's Brief, 20-23. She then dismisses the likelihood that any other states will adopt this code section since there are no current bills to do so. *Id*. at 20. This, of course, ignores that fact that Massachusetts adopted UNIF. PROBATE CODE § 2-804(h)(2) effective just last year. MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2011). However, even assuming that no other state ever adopts UNIF. PROBATE CODE § 2-804(h)(2), the ridiculousness of the suggestion that 12 states or 24% of the country is insignificant, speaks for itself.

III. THIS COURT'S RULINGS IN ERISA CASES ARE HIGHLY PERSUASIVE ON FEGLIA CASES AND VICE VERSA.

Ex-Wife takes issue with Widow's assertion that this Court has recognized in footnote 10 of *Kennedy* that the question presented in this case raises an important unresolved issue. Ex-Wife's Brief, 24-25. Ex-Wife's argument is based on the fact that *Kennedy* dealt with a life insurance policy governed by ERISA while this case deals with a life insurance policy governed by FEGLIA. Ex-

Wife is clearly of the opinion that this Court's ruling on one Act would have no impact on the other. This is somewhat ironic given that Ex-Wife bases her preemption argument, not on a FEGLIA case, but on this Court's holding in *Ridgway*, a SGLIA case. Apparently, for Ex-Wife, it is entirely appropriate to rely on a different Act (i.e., SGLIA) for purposes of establishing that FEGLIA preempts UNIF. PROBATE CODE § 2-804(h)(2), but preposterous to suggest that ERISA cases have any bearing on the subject.

ERISA is "a statutory scheme more analogous to FEGLIA than either [National Service Life Insurance Act] or SGLIA." *Maretta*, 722 S.E.2d at 42 (McClanahan, J., dissenting). SGLIA, unlike FEGLIA, has an anti-attachment provision;[6] FEGLIA, unlike SGLIA, has a provision which permits divorce decrees to alter and restrict a beneficiary designation;[7] and Congress enacted FEGLIA and SGLIA for entirely different reasons.[8]

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[6] The relevance of the anti-attachment provision contained in SGLIA is discussed in Widow's Petition, 31-35 and does not need to be repeated here.

[7] The relevance of 5 U.S.C. § 8705(e) is discussed in Widow's Petition, 35-36 and does not need to be repeated here.

[8] The Congressional intent behind the enactment of FEGLIA, to offer life insurance to federal employees so that the federal government, in competing with private employers, was offering benefits in-line with (but not better than) the best practices of progressive private employers, is discussed in Widow's Petition, 29-30 and does not need to be repeated

The suggestion that ERISA cases have no bearing on FEGLIA cases and vice versa, again speaks for itself. Furthermore, while this Court clearly left open the issue of whether a suit may be brought against the beneficiary of insurance proceeds post-payment, at least with regard to policies governed by ERISA, whether this Court invited this issue to be brought before it is known by this Court and requires no further discussion.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. Alternatively, this Court should Call for the Views of the Solicitor General.

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here. The Congressional intent behind the enactment of SGLIA, to improve the morale of servicemen in the interests of national defense, is discussed in Widow's Petition, 28-29 and does not need to be repeated here.

Respectfully, submitted.

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May 29, 2012