No. 07-636

In the Supreme Court of the United States

KARI E. KENNEDY, PETITIONER

v.

PLAN ADMINISTRATOR FOR
DUPONT SAVINGS AND INVESTMENT PLAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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By order dated October 28, 2008, the Court directed the parties and permitted amici to file briefs addressing the following question: "Whether 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar." As the government explained in its amicus brief (at 22-32), Section 1104(a)(1)(D) required the plan administrator in this case to pay benefits to Liv Kennedy, as the designated beneficiary of William Kennedy.

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires an employee benefit plan to "specify the basis on which pay-

ments are made to and from the plan," 29 U.S.C. 1102(b)(4), and requires a plan administrator to administer the plan "for the exclusive purpose" of "providing benefits to participants and their beneficiaries," 29 U.S.C. 1104(a)(1)(A), "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D). This Court has recognized that the obligation to administer a plan in accordance with plan documents includes the obligation to distribute benefits to a "beneficiary," a term defined in 29 U.S.C. 1002(8) to mean a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001); see also *Boggs* v. *Boggs*, 520 U.S. 833, 844-851 (1997).

The so-called plan documents rule serves important statutory interests. It promotes certainty for both plan participants and beneficiaries, thereby "enabl[ing] beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). And it facilitates plan administration. The statutory rule that administrators administer plans in accordance with plan documents "minimiz[es] the administrative and financial burden[s] on plan administrators," and allows them to discharge their duties quickly and efficiently. *Egelhoff*, 532 U.S. at 149-150 (internal quotation marks and citation omitted).

2. The DuPont Savings and Investment Plan (SIP) at issue in this case contained several provisions specifying the basis on which payments were to be made to beneficiaries. The SIP provided that a participant could "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests * * * in case of his death," as well as to "replace or revoke such

designation." J.A. 48. It provided that any designations had to be made "in the manner prescribed by the Company," J.A. 52, and the plan administrator provided forms for purposes of making and altering beneficiary designations. See, *e.g.*, J.A. 34, 56-57. Consistent with those provisions of the plan itself, the Summary Plan Description stated: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. The plan itself and the Summary Plan Description are "documents and instruments governing the plan" under 29 U.S.C. 1104(a)(1)(D). See *Schoonejongen*, 514 U.S. at 83-84 (explaining that ERISA gives effect to the written plan documents scheme through a comprehensive set of reporting and disclosure requirements that includes obligations under 29 U.S.C. 1024(b)(2) and (4) to make available governing plan documents); 29 U.S.C. 1024(b)(2) (such documents include the summary plan description and the "bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated"); 29 U.S.C. 1024(b)(4) (similar).

In accordance with the plan's terms, William Kennedy signed a beneficiary-designation form naming his then-wife Liv Kennedy as his sole beneficiary for the SIP, and a second form naming Liv Kennedy as his sole beneficiary for another plan that would later merge into the SIP. J.A. 27-28; see Pet. App. 2, 32-33. The Kennedys divorced in 1994. *Id.* at 2. Although William Kennedy later submitted a new form designating his daughter, Kari Kennedy, as his beneficiary for the DuPont Pension and Retirement Plan, thereby revoking any previous designations, J.A. 62, he never revoked his designation of Liv Kennedy as his beneficiary for the SIP, Pet. App. 3.

Petitioner argues (Reply Br. 23-26) that William Kennedy's beneficiary designation is not controlling because neither ERISA nor DuPont defined beneficiary designations as plan documents. But whether a beneficiary-designation form itself is one of the "documents and instruments governing the plan" under Section 1104(a)(1)(D) is irrelevant. Petitioner does not dispute that the SIP and the Summary Plan Description *are* plan documents, see 29 U.S.C. 1024(b)(2) and (4), and those documents made clear that the plan administrator would pay benefits to a participant's designated beneficiary, and that any changes to the participant's beneficiary designation had to be made in the manner prescribed by the plan. Thus, when William Kennedy died in 2001, the plan documents required the plan administrator to distribute the balance in his account to Liv Kennedy, as William Kennedy's designated beneficiary. Pet. App. 3, 33.

3. Petitioner's primary contention is that, instead of distributing benefits in accordance with the plan documents, the plan administrator should have given effect to a state-court divorce decree that awarded to William Kennedy, and simultaneously divested Liv Kennedy of, "all right, title, interest, and claim" to, *inter alia*, William Kennedy's pension plan benefits. Pet. App. 64-65. According to petitioner (Pet. Br. 17), by consenting to that division of property, Liv Kennedy effectively waived her beneficiary interest in any SIP benefits payable with respect to William Kennedy. Petitioner argues (Pet. Br. 14-15, 47-52) that, as a matter of federal common law, the plan administrator was required to enforce Liv Kennedy's divorce-decree waiver—even though, because William Kennedy never revoked his earlier ben-

eficiary designation, Liv Kennedy remained William Kennedy's sole beneficiary for the SIP.[1]

Petitioner's argument rests on the premise that, in the absence of a provision in ERISA that specifically addresses waivers by a beneficiary, courts may fill that supposed gap by requiring plan administrators to give effect to beneficiary waivers as a matter of federal common law. See Pet. Br. 12-13 (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)). As petitioner notes, a number of courts of appeals and state supreme courts have endorsed that proposition. See Pet. Br. 31-33 (citing cases). The premise is, however, flawed. A rule that required plan administrators to recognize a waiver contained in a state-court divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, would allow the state-court decree to trump the beneficiary designated according to the plan. It therefore would conflict with the plan administrator's duties under ERISA. As this Court has explained, "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted); see also *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832 (2003).

This Court has previously rejected rules that would require plan administrators to pay ERISA plan benefits to persons other than those designated as beneficiaries in accordance with plan terms. In *Boggs*, the Court held that ERISA preempted application of state community

[1] As the government noted in its amicus brief (at 30), the SIP did provide for qualified tax disclaimers under 26 U.S.C. 2518. J.A. 50. Petitioner does not, however, contend that Liv Kennedy disclaimed her right to receive benefits in a manner that complied with Section 2518.

property laws insofar as they permitted a nonparticipant spouse to transfer, by will, an asserted community-property interest in undistributed pension plan benefits. 520 U.S. at 848-851. The Court reasoned that such an application of state law was inconsistent with the principle that pension plan benefits are to be paid only to beneficiaries designated either by the participant or under the terms of the plan, and would effectively "create a new class of persons for whom plan assets are to be held and administered." *Id.* at 850. ERISA, the Court concluded, "is not amenable to this sweeping extratextual extension." *Ibid.*

Later, in *Egelhoff*, the Court held that ERISA preempted, as applied to ERISA pension plan benefits, a state statute providing that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. 532 U.S. at 143. The Court reasoned that the state statute, which would forbid plan administrators from "mak[ing] payments simply by identifying the beneficiary specified by the plan documents," created a "direct[] conflict[] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Id.* at 148, 150; see *id.* at 147 n.1 (identifying "the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else)"). Further, the Court noted, the state statute would undermine ERISA's aim of "nationally uniform plan administration" and impose substantial burdens on plan administrators. *Id.* at 148; see *id.* at 146-150.

Similar principles apply here. Although petitioner seeks to distinguish *Egelhoff* and *Boggs* on the ground that the question in those cases concerned whether

ERISA preempts "one of fifty different [state] statutes," as opposed to the development of a federal-common-law rule, Pet. Br. 16, the common-law rule she urges creates no less of a conflict with ERISA's command that plan administrators distribute benefits to individuals who are "beneficiaries," in accordance with plan terms.

The federal-common-law rule petitioner proposes would also undermine the principles of certainty and plan administrability that underlie that command. Such a common-law rule requires plan administrators to "examine a multitude of external documents that might purport to affect the dispensation of benefits," *Estate of Altobelli* v. *IBM*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting), and to decide among the "myriad of tests" courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver, *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 332 (Neb. 2005) (Connolly, J., dissenting); see U.S. Amicus Br. at 27 n.9 (citing cases). In some instances, it would be difficult if not impossible to determine the parties' intent. See West. Conference Teamsters Amicus Br. 14-16. Evaluating waivers would delay the payment of benefits to designated beneficiaries. Resp. Br. 38. And plan administrators would inevitably be drawn, as the plan administrator was in this case, see Pet. App. 41-43, into litigation regarding whether language in a divorce decree constituted a knowing and voluntary waiver of a beneficiary interest in pension plan benefits.

Requiring plan administrators to undertake such a review also would create a risk of inconsistent interpretations of identical divorce decrees, thus undermining the interest in nationally uniform plan administration, see *Egelhoff*, 532 U.S. at 148, as well as a substantial "risk of litigation and administrative burdens." *McGowan* v. *NJR Serv. Corp.*, 423 F.3d 241, 247 (3d Cir. 2005) (opinion of Van Antwerpen, J.), cert. denied, 127 S. Ct. 1118 (2007). By contrast, adherence to ERISA's statutory directive that plan administrators pay benefits only to persons authorized to receive them under the terms of the plan avoids that result. See, *e.g.*, *McMillan* v. *Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation."); *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 283 (7th Cir.) (Easterbrook, J., dissenting) ("Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."), cert. denied, 498 U.S. 820 (1990).

As Amicus AARP explains, ERISA provides a simple method for a plan participant to eliminate a divorcing spouse's interest in pension plan benefits: participants can "review their beneficiary designations when they experience a life change such as marriage, divorce or widowhood, and * * * follow the terms of their plan to make any changes, as they see fit." AARP Amicus Br. 12; see also U.S. Amicus Br. 28. ERISA leaves no room for courts to fashion the federal-common-law rule petitioner urges.

4. Seeking to minimize the conflict between her proposed federal-common-law rule and Section 1104(a)(1)(D), petitioner notes (Reply Br. 26-27, 28) that ERISA expressly requires plan administrators to give effect to certain external documents, such as qualified domestic relations orders (QDROs) under 29 U.S.C.

1056(d)(3). In petitioner's view, the QDRO provision "suggests that Congress simply did not see a conflict" with Section 1104(a)(1)(D). Reply Br. 26-27. But as we have explained (U.S. Amicus Br. 25-26), that is because Congress was careful, in enacting the QDRO provision, to provide numerous safeguards that minimize the burden on the plan administrator and that ultimately treat the terms of the QDRO as if they were part of the plan itself and treat the alternate payee under the QDRO as a beneficiary under the plan. See 29 U.S.C. 1056(d)(3)(A) ("Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."); 29 U.S.C. 1056(d)(3)(G) (the plan administrator must decide whether a domestic relations order is qualified, based on specific statutory criteria); 29 U.S.C. 1056(d)(3)(J) ("A person who is an alternate payee under a qualified domestic relations order shall be considered * * * a beneficiary under the plan."). Thus, contrary to petitioner's contention, the QDRO provision demonstrates a continuing commitment to the principle that a plan administrator must pay benefits, and administer the plan, according to plan documents. See *Boggs*, 520 U.S. at 847 (in enacting the QDRO provision, Congress was careful to "conform[] entitlements to benefits with participant or beneficiary status"). Petitioner's proposal, by contrast, would be fashioned by the courts, not Congress, and it would require the payment of benefits to someone who is *not* a beneficiary under the plan.

Petitioner also suggests (Reply Br. 28-31) that, to comply with the spousal protection provisions of 29 U.S.C. 1055, plan administrators must undertake difficult inquiries into marital status. But when plan administrators undertake such inquiries, they do so to *effectu-*

ate the terms of the plan and of the statute, not to override them. See 29 U.S.C. 1055(a) and (b)(1)(C)(i) (requiring plans to provide for certain spousal protections); cf. J.A. 43-44 (SIP Summary Plan Description).[2] And inquiring whether a plan participant has a "spouse" entitled to the protections of Section 1055 is generally far less burdensome than inquiring whether a former spouse has made a sufficiently clear, knowing, and voluntary waiver of beneficiary rights as part of a divorce settlement.

5. Petitioner argues (Reply Br. 16-18) that William Kennedy's estate is a beneficiary under the SIP because William Kennedy's change of beneficiary for another DuPont plan should be construed to remove Liv Kennedy as the beneficiary on the SIP plan. Petitioner did not present that argument to the court of appeals, and the court of appeals accordingly did not address it. This Court should decline to address the argument in the first instance. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998). In any event, petitioner stipulated in the district court that William Kennedy "never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under either the SIP or [a plan that merged into the SIP]." J.A. 28. The designation that William Kennedy filled out

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[2] Courts of appeals have recognized that a plan administrator may, in certain circumstances, have to consider external documents to determine whether the plan's terms have been met. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Johnson*, 297 F.3d 558, 567-568 (7th Cir. 2002) (considering whether participant substantially complied with instructions on changing a beneficiary). At least one court has also concluded that 29 U.S.C. 1104(a)(1)(D) does not preclude consideration of whether a beneficiary designation results from fraud or undue influence. *Tinsley* v. *General Motors Corp.*, 227 F.3d 700, 704 & n.1 (6th Cir. 2000). Neither of those factual scenarios is present here.

for another plan is limited to that plan. The plan administrator was not required to construe it as a designation for the SIP. See J.A. 62.

6. Finally, contrary to petitioner's suggestion (Reply Br. 33-34), just as the terms of the divorce decree cannot be given effect as a "waiver" under a rule of *federal* common law, neither could the waiver be enforced as a matter of *state* law in a suit against the designated beneficiary after the benefits have been paid out. Because the "waiver" does not trump the designation under the plan, the assets paid out by the plan belong to the beneficiary as a matter of federal law.

* * * * *

For the foregoing reasons and those stated in our amicus brief, the judgment of the court of appeals should be affirmed on the ground that 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy.

Respectfully submitted.

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