

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DONNA RAE EGELHOFF,                   :

4                   Petitioner                   :

5                   v.                   :   No. 99-1529

6   SAMANTHA EGELHOFF, A MINOR, BY   :

7   AND THROUGH HER NATURAL                   :

8   PARENT KATE BREINER, AND DAVID   :

9   EGELHOFF                   :

10  - - - - - X

11                                   Washington, D.C.

12                                   Wednesday, November 8, 2000

13                   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States at

15   11:02 a.m.

16   APPEARANCES:

17   WILLIAM J. KILBERG, ESQ., Washington, D.C.; on behalf of

18                   the Petitioner.

19   BARBARA J. McDOWELL, ESQ., Assistant to the Solicitor

20                   General, Department of Justice, Washington, D.C.; on

21                   behalf of the United States, as amicus curiae,

22                   supporting the Petitioner.

23   THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of

24                   the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1529, Donna Rae Egelhoff v. Samantha Egelhoff.

Mr. Kilberg.

ORAL ARGUMENT OF WILLIAM J. KILBERG  
ON BEHALF OF THE PETITIONER

MR. KILBERG: Mr. Chief Justice, and may it please the Court:

Washington State's divorce revocation law strikes at the very heart of ERISA's comprehensive regulatory scheme for employee benefit plans. It does so by purporting to revoke ERISA plan beneficiary designations upon divorce.

We submit that the Washington statute is preempted by ERISA on two independent grounds. First, because it relates to an ERISA plan within the meaning of ERISA's express preemption provision, section 514(a) and second, because it conflicts with ERISA's other provisions.

Turning first to section 514, this Court has made clear that a State law relates to an employee benefit plan if it mandates employee benefit structures or their administration or binds plan administrators to particular

1 choices. Washington's divorce revocation statute has  
2 precisely that forbidden effect.

3 As applied by the courts below, the statute  
4 invalidates the beneficiary determination and benefit  
5 payment scheme provided for by the terms of the ERISA  
6 plans here and instead mandates payment according to a  
7 different State-imposed scheme. Moreover, the  
8 determination of beneficiary status, and the payment of  
9 plan benefits, lie at the very heart of ERISA's concerns.

10 Indeed, the determination whether particular  
11 alleged beneficiaries are entitled to obtain plan benefits  
12 is so crucial to the entire Federal scheme created by  
13 ERISA that such benefits claims are deemed to arise under  
14 Federal law under this Court's decision in Metropolitan  
15 Life v. Taylor even if they purport to raise only State  
16 law claims.

17 QUESTION: Of course, what you say applies  
18 exactly similarly, I take it, to a State statute that  
19 would say, if A murders B, A shall be treated as having  
20 predeceased B for purposes of inheriting from B, or in a  
21 word, A can't inherit from B. All that you've said would  
22 apply to that similarly, so what's the difference?

23 MR. KILBERG: If that were a State law, then it  
24 would be preempted.

25 QUESTION: In other words, you're saying that

1 basically this ERISA preempts all of what you call the  
2 slayer statutes, I guess, that traditionally have said you  
3 can't inherit from a person you murder.

4 MR. KILBERG: It preempts the slayer statutes.  
5 However, the slayer rule may very well be incorporated  
6 into ERISA, because the slayer rule was extant at the time  
7 of ERISA's passage in 1974, was a common law rule, and had  
8 been applied in numerous cases, Federal cases with regard  
9 to a death benefit statute, so it was a gloss on the law.

10 QUESTION: All right. So does it also  
11 incorporate statutes where people die simultaneously?  
12 There are a complicated set of State rules as to how you  
13 treat what assets for purposes of inheritance.

14 MR. KILBERG: It may encompass simultaneous  
15 death, a simultaneous death rule.

16 QUESTION: All right, so if it -- now we have it  
17 interpreting a considerable area of State probate law. Is  
18 there any reason why Congress would have wanted ERISA to  
19 preempt a traditionally State-regulated subject like  
20 probate and -- you know, at least where it doesn't  
21 interfere with some important policy, or -- I don't know.  
22 I mean, you see the -- that's what I want you to address.

23 MR. KILBERG: I can imagine where you're headed,  
24 Justice Breyer. Yes, the answer, of course it preempts  
25 those laws. There's no reason to believe that it doesn't.

1 We're talking about employee benefit plans. There's  
2 nothing more central to an employee benefit plan than  
3 benefits, how it pays them, to whom it pays them, and  
4 ERISA has specific provisions with regard to the exception  
5 for State law with -- in the context of the payment  
6 employee benefit plans in a divorce situation.

7 QUESTION: I'm not sure about you -- how you  
8 distinguish the slayer statute. You say it's been around,  
9 it's part of the common law, it's part of the background.  
10 Why -- suppose the case we have here has been around a  
11 long time.

12 MR. KILBERG: Well, the difference, Justice  
13 Kennedy, is that the slayer -- the slayer rule was part of  
14 the common law, was part of the common law of trust at the  
15 time that ERISA was enacted, and it may be presumed that  
16 the Congress, seeing that as a backdrop, incorporated,  
17 impliedly incorporated the slayer rule into ERISA.

18 QUESTION: But not simultaneous death statutes,  
19 because they vary from State to State, or --

20 MR. KILBERG: Well, I'm not sure about  
21 simultaneous death statutes, quite frankly. They may,  
22 too, have been incorporated, but with regard to a divorce  
23 revocation rule, that was not the state of the common law  
24 in 1974. Indeed, it's not the state of the law now. Very  
25 few States, fewer than a third of the States have any sort

1 of divorce revocation rule. Only 10 States have  
2 developed --

3 QUESTION: May I just -- is your point that it  
4 was the law before ERISA was passed, or that it's part of  
5 the common law.

6 MR. KILBERG: That's correct.

7 QUESTION: I mean, which is true? In other  
8 words, supposing this statute had been passed before  
9 ERISA. Would that make a difference?

10 MR. KILBERG: No, not the statute. If -- if the  
11 divorce revocation rule had been commonly accepted in the  
12 common law at the time ERISA was passed and had been used  
13 as a gloss --

14 QUESTION: So your point is that --

15 MR. KILBERG: -- on similar Federal statutes --

16 QUESTION: Your point is, the other was a common  
17 law rule, not the timing. The timing is --

18 MR. KILBERG: That's correct. Well, it's really  
19 both, Justice Stevens. It is that it is a common law rule  
20 and it was a common law rule at the time of ERISA's  
21 passage in 1974.

22 QUESTION: Yes, but you've said that if there  
23 had been a statute which is in effect that wouldn't have  
24 done the trick.

25 MR. KILBERG: That's correct.

1           QUESTION: Well, when you say a common law rule,  
2 we're dealing with a country with 50 different States. I  
3 mean, don't you think the law might have been different in  
4 some of those States?

5           MR. KILBERG: Not with regard to the slayer  
6 rule, in fact, and indeed what is important here is that  
7 the slayer rule had been applied in Federal cases as a  
8 gloss to death benefit statutes, and so one can assume  
9 that the Congress, or one can rule that the Congress had  
10 impliedly incorporated that common law rule into ERISA.

11           QUESTION: Even in the face of a provision in  
12 ERISA that says benefits have to be paid to the named  
13 beneficiary?

14           MR. KILBERG: With regard to the slayer rule, if  
15 it had been incorporated into ERISA, then it would be  
16 incorporated as an implied exception.

17           QUESTION: What is the mechanics of the working  
18 of a plan? Supposing that you have a designated  
19 beneficiary, and the insurance company or whoever goes and  
20 pays -- goes on and pays out to the beneficiary. In fact,  
21 the beneficiary killed someone and he's disqualified from  
22 inheriting. If he's still the named beneficiary, is the  
23 insurance company responsible for that sort of an error?

24           MR. KILBERG: Yes, they would be responsible  
25 under those circumstances. The plan administrator has to



1     make a decision as to whether a benefit is to be paid out.  
2     The plan administrator does so by looking both to ERISA  
3     and to the terms of the plan.

4             QUESTION:  Well, does he have to look into a  
5     whole bunch of factual matters like, you know, whether  
6     this beneficiary might be disqualified by some State,  
7     State statute like the slayer's --

8             MR. KILBERG:  No.  No.  He would not look at  
9     State law.  He would not have to look at State rules  
10    unless, not finding the answer in his plan, and not  
11    finding the answer in ERISA he may choose to look to State  
12    law, but --

13            QUESTION:  It seems to me that would be a much  
14    narrower ground for ruling in your favor here, rather than  
15    these general assertions about the incorporation in the  
16    common law, that perhaps if a State statute actually  
17    directly affects the designation of a beneficiary, the way  
18    the Washington statute does, it may be different than the  
19    slayer statute.

20            MR. KILBERG:  But we believe that State law, Mr.  
21    Chief Justice, that a State law like this, which is  
22    essentially a rule of decision for employee benefit plan,  
23    is preempted both as a matter of express preemption and as  
24    a matter of conflict preemption under ERISA.

25            QUESTION:  But you agree that your argument is

1 stronger -- let's assume that the statute does not  
2 incorporate slayer statutes, or simultaneous death  
3 statutes --

4 MR. KILBERG: Yes.

5 QUESTION: -- or simultaneous death rules.  
6 Would you agree that your argument is much stronger than  
7 if you rely on conflict preemption than if you rely on  
8 statutory relating-to preemption?

9 MR. KILBERG: I believe it's equally strong.

10 QUESTION: Well, if it's a flat conflict  
11 preemption, it seems to me relatively easy for us to say,  
12 look, the statute says, beneficiaries or plans designate  
13 the --

14 MR. KILBERG: Participants.

15 QUESTION: -- participants or plans designate  
16 beneficiaries. This says they don't. Clear conflict.

17 But if you get to relating-to preemption, which  
18 we do not find it easy to understand, then it seems to me  
19 the force of the argument for anomalous results which my  
20 colleagues were making is simply a stronger argument,  
21 because the concept of preemption is a comparatively  
22 weaker concept.

23 MR. KILBERG: Well, obviously, we believe that  
24 there is both conflict preemption and express preemption  
25 here, and the Court can certainly, as it did in Boggs, not

1 reach the question of express preemption and go off on  
2 conflict preemption, but --

3 QUESTION: Well, except your -- I think the  
4 point being made is that your preemption is stronger if  
5 you're willing to swallow the bitter pill of not including  
6 the slayer statutes, but once you say the slayer statutes  
7 don't pose any conflict, it's hard to see why they pose  
8 any more of a conflict than -- or, excuse me, any less of  
9 a conflict than the statute here.

10 MR. KILBERG: In Ridgeway v. Ridgeway, which was  
11 a decision of this Court involving the Servicemen's Group  
12 Life Insurance Act, the Court noted the slayer rule and  
13 determined that it did not have to deal with it in the  
14 context of that case and that it was an extreme example.  
15 The Court certainly is free to do the same in this context  
16 and that, I believe, was also an express preemption.

17 QUESTION: Mr. Kilberg --

18 QUESTION: But is -- is the answer that you gave  
19 in talking about the administrative burden -- my  
20 understanding, and correct me if I'm not right, that this  
21 statute says that if a trustee of a plan doesn't know  
22 about this problem, he doesn't have to pay, and if he does  
23 know about the problem, he doesn't have to pay until the  
24 State courts resolve it, and if that isn't good enough, he  
25 can opt out of the whole thing just by putting a sentence

1 in the plan that says, I opt out, in effect.

2 So where is the administrative burden, and is it  
3 the same -- they also say there are 47 other States that  
4 have similar statutes, and so I'm trying to get an idea  
5 for what this administrative burden is.

6 MR. KILBERG: Oh, indeed, as we point out in our  
7 brief, I believe it's at footnote 8 on page 20 of  
8 petitioner's brief.

9 QUESTION: Yes.

10 MR. KILBERG: It's also described in amicus  
11 briefs for the National Coordinating Committee and in the  
12 Western Conference of Teamsters. In fact, the State rules  
13 vary dramatically. Most States do not have a divorce  
14 revocation rule at all.

15 Most States, more than two-thirds of the States,  
16 the rule is simply that you go with the main beneficiary.  
17 It is in a handful of States that you have divorce  
18 revocation rules, and they vary among themselves, so there  
19 is that burden that plaintiffs would have to deal with.

20 Moreover, the opt-out provision that you're  
21 referring to in this State law merely adds another layer  
22 of complexity. Now, in order to opt out you have to meet  
23 yet another State standard, so at the end of the day --

24 QUESTION: Which is?

25 MR. KILBERG: Well, which is that you have to

1 specifically opt out, and you have to opt out in the  
2 manner in which the State tells you you have to opt out.

3 QUESTION: And you may not know which State is  
4 the State that will govern.

5 MR. KILBERG: That's correct, Justice Ginsburg.

6 QUESTION: But before we get into that, I'm  
7 still a little confused on the nature of the common law  
8 that we're talking about. As I understand you,  
9 Mr. Kilberg, you are not talking about the common law of  
10 California or Massachusetts or anything.

11 MR. KILBERG: That's correct.

12 QUESTION: You're talking -- and you're not  
13 talking about the pre-Erie general common law, either.  
14 You're talking about what Judge Friendly called, in praise  
15 of Erie and the new Federal common law. That is, Federal  
16 common law that fills in the interstices of Federal  
17 statute, so you would not be incorporating any particular  
18 State's slayer rule.

19 MR. KILBERG: That's correct.

20 QUESTION: But it would be a Federal, a true  
21 Federal common law rule.

22 MR. KILBERG: That's correct.

23 QUESTION: And that with all Federal statutes,  
24 or most Federal statutes, there will be a penumbral area,  
25 and what would fill that in would not be the law of any

1 particular -- common law of any particular State, but  
2 Federal common law.

3 MR. KILBERG: That's correct. I'm talking about  
4 the common law of trusts, Federal common law, which in  
5 prior decisions of this Court has been understood to apply  
6 to ERISA but, more importantly, or as importantly --

7 QUESTION: I mean, if there is such a Federal  
8 common law I suppose we could invent a -- you know, the  
9 same spousal substitution rule that the State has done by  
10 statute here. I mean, if there is -- if we have that  
11 common law power to say, fill in the interstices in  
12 statutes --

13 MR. KILBERG: I'm afraid not, Justice Scalia.

14 QUESTION: No?

15 MR. KILBERG: I was moving on from Justice  
16 Ginsburg's question to distinguish between Federal common  
17 law which is incorporated into a statute, because it is  
18 the common law against which the Congress legislates,  
19 which is what I would be referring to with regard to the  
20 slayer rule, and that would be the common law in extant in  
21 1974 that had been applied in other Federal cases to other  
22 Federal death benefit statutes.

23 There is also a notion that if a statute does  
24 not answer a question, if there are interstices that the  
25 Court -- a court may apply a Federal common law rule, but

1       that's not the case here. Here, ERISA speaks specifically  
2       to the issue at hand, and I believe --

3               QUESTION: Well, of course, that's the question  
4       in the case, whether it does.

5               But suppose there's an ambiguity in the  
6       designation, that there's a State rule of law that would  
7       resolve, would the trust look to the State rule of law or  
8       would it look to some Federal common law rule about  
9       ambiguities. For example, say the beneficiary named my  
10      son Joseph, and it turns out that the -- that he has -- he  
11      gave the middle name Joseph to four different sons, and  
12      how would you go about resolving that? Would you look to  
13      a State rule or a Federal rule?

14              MR. KILBERG: It looked -- it would be the plan  
15      administrator's choice. It would not be a decision under  
16      State law, and the plan administrator would look to see if  
17      there were any guidance in the plan, in Federal common  
18      law, and then the plan --

19              QUESTION: He would confine his inquiry entirely  
20      to the terms of the plan itself?

21              MR. KILBERG: He -- no. He may -- in making a  
22      decision he may, of course, look to State law if he  
23      chooses.

24              QUESTION: Mr. Kilberg, the Washington supreme  
25      court seems to have analyzed the decedent's life insurance

1 policy separately from the pension plan in doing the  
2 preemption analysis. Do we have to consider those two  
3 plans separately, or do we apply the same analysis to both  
4 of them?

5 MR. KILBERG: I believe we can apply -- the  
6 Court can apply the same analysis for both of them with  
7 one exception. One of our arguments is that there is a  
8 conflict with ERISA's antialienation provision. That  
9 provision, which is found in section 206 of the statute,  
10 applies only to pension plans, but all of our other  
11 arguments would apply to both welfare and pension plans.

12 If the Court has no further questions, I would  
13 like to reserve the remainder --

14 QUESTION: Very well, Mr. Kilberg.

15 Ms. McDowell, we'll hear from you.

16 ORAL ARGUMENT OF BARBARA B. McDOWELL

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
18 SUPPORTING THE PETITIONER

19 MS. McDOWELL: Mr. Chief Justice, and may it  
20 please the Court:

21 The Washington statute relates to employee  
22 benefit plans within the meaning of ERISA's express  
23 preemption provision and also conflicts with several  
24 specific provisions with ERISA. Accordingly, whether  
25 viewed as a matter of express preemption, conflict



1     preemption, or appeal preemption, the Washington statute  
2     in its application to ERISA plans is preempted.

3             QUESTION:   Suppose, Ms. McDowell, you have a  
4     trustee under an ERISA plan who has a designated  
5     beneficiary and so forth and perhaps, you know, ambiguity  
6     as suggested by Justice -- something else -- and then you  
7     have simply a trust company that has exactly the same  
8     provisions but it's not an ERISA plan.  Are -- does -- are  
9     their duties different?  Say when you come to an  
10    ambiguity -- you're both sitting in Seattle.

11            MS. McDOWELL:  As a practical matter, they may  
12    do essentially the same thing interpreting the terms of  
13    the plan, or whatever instrument governs it.  The key  
14    question is what happens after the plan makes the decision  
15    in the ERISA context.  That decision is subject to review  
16    and an action under ERISA section 502(a).  In that sort of  
17    action the Federal court would apply common law.

18            QUESTION:  So -- but would the Federal common  
19    law likely be different from the State of Washington's  
20    law, or is it just up for grabs, kind of?

21            MS. McDOWELL:  In many instances the appropriate  
22    rule would presumably be for the plan administrator of the  
23    ERISA plan to look to State law for guidance, for example,  
24    in determining who was a spouse, who was a child, et  
25    cetera.  It would only make sense for the ERISA plan to

1       essentially require looking to the relevant State law that  
2       creates the relationship. That's not so, however, where  
3       the State law is one that conflicts with the provisions of  
4       an ERISA plan such as the one here, which --

5                QUESTION: May I ask two questions? First, do  
6       you agree that the State law here is a law of general  
7       applicability?

8                MS. McDOWELL: Yes, it is. It refers to  
9       insurance, but it's more general.

10              QUESTION: My second question is, in weighing  
11       the various interests at stake here, should we give any  
12       weight at all to the interests in carrying out the wishes  
13       of the former employee who -- whose assets are being  
14       distributed?

15              MS. McDOWELL: No, we shouldn't

16              QUESTION: We shouldn't.

17              MS. McDOWELL: In the first place, we don't know  
18       his wishes. In the second place --

19              QUESTION: Well, we know he presumably was  
20       advised by a lawyer, who was a State lawyer who told him  
21       what the State rule of law was, and presumably he was told  
22       he could rely on the fact that he didn't have to change  
23       his designation for his sons to get the property. Isn't  
24       that the normal thing you would expect a divorce lawyer in  
25       that State to tell him?

1 MS. McDOWELL: This individual in fact was not  
2 represented. It was a pro se divorce. One would assume  
3 that a participant in an ERISA plan would look at a  
4 variety of sources, most specifically including his  
5 summary plan description, which in this case made quite  
6 clear that the only way to change a beneficiary is to file  
7 the required form, that such documents as divorce decrees  
8 would not --

9 QUESTION: Of course, unless as a matter of law,  
10 there is a rule of law that automatically changed the --  
11 such as the slayer rule. Don't you think there's a  
12 reasonable probability here that the plan participant  
13 thought the money would not go to his divorced wife?

14 MS. McDOWELL: I don't think there's any way to  
15 say what the plan participant intended at this point.

16 QUESTION: Because normally in the divorce  
17 settlement -- they did have a divorce settlement -- don't  
18 they provide otherwise? If there's a specific intent to  
19 save that particular asset for the divorced wife, isn't  
20 that normally set forth in the agreement providing for the  
21 property settlement?

22 MS. McDOWELL: Well, certainly there is the  
23 possibility under ERISA to obtain a qualified domestic  
24 relations order. In this case the children's interests  
25 could have been protected if such an order had been

1     obtained at any point in the process since the first  
2     wife's divorce. That wasn't done.

3             QUESTION: Your basic -- you think he really  
4     wanted the money to go to his divorced wife. That's your  
5     suggestion.

6             MS. McDOWELL: My point is, we don't know, and  
7     an ERISA plan --

8             QUESTION: What about ordinary common sense,  
9     that a person who just divorces his wife, gives her half  
10    the property, might prefer that the other half of the  
11    property go to his children, rather than this wife, who's  
12    now going to get more than her fair share, and whom he's  
13    just divorced?

14            I mean, suppose I thought the common sense of it  
15    in my knowledge of human nature is that people would  
16    prefer their half share to go to their children rather  
17    than the just-divorced wife.

18            MS. McDOWELL: Well, that's a sensible approach,  
19    and ERISA plans could adopt that approach --

20            QUESTION: And is there some reason -- all  
21    right, is there any -- so then is there any reason to  
22    think that Congress wouldn't have wanted State statutes  
23    that don't interfere that much with anything and in fact  
24    embody that common sense notion, like you wouldn't like  
25    your property to go to the guy who kills you. You know,

1       that's another common sense notion.

2               QUESTION:  Ms. McDowell, that common sense  
3       approach is disagreed with by two-thirds of the States, as  
4       I understand it, right?  Two-thirds of the States don't  
5       think that that's common sense and don't provide for  
6       automatic substitution in the event of a divorce.

7               MS. McDOWELL:  That's correct, and in many  
8       instances --

9               QUESTION:  So it's not that much common sense,  
10      and I --

11              (Laughter.)

12              QUESTION:  And I assume that any -- that once  
13      you have a statute like ERISA, which avowedly supersedes  
14      State law, if you're dealing with a lawyer who doesn't  
15      consult ERISA and knows nothing about ERISA and gives you  
16      your advice only on the basis of State law, you're going  
17      to get a lot of bad advice.

18              MS. McDOWELL:  And you might in fact have a  
19      malpractice action.

20              QUESTION:  Mine was actually a question.  Mine  
21      was actually a question.  I wasn't just making a comment.

22              (Laughter.)

23              QUESTION:  I wanted you to respond to the notion  
24      that State statutes, probate -- you know, that traditional  
25      State area that embody that kind of a notion, what I'd

1 call a notion of trying to carry out the wishes of the  
2 testator, or whoever, that those are not preempted unless  
3 they impose a real burden upon the ERISA plan.

4 MS. McDOWELL: Well, you began your question  
5 with a reference to what Congress would have intended  
6 here, and we do know that Congress intended to permit the  
7 nationally uniform administration of ERISA plans. That's  
8 why it included an express preemption provision.

9 QUESTION: Ms. McDowell, I would like to go back  
10 to your prior concession, or maybe I shouldn't use the  
11 word concession, but is it not within the realm of the  
12 possible that a man who has just divorced a woman, he's  
13 tired of her, he's used her up, he's thrown her over, he's  
14 off with a young thing but not married, and he's feeling  
15 tremendous remorse, so he says, I'm going to leave that  
16 pension plan alone.

17 (Laughter.)

18 MS. McDOWELL: Well, that's true, and perhaps  
19 the more common situation is where the divorced spouse has  
20 custody of the couple's children. In that case, it would  
21 probably be a matter of relative indifference to the plan  
22 participant whether the money went to the spouse directly  
23 or the children, or --

24 QUESTION: Isn't it even more likely, instead of  
25 this tender-hearted --

1 (Laughter.)

2 QUESTION: -- divorced husband, isn't it more  
3 likely that the wife, in striking her deal for the divorce  
4 settlement, having an ERISA plan, knowing there's an ERISA  
5 plan which names her as the beneficiary, assumes that  
6 that's her money?

7 MS. McDOWELL: She may well do so, although she  
8 would know that at the time of their divorce the -- her  
9 spouse would be free to --

10 QUESTION: And knowing that ERISA supersedes  
11 State law, as well --

12 (Laughter.)

13 MS. McDOWELL: With respect to express conflict  
14 preemption there are several provisions of ERISA that we  
15 submit conflict with the Washington statute. One is the  
16 provision that requires that plans be administered in  
17 accordance with plan documents. The plan documents, in  
18 this case, require payment to the beneficiary designated  
19 by the plan participant, rather than by somebody  
20 designated under State law.

21 It also conflicts with ERISA's definition of  
22 beneficiary as the person designated by the participant or  
23 under the terms of the plan. If one looks to the  
24 participant's designation and the terms of the plan,  
25 petitioner here is the proper beneficiary, not respondent.

1                   With respect to the pension plan, the Washington  
2     statute also conflicts with ERISA's antialienation  
3     provision, which prohibits the assignment or alienation of  
4     plan benefits. This statute affects an assignment or  
5     alienation of benefits by transferring a right to benefits  
6     from the petitioner's former spouse.

7                   QUESTION: So your view of the murder situation  
8     statutes are all preempted, too.

9                   MS. McDOWELL: Well, we would submit that the  
10    slayer statutes and the underlying slayer rule and the  
11    Federal common law reflect a public policy limitation that  
12    ERISA plans would not be free to --

13                  QUESTION: Despite the express preemption  
14    provisions on which you rely here.

15                  MS. McDOWELL: That's correct.

16                  If there are no further --

17                  QUESTION: What is your position if in a divorce  
18    decree the decree sets forth that the wife agrees to  
19    relinquish her interest in the pension plan and that the  
20    husband will name the children as beneficiary, and they  
21    both agree to that?

22                  MS. McDOWELL: And the husband doesn't do it?

23                  QUESTION: Right, and then you have this -- then  
24    you have this --

25                  MS. McDOWELL: Our position is that under ERISA



1 one would continue to enforce the terms of the plan, just  
2 as in this case.

3 QUESTION: And the children could not bring a  
4 suit, because that would be preempted? The suit would be  
5 preempted as well, I take it.

6 MS. McDOWELL: There may be a separate sort of  
7 action in that situation under State law.

8 QUESTION: Why couldn't that --

9 QUESTION: Well, I thought the preemption of the  
10 plan --

11 QUESTION: -- be a QDRO, though? In the example  
12 Justice --

13 MS. McDOWELL: Yes, you're correct. It might be  
14 recognized as a QDRO --

15 QUESTION: -- Kennedy gave you, why isn't that  
16 covered by the QDRO section --

17 QUESTION: Can --

18 QUESTION: -- if it comes up in a divorce  
19 matter?

20 MS. McDOWELL: That's correct, it could  
21 constitute a QDRO, depending on whether it meets the  
22 procedural requirements.

23 QUESTION: But the QDRO has to be forwarded to  
24 the plan administrator, I take it?

25 MS. McDOWELL: That's correct, and presumably

1 the children with an interest in the benefits would do  
2 that.

3 Thank you.

4 QUESTION: Thank you, Ms. McDowell.

5 Mr. Goldstein, we'll hear from you.

6 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

7 ON BEHALF OF THE RESPONDENTS

8 MR. GOLDSTEIN: Mr. Chief Justice, and may it  
9 please the Court:

10 I will turn quickly to the mistaken notion that  
11 the Washington statute at issue in this case conflicts  
12 with ERISA, but I want to explain from the outset exactly  
13 what this statute does and why it does it.

14 Washington, like a number of States, as a number  
15 of the questions have reflected, recognizes the  
16 unsurprising proposition and, Justice Scalia, it is  
17 recognized by an increasing number of States very rapidly,  
18 that when two people divorce they try to give each other  
19 less money, not more.

20 Particularly relevant here, the designation of  
21 one spouse as a death beneficiary, whether in a will, and  
22 there are will statutes in 49 out of the 50 States, or in  
23 some other asset, is premised on the idea that at the time  
24 of death the couple will still be married.

25 Applied to this case, and I think it very

1 important that we talk about the facts of this case, the  
2 statute rests on the idea that when petitioner sought and  
3 received a divorce from David Egelhoff, and after they  
4 entered a very detailed divorce decree, to the level of,  
5 he got the tan area rug and she got the Exercycle, that he  
6 did not walk out of the courthouse thinking, oh, and I  
7 want her to get the pension and the life insurance, too.

8 QUESTION: Maybe she thought she got it.

9 MR. GOLDSTEIN: That is --

10 QUESTION: Maybe she had a good lawyer who read  
11 ERISA --

12 (Laughter.)

13 QUESTION: -- and said that, you know, there is  
14 this statute, but it ain't going to affect whether you get  
15 your ERISA payment. You have that one. Now, maybe he  
16 doesn't know that, but boy, we're walking away with a good  
17 settlement here.

18 MR. GOLDSTEIN: Fortunately --

19 QUESTION: You really can't predict what the  
20 expectations were. It's hard to do.

21 MR. GOLDSTEIN: With respect, we can here for  
22 two reasons. First, the divorce decree itself explicitly  
23 says that he gets the pension. It says so, and there's no  
24 doubt that that was the parties' intent.

25 And second, there is a declaration

1       uncontradicted in the record that she basically went  
2       around telling people that David would roll over in his  
3       grave at the notion that she was going to get this money.

4                QUESTION: Well, just addressing the first, the  
5       fact that the husband has the property interest means that  
6       he simply has the power to designate the beneficiary.  
7       That's quite consistent with his wanting to let her remain  
8       the beneficiary.

9                MR. GOLDSTEIN: With respect, in terms of just  
10      what the parties understood would happen to the money, and  
11      in particular, Justice Scalia, what Donna's expectation  
12      was, he got the pension benefits. The death benefit is  
13      the entirety of the pension benefit, and she could not  
14      have an expectation that she would ever get the money,  
15      because she knows that he could change it the next day.

16               Moreover, this is a community property State.  
17      They had to divide up the marital property, which included  
18      the value of the pension at the time of divorce, and she  
19      had to get equivalent assets at the time of divorce. This  
20      is nothing more than a double recovery in the purest  
21      sense.

22               QUESTION: Well, maybe it is, but I guess the  
23      point that I don't seem to grasp is why it makes a dime's  
24      worth of difference.

25               We've got a statute. If the statute means what

1     they say it does, you lose.  If it doesn't, maybe you win,  
2     but the particular expectations of the parties in a  
3     particular divorce, even if there's an evidentiary basis  
4     for it, seems to me irrelevant.

5             MR. GOLDSTEIN:  It is relevant in the sense --  
6     in two senses, Justice Souter.  The first is that I'm  
7     trying to explain to you the rationale and why it is so  
8     rational that Washington did what it did, and second, it  
9     goes to the question now speaking to the statute, what the  
10    standard is for finding a conflict and finding preemption,  
11    and that is that in this area, from cases like *Hisquidero*  
12    on, there must be a clear and manifest conflict.

13            And now let me turn directly to the notion of  
14    whether or not there is a conflict.

15            QUESTION:  Before you do that, can you just  
16    clarify -- you said that this is a galloping thing in the  
17    States.  How many States have these statutes now?

18            MR. GOLDSTEIN:  There are 20 States that have  
19    the statute now -- the number has been growing rapidly --  
20    with respect to nonprobate assets.  It was --

21            QUESTION:  So the majority of States still do  
22    not.

23            MR. GOLDSTEIN:  They do not.

24            QUESTION:  Is this the case:  47 States had  
25    divorce revocation when the instrument is a will --

1 MR. GOLDSTEIN: Exactly.

2 QUESTION: -- and about 20 have it when divorce  
3 revocation is a nonprobate asset, and it's not  
4 nonuniform -- that is, the States that have it are copying  
5 the Uniform Probate Code, which has such a provision in  
6 it? Is that right?

7 MR. GOLDSTEIN: Yes.

8 QUESTION: All right. If that is right, do  
9 these 20 States all say, or most of them say, like  
10 Washington, that if you expressly deny the applicability  
11 of a divorce revocation statute, you're home free? Do  
12 they all say that?

13 MR. GOLDSTEIN: They do not --

14 QUESTION: Some of them? They all say that?

15 MR. GOLDSTEIN: They do not all say that, but  
16 almost all do, because that's in the UPC.

17 QUESTION: All right. Do almost all of them  
18 provide, as Washington does, that if a trustee doesn't  
19 know about a conflict among beneficiaries, he needn't pay?

20 MR. GOLDSTEIN: The majority do.

21 QUESTION: All right. Do the majority also  
22 provide that if the trustee does find out about it he also  
23 need not pay until the State courts resolve the matter?

24 MR. GOLDSTEIN: Yes.

25 QUESTION: All right.

1 MR. GOLDSTEIN: Justice Breyer has helpfully  
2 just identified three different opt-out provisions that go  
3 directly to the question of whether or not there's an  
4 actual burden on the plan.

5 Chief Justice Rehnquist --

6 QUESTION: Now, is it the case that -- does the  
7 preemption provision at issue here say that preemption  
8 only occurs when there's an administrative burden on the  
9 plan?

10 MR. GOLDSTEIN: The courts --

11 QUESTION: Is that the criterion? I mean --

12 MR. GOLDSTEIN: It is a principal criterion.  
13 Whether or not there's an --

14 QUESTION: Oh, I have no doubt that if there is  
15 an administrative burden you will be much more likely to  
16 find preemption, but if, on the face of it, there is  
17 preemption, does there need to be an administrative  
18 burden?

19 MR. GOLDSTEIN: We do not believe so, and Boggs  
20 is an example, that the Court did not reach the question.  
21 Four justices of the Court in Justice Breyer's opinion  
22 explained that there really wasn't a burden and there  
23 wasn't field preemption. The majority said there is  
24 conflict preemption here, but it is worth noting that  
25 Justice Kennedy's opinion in that case did explain why

1       there would be real administrative trouble if you  
2       recognized nonparticipant interest.

3               Chief Justice Rehnquist -- so if I could  
4       continue for the moment to focus on the practicalities of  
5       what happens to an ERISA plan, turn to the specific  
6       alleged conflicts with the statute in just a moment.

7               Chief Justice Rehnquist, you asked how this  
8       worked in operation, and I'd like to refer to you -- refer  
9       you to the respondent's lodging for a moment.  
10      Respondent's lodging at tab 3 has the designation form for  
11      the life insurance plan, and it explains that David  
12      Egelhoff designated Donna R. Egelhoff, wife -- I  
13      apologize. There may be some confusion. This is an  
14      8-1/2 X 11 lodging that may not have come upstairs.

15              QUESTION: What is the tab that you --

16              MR. GOLDSTEIN: I'm starting at tab 3, Justice  
17      Kennedy.

18              QUESTION: On this so-called lodging --

19              MR. GOLDSTEIN: Yes.

20              QUESTION: -- this isn't part of the joint  
21      appendix, apparently.

22              MR. GOLDSTEIN: That is correct, Justice  
23      O'Connor.

24              QUESTION: And it's not a brief of yours, and by  
25      what authority did you file it, if I may ask?



1               MR. GOLDSTEIN: We conferred with the Clerk's  
2 Office and received permission to file a lodging.

3               Let me explain also that these are materials --  
4 it's particularly important, because this is not something  
5 that translates at all well into --

6               QUESTION: Well, normally things that the  
7 parties intend to refer to are incorporated in a joint  
8 appendix, and I did not know that we accepted these  
9 independently submitted supplemental documents. I  
10 couldn't believe it when it came in.

11              QUESTION: The fact that the Clerk's Office  
12 gives you leave to file it doesn't mean that it's a  
13 desirable or even a permissible thing to do so far as the  
14 Court is concerned.

15              MR. GOLDSTEIN: That point is well-taken, Mr.  
16 Chief Justice. Let me just specify for the benefit of the  
17 Court that the documents that I am about to refer to are  
18 part of the record.

19              I understand the point is well-taken that  
20 counsel are much preferred at the beginning of the case  
21 within the joint appendix to have one consolidated  
22 document. It is the case, however, that as the case moves  
23 along, for example, after we received the petitioner's  
24 brief, other documents become relevant that we want to  
25 bring to the Court's attention.

1                   QUESTION: And these are part of the record?

2                   MR. GOLDSTEIN: Yes, Mr. Chief Justice, and so  
3 let me just be absolutely clear these are not pedagogical  
4 devices, anything outside the record. The two documents  
5 I'm going to take you now are in the record of the case.  
6 Tab 3 is the designation form, and it says that David  
7 designated Donna R. Egelhoff, wife.

8                   The reason I point to it is that when the  
9 administrator receives a claim for death benefits it's  
10 common ground that he or she pulls out the designation  
11 form. Before paying the benefits, he or she must get the  
12 death certificate. We have to be sure that the person is  
13 dead. That's common sense.

14                  On the death certificate it explains that David  
15 Egelhoff died, and on line 14 -- or, excuse me, in cell  
16 14, three lines down, it explains that he was divorced,  
17 and that is the sum total of the administrative burden  
18 that is put on ERISA plan administrators. They look at  
19 the exact same documents.

20                  QUESTION: Death certificates always say whether  
21 you're divorced or not?

22                  MR. GOLDSTEIN: So far -- I will not represent  
23 to the Court that I have been able to identify every  
24 State, but I have not been able to find one that hasn't.  
25 There was no easy way of identifying every State's death

1 certificate, but yes, because they have to notify  
2 next-of-kin, and remember as well, Justice Scalia, that  
3 when you try to pay on death the survivor annuity required  
4 by ERISA you must make the same inquiry. You have to know  
5 if the participant was married at the time of death, and  
6 so --

7 QUESTION: But it's not married. I mean, do  
8 they put down never married so you know that? You said  
9 they must put down divorced.

10 MR. GOLDSTEIN: The question for the survivor  
11 annuity, Justice Ginsburg, is, at the time of death was  
12 the person married. That -- and if so, there must be a  
13 mandatory --

14 QUESTION: So it will say -- it will say either  
15 married or divorced.

16 MR. GOLDSTEIN: Exactly. There are two lines in  
17 the death certificate. One is married or divorced and the  
18 second is, there is, in fact, a surviving spouse, so --

19 Now, a number of the questions have focused on  
20 whether or not there is a conflict with the terms of  
21 ERISA. Justice Scalia, you pointed out that it may well  
22 be that there would be preemption even if there was no  
23 additional burden. This is -- Congress said, this is how  
24 it's going to work. Washington can't say anything  
25 different.

1           Justice Souter, earlier you inquired similarly  
2   whether or not there might not be conflict preemption,  
3   because the statute mandates that you have to pay the  
4   benefits to the named beneficiary. The difficulty is that  
5   the statute does not say that. The only claimed conflict  
6   here is with the term, beneficiary, and with the --

7           QUESTION: I think I was referring to the  
8   definition of beneficiary as being the individual  
9   designated by the participant or by the plan, and I  
10  thought there was an apparent conflict between that and  
11  any statute which in effect superseded that.

12          MR. GOLDSTEIN: That occurs, with all due  
13  respect to my colleagues, because in their briefs there is  
14  an ellipsis of an important phrase, and the definition of  
15  a beneficiary is -- and I'm going to now refer to 29  
16  U.S.C. 1002 sub (8).

17          QUESTION: Where do we find it?

18          MR. GOLDSTEIN: Mr. Chief Justice, it is at the  
19  appendix to the petitioner's brief at page 2, and I --  
20  when I refer to statutory section, from henceforth it will  
21  always be in that brief.

22          QUESTION: Page 2a?

23          MR. GOLDSTEIN: Yes, Justice Scalia. This is  
24  1002, sub (8). The term, beneficiary, means a person  
25  designated by a participant or by the terms of an employee

1 benefit plan who is or may become entitled to a benefit  
2 thereunder, and let me explain how Washington law operates  
3 here.

4 Washington law at the time of divorce does not  
5 say, if you divorce you are no longer a beneficiary, the  
6 money instead goes to the children. It instead says that  
7 the designation is ineffective and it is up to the terms  
8 of the plan to determine who gets the money, and that's  
9 exactly what the children were here. They were persons  
10 who may become entitled to a benefit thereunder. They  
11 have always been, because the plan specified.

12 QUESTION: Two things -- excuse me. Two things  
13 occur to me. One is, doesn't -- first I guess is, just as  
14 a matter of Washington law, the children don't become  
15 entitled under the plan. They end up becoming entitled,  
16 if they are entitled at all, under the Washington -- under  
17 the State law of Washington.

18 And number 2, would you comment on what I  
19 speculated when I read that last phrase, who are or may  
20 become entitled. I assumed that that last phrase was  
21 referring to, in effect, a contingent designation. You  
22 know, to B or a C if B dies first, something like that. C  
23 would be, may become entitled. --

24 MR. GOLDSTEIN: I --

25 QUESTION: And I thought that was all it was

1 referring to.

2 MR. GOLDSTEIN: I understand. I have both  
3 points firmly in mind. The first, Washington law does not  
4 say that the children become entitled because of the  
5 statute. All that Washington law says is that the  
6 designation -- it reflects, again, the common-sense  
7 understanding that the meaning of the designation -- I  
8 mean, it's fairly obvious here, when it says Donna R.  
9 Egelhoff, wife, but --

10 QUESTION: Well, the form is, first becomes  
11 disentitled --

12 MR. GOLDSTEIN: Becomes disentitled, and then --

13 QUESTION: We agree with that, and isn't that  
14 enough for the conflict?

15 MR. GOLDSTEIN: No, Justice Souter.

16 QUESTION: Because the participant, or the  
17 plan -- I guess the participant in this case -- is  
18 designated and the statute says no, that designation is  
19 not operative. Isn't that a conflict?

20 MR. GOLDSTEIN: No. The actual conflict, to  
21 make it even more specific, the conflict would have to go,  
22 if petitioner's position were accepted, ERISA says, pay  
23 the beneficiary, which is correct, absent this special --

24 QUESTION: Well, ERISA says, sure, but ERISA  
25 says, by means of the definition section, pay the

1 beneficiary, who is the designee either of the participant  
2 or of the plan.

3 MR. GOLDSTEIN: Well, then we come to your  
4 second point, because we have, or may become, because it  
5 doesn't say the person who is entitled to receive by that  
6 -- under the designation or under the plan. It's, who may  
7 become.

8 I agree with you that that is intended to  
9 trigger contingent beneficiaries. Our point is that the  
10 children are as much contingent beneficiaries in the  
11 meaning of that term as is the participant, because --

12 QUESTION: They are if you first assume there is  
13 no conflict and therefore the statute prevails.

14 MR. GOLDSTEIN: Well, we are looking --

15 QUESTION: That's -- I mean, that seems to me a  
16 circularity in your position.

17 MR. GOLDSTEIN: I will give you an interpretive  
18 aid in trying to decide what it means to be, or may  
19 become, and that is that it can't be the case that  
20 the children -- let me take you to Boggs.

21 Justice Kennedy's opinion for the Court in Boggs  
22 explained that there are a class of people that ERISA is  
23 intended to protect, participants and beneficiaries. Our  
24 position is, is that before the death of David, and before  
25 the administrator looked at the alternate beneficiary

1 provisions, the children were protected by ERISA.

2           They were in the class of people who could bring  
3 an action and say, look, you're misadministering plan  
4 assets, just as much as Donna could. They are within the  
5 class of people that ERISA intended to protect, and so if  
6 you are going to call them not beneficiaries, they are  
7 excluded from the rest of the statute entirely and they  
8 receive none of the protections.

9           Our understanding is that if Congress wanted to  
10 say -- use more limited language than or may become, it  
11 could have. It could have said --

12           QUESTION: Yes, but it's also the case that  
13 the -- and I will assume the premise of your argument that  
14 there may be a considerable class of individuals who may  
15 object to plan administration. It does not follow from  
16 that that every one of those individuals in fact gets some  
17 money in the pocket at the point of distribution.

18           MR. GOLDSTEIN: No, but the first class, the  
19 group of people who are protected by the statute, are  
20 denominated in the statute as beneficiaries.

21           QUESTION: It seems to me what you're arguing is  
22 that it does not pose a conflict with the plan if you  
23 require the plan to pay out to a contingent beneficiary  
24 instead of to the main beneficiary.

25           I mean, the mere fact that it's somebody who was



1 not entitled to it, but would be entitled to it if the  
2 person entitled to it weren't around, that's still a  
3 conflict, it seems to me. Just because they both are  
4 called beneficiaries of some sort, you're still requiring  
5 payment not to the beneficiary named.

6 MR. GOLDSTEIN: Well, Justice Scalia, there are  
7 many times when an ERISA plan pays benefits to someone  
8 other than a named beneficiary, so we're going to have to  
9 find the conflict somewhere else.

10 ERISA plans pay benefits out under the spousal  
11 annuity. ERISA plans pay ERISA benefits out under the  
12 QDRO provisions. It is many times not the case that they  
13 pay it out directly to the person whose name is on it. In  
14 fact, the plan here reserves the right to determine that  
15 the individual named is incompetent, and not to pay them  
16 then, either.

17 QUESTION: But the spousal annuity provision, I  
18 mean, the spouse at the time of death may not be named,  
19 but it's clear on the face of the plan and the  
20 accompanying law of ERISA that the spousal annuity goes to  
21 the spouse at the time of the beneficiary's death, or --

22 MR. GOLDSTEIN: Let me deal with what I take to  
23 be the premise of your point, which is that a conflict  
24 with the terms of the plan would be sufficient to cause  
25 preemption, if the plan said, you can't do this, and

1 second -- so I'll return to that in just a moment, whether  
2 or not that would be sufficient to cause ERISA preemption,  
3 but let me deal with it on the facts of this case, and it  
4 is important to return to the text of the statute again.  
5 With the stroke of a pen, you can write into any  
6 nonprobate asset, including an ERISA plan, divorce  
7 revocation statutes do not apply.

8 Justice Ginsburg, you asked the petitioner's  
9 lawyer, wouldn't there also be the problem you wouldn't  
10 know which State law applies. The Attorney General of  
11 Washington in her brief at footnote 6 has explained under  
12 this statute, you don't have to say, Revised Code 1107010  
13 doesn't apply, Alabama Code, da-da-da. It is, you just  
14 say, divorce revocation statutes don't apply.

15 An earlier question also said, and --

16 QUESTION: Mr. Goldstein, you said the  
17 Washington statute, but there are a number of statutes,  
18 and they are various, so it wouldn't obviate the conflicts  
19 problem.

20 MR. GOLDSTEIN: Justice Ginsburg, it would in  
21 one sense and potentially not in another. The Court is  
22 asked to pass on a particular statute with three safe  
23 harbors that Justice Breyer has identified. I'm not  
24 representing to you that the same rationale would save all  
25 of them.

1           I think, though, your point goes more  
2 particularly to what does the administrator do in a  
3 conflict of laws problem? There's the hypothetical, for  
4 example, that someone's from Oregon, someone from  
5 Washington, someone from Texas. The plan operates in a  
6 multi-State arena.

7           There are two important points. The first is  
8 that there is the safe harbor both under the text of ERISA  
9 and under this plan -- under this statute, that says, if  
10 you have any doubt, don't pay. You don't have to go to  
11 court. Just don't do it. Just send a letter to the  
12 people who want the money and say to them, come back to us  
13 when you have figured it out or a court has told you what  
14 to do.

15           And so in terms of getting to the  
16 practicalities, Justice Ginsburg, of how is this going to  
17 work for administrators --

18           QUESTION: Doesn't that conflict with ERISA? I  
19 mean, isn't he supposed to pay out the money promptly to  
20 the person entitled to it, and you're saying it doesn't  
21 conflict with ERISA to tell him to sit on his hands until  
22 litigation terminates 2 years hence?

23           MR. GOLDSTEIN: Justice Scalia, it is frequently  
24 the case, in fact, that ERISA plans have some doubt. The  
25 Court discussed probably the most obvious cases, slayer

1 statutes, simultaneous death happens actually not  
2 infrequently, but there are lots of times -- Justice  
3 Stevens, the middle name of all the children is Joseph.  
4 There are many times when you don't pay immediately.

5 ERISA provides in its enforcement section, and  
6 the circuits uniformly agree, that what the plan should do  
7 there is simply put the money aside and wait for the  
8 claiming participants to fight it out.

9 QUESTION: Would you refresh my recollection?  
10 Does the statute take care of the situation when the  
11 beneficiary is incompetent, or a child, or something like  
12 that? Does it provide paying to a conservator, or is that  
13 done as a matter of State law?

14 MR. GOLDSTEIN: Does -- ERISA does not.

15 QUESTION: It doesn't contemplate that. So if,  
16 in fact, the plan administrator knows that the -- say, the  
17 beneficiary is in prison, or is having a mental problem or  
18 something, he doesn't have to pay out right away?

19 MR. GOLDSTEIN: That's correct.

20 QUESTION: Yes.

21 MR. GOLDSTEIN: There are many times this  
22 happens.

23 QUESTION: If -- is there -- you're asking us, I  
24 take it, to interpret the statute, ERISA, which  
25 effectively says pay the money to the primary beneficiary.

1     You want to say, well, pay the money to the primary  
2     beneficiary who is a beneficiary and isn't disqualified by  
3     certain State laws, and now this is one of the State laws  
4     that might disqualify a person, and another one is a  
5     slayer statute, and a third one, I take it, is a  
6     simultaneous death statute, and are there any others --

7             MR. GOLDSTEIN:   Those --

8             QUESTION:   -- that anybody's been able to think  
9     of?

10            MR. GOLDSTEIN:   No, and it is important to  
11     understand in terms of what the court is opening the doors  
12     to, that the States have been regulating this area for  
13     centuries, and that is the -- you know, this is in the  
14     area of divorce.  There are normal probate areas that they  
15     have limited themselves, and if I could just mention one  
16     point --

17            QUESTION:   Do -- I mean, one of the ways they  
18     used to regulate it is that, you know, the wife would get  
19     half the estate automatically upon death.  Suppose the --  
20     a State enacts a law that says, you know, if this benefit  
21     is not given to the spouse at the time of death, it must  
22     be.

23            MR. GOLDSTEIN:   I understand.

24            QUESTION:   And this is probate, this is our  
25     concern with the family and with marriage and all of that.

1                   MR. GOLDSTEIN: Yes.

2                   QUESTION: Surely you wouldn't say that ERISA  
3 would be overcome with that.

4                   MR. GOLDSTEIN: That's exactly right, because  
5 that's a prohibited alienation. That's Boggs, and let me  
6 explain why this is not.

7                   Congress provided that there are certain people,  
8 participants and their beneficiaries, when it's a spousal  
9 annuity, who have an expectation that they are going to  
10 live off pension benefits, and it specified when an  
11 alienation would occur.

12                   This is not a situation where the money is taken  
13 away from the participant or anyone else who has a  
14 mandated right to it and give -- and let me take you to  
15 the definition. The alienation definition is not  
16 reprinted in the appendix to any brief -- I apologize --  
17 but I will simply read it to you. Well, the statute is,  
18 and that is at the appendix to petitioner's brief at page  
19 4, and it simply says, not very helpfully, each pension  
20 plan shall provide the benefits provided under the plan  
21 may not be assigned or alienated.

22                   Justice Kennedy's opinion in Boggs looks to the  
23 IRS's definition and I will read it to you. This for the  
24 record is at 26 C.F.R. section 1.401A-(13)(c)(i) -- (ii).  
25 The terms, assignment and alienation, include any direct

1 or indirect arrangement, whether revocable or irrevocable  
2 whereby a party acquires from a participant or beneficiary  
3 a right or interest enforceable against a plan in or to  
4 any or all of the plan benefit payment.

5 QUESTION: That's what I thought alienation  
6 means. It means from a participant. This alienation is  
7 not from the participant. It's by operation of the State  
8 law. You're not getting it from the participant.

9 MR. GOLDSTEIN: We agree. It's not an  
10 alienation. That's our point, and that's the difference  
11 from the hypothetical you asked. If there was a divorce  
12 decree that said, look -- if the divorce decree here said,  
13 Donna Egelhoff is going to get 100 percent of David's  
14 pension, if that is not, Justice O'Connor, registered as a  
15 QDRO that's an alienation. You can't do it.

16 Now, the petitioner --

17 QUESTION: Excuse me, that is an alienation?  
18 Why is that an alienation?

19 MR. GOLDSTEIN: Because it takes it from David  
20 and gives it to Donna.

21 QUESTION: But David is not alienating himself.  
22 He's not taking it from himself and giving it to Donna. I  
23 thought you agreed with me that that's what alienate  
24 means. It means you can't transfer it to someone else,  
25 not that operation of law can't take it away from you and

1     give it to somebody else.

2                   MR. GOLDSTEIN:  I apologize, Justice Scalia.  I  
3     was focusing on the take it from the person to another.  
4     You were focusing on the operation of law.  I actually  
5     agree with your interpretation of operation of law.  
6     Unfortunately, I think it's precluded by Boggs.  That was  
7     State community property law.  I think Justice Breyer  
8     might -- some might think he had the better of that  
9     argument.  That is water under the bridge, and that was  
10    community property law.

11                   QUESTION:  Yes.  Yes.

12                   MR. GOLDSTEIN:  Remember, the second wife,  
13    community property law, took it.  She -- the community  
14    property law is what gave it to her.  So what I'm focusing  
15    on, though, is that this does not take it from somebody  
16    and give it to somebody else.

17                   Now, there was the question put before, well,  
18    should this have been a QDRO, and there is the negative  
19    inference suggested by petitioner that Congress occupied  
20    this field, that really these sorts of things are supposed  
21    to be done by QDRO's, and I will explain to you why that's  
22    not so.

23                   Washington law doesn't intend to say that the  
24    kids will get the money.  That's the whole point, that the  
25    plan will decide who gets the money.  Washington law wants



1 David, after the divorce, to decide who will get it. Say  
2 there's a third wife. David -- say he's a serial marrier.  
3 If there's a third wife, David wants to be able to name  
4 her. If there's a QDRO, he can't. If the divorce decree  
5 said, the money goes to the kids, he's out of luck.  
6 That's a registered decree under Washington State law.

7 All Washington is trying to do here is say,  
8 look, when you divorce, the intent is that the spouse,  
9 your ex-spouse isn't going to get the money. Go fix the  
10 problem some other way, and it says to the plans, or any  
11 other nonprobate asset, you don't want to comply, say  
12 you're not going to comply. You have any doubts, don't  
13 comply. And it says to the participant himself, if you  
14 don't want this to be the rule, just say so, either in the  
15 divorce decree or even in your designation.

16 There really is nothing going on here that  
17 Congress didn't want to happen. There's nobody -- unlike  
18 Boggs, where we had the actual spouse who was going to get  
19 the spousal annuity, or we had the pension benefits after  
20 death in the hands at least of the estate of the  
21 pensioner, none of that applies here.

22 We're in a situation where Congress left it up  
23 to anybody to name a designee, and unless there's some  
24 real practical problem for the ERISA plan, unless  
25 something's -- it's just not workable, I could understand

1 a reason to preempt it. But when you're going to take  
2 away simultaneous death, slayer statutes -- in the  
3 footnote in which they address the issue in their reply  
4 brief, petitioner says, Justice Scalia, that it preempts  
5 state law definitions of what it is to die, who's a  
6 spouse, what's a child, common law issues frequently  
7 regulated by the States.

8 I should make one final point, and that is that  
9 there is at the very least one alternative narrow holding  
10 that I don't understand the answer to for this Court, and  
11 that is that we sued petitioner under a provision of State  
12 law that lets us just sue her, and if the problem is the  
13 practical administration of this rule, that it will cause  
14 a burden for ERISA plans, the rule at the least ought to  
15 be that that's not preempted. It's a State law conversion  
16 suit. We can go after her for the money.

17 QUESTION: It seems to me, and maybe you have an  
18 answer to it, that the manner in which this State law  
19 differs from laws that say who a wife is, who a child is  
20 and so forth, is that this is a State law that is directed  
21 explicitly to the manner in which a contract, an ERISA  
22 contract in particular, should be interpreted. It is  
23 directed precisely to the intent of the parties to an  
24 agreement, and it says this is what they shall be deemed  
25 to intend. It operates directly and explicitly upon the

1 agreement itself.

2 MR. GOLDSTEIN: Two points. The first is that,  
3 of course, it doesn't operate in such a fashion if there's  
4 any contrary expression of intent by any of the parties,  
5 be it the plan or the participant.

6 The second is that I do think in these ERISA  
7 cases we get the unfortunate sense that this statute is  
8 about ERISA plans, and it's not. There's a separate  
9 statute, of course, that deals with every form of will.  
10 This statute deals with every conceivable form of  
11 nonprobate asset. It's really important under State law.

12 Most of the money that is held by individuals  
13 now is either in your home or in a life insurance plan or  
14 in a pension, whether qualified or not, and you get the  
15 situation that you have here, and that is that Donna  
16 Egelhoff already got equivalent assets. She's going to  
17 come along and recover again. The children are going to  
18 be completely out of luck for no sensible purpose at all.

19 If there are no further questions --

20 QUESTION: Thank you, Mr. Goldstein.

21 Mr. Kilberg, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF WILLIAM J. KILBERG

23 ON BEHALF OF THE PETITIONER

24 MR. KILBERG: Thank you, Mr. Chief Justice.

25 Just a few points. The last point that Mr.

1 Goldstein made, which suggests broader preemption than I  
2 think the statute entails, ERISA preempts State law only  
3 insofar as it relates to an employee benefit plan. No one  
4 is suggesting that the State statute is preempted with  
5 regard to other nonprobate assets.

6 Mr. Goldstein also mentioned that they had sued,  
7 the respondents here had sued petitioner, not the plan.  
8 Well, that is true. That, of course, was true in Boggs as  
9 well and, as the Court said in the Boggs decision, there,  
10 as here, the premise of the lawsuit is based on a  
11 displacement of ERISA provisions and plan provisions.

12 A point with regard to the contingent  
13 beneficiary notion. If Mr. Goldstein is correct, and  
14 respondents are beneficiaries under ERISA because they  
15 have a contingent right, then their only cause of action  
16 would be under section 502(a) of ERISA. That would be  
17 their exclusive right, and they would have had to sue the  
18 plan under those provisions rather than the petitioner  
19 under the State statute.

20 With regard to the QDRO point, Qualified  
21 Domestic Relations Order point, the fact is that a QDRO  
22 could have been fashioned that provided that the spouse  
23 had given up any interest that she might have as a  
24 beneficiary. The fact here is, that wasn't done. That  
25 provision is a relatively easy one to effect. It wasn't

1       done, and that's the reason that respondents must lose.

2               Unless the Court has any questions for me --

3               CHIEF JUSTICE REHNQUIST:  Thank you, Mr.

4   Kilberg.  The case is submitted.

5               (Whereupon, at 12:00 noon, the case in the  
6   above-entitled matter was submitted.)

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