No. 14-1531

In the Supreme Court of the United States

KIMBERLY COWSER-GRIFFIN, EXECUTRIX OF THE ESTATE OF DAVID GRIFFIN, PETITIONER

v.

SANDRA D.T. GRIFFIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Table Of Authorities II

A. The Split Is Real 2

B. The Decision Below Is Wrong 10

C. This Recurring And Important Question Warrants Immediate Review 12

Conclusion 13

TABLE OF AUTHORITIES

Cases: **Page(s)**

Aetna Health Inc. v. *Davila*,
542 U.S. 200 (2004) 3

Boggs v. *Boggs*,
520 U.S. 833 (1997) 10

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*,
467 U.S. 837 (1984) 8

Dahl v. *Aerospace Emps.' Ret. Plan of the Aerospace Corp.*,
No. 1:15-cv-611, 2015 WL 4874706 (E.D. Va. Aug. 13, 2015) 7

Hopkins v. *AT&T Global Information Solutions Co.*,
105 F.3d 153 (4th Cir. 1997) 4, 6, 7, 11

In re Marriage of Padgett,
91 Cal. Rptr. 3d 475 (Cal. Ct. App. 2009)..... 2

Ingersoll-Rand Co. v. *McClendon*,
498 U.S. 133 (1990) 9

Langston v. *Wilson McShane Corp.*,
828 N.W.2d 109 (Minn. 2013) 7

R.A.F. v. *S. Co. Pension Plan*,
No. 2:07-cv-192-WKW, 2008 WL 2397391 (M.D. Ala. June 10, 2008) 2

Rivers v. *Cent. & Sw. Corp.*,
186 F.3d 681 (5th Cir. 1999) 4

Cases—continued: **Page(s)**

Samaroo v. *Samaroo*,
193 F.3d 185 (3d Cir. 1999) 9

Trustees of Directors Guild of Am.-Producer Pension Benefits Plans v. *Tise*,
234 F.3d 415 (9th Cir. 2000) 5

Yale-New Haven Hosp. v. *Nicholls*,
788 F.3d 79 (2d Cir. 2015) 1, 7, 11

Statutes:

29 U.S.C. § 1055 ..... 10, 12

29 U.S.C. § 1055(b)(1)(C) 10

29 U.S.C. § 1055(b)(1)(C)(i) 10

29 U.S.C. § 1056(d)(3) 10, 11

29 U.S.C. § 1056(d)(3)(B)-(D) 11

29 U.S.C. § 1056(d)(3)(B)(i) 5

29 U.S.C. § 1056(d)(3)(B)(i)(I) 2, 4, 11

29 U.S.C. § 1056(d)(3)(D)(i) 2, 6, 7, 10

29 U.S.C. § 1056(d)(3)(H) 11

Pension Protection Act of 2006,
Pub. L. No. 109-280, 120 Stat. 780 ..... 6, 7, 8

Regulations:

29 C.F.R. § 2530.206(b)(2) 8

29 C.F.R. § 2530.206(c) 8

29 C.F.R. § 2530.206(d)(2) 8

Miscellaneous: **Page(s)**

Aaron Klein, Note, *Divorce, Death, and Posthumous QDROs: When Is It Too Late for a Divorcee to Claim Pension Benefits Under ERISA?*, 26 Cardozo L. Rev. 1651 (2005) 2

Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. Marshall L. Rev. 919 (2007) 4

Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders, 75 Fed. Reg. 32,846 (June 10, 2010) 6, 8

Jack VanDerhei et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013*, EBRI Issue Brief No. 408 (Employee Benefit Research Inst., Wash., D.C.), Dec. 2014, http://goo.gl/ZzWhzB 12

Letter from Hewitt Assocs. LLC, to U.S. Dep't of Labor (May 14, 2007), http://goo.gl/R8r3nO 8

Letter from Mark J. Ugoretz, President, ERISA Indus. Comm., to U.S. Dep't of Labor (May 7, 2007), http://goo.gl/SKFSr7 8

Nathan R. Ross, *A Power Struggle of Mythic Proportion: In the World of ERISA, Are Retirement Plan Administrators the Real Gods of Olympus?*, 46 Val. U. L. Rev. 529 (2012) 1, 3

Miscellaneous—continued: **Page(s)**

Robert D. Feder et al., *Valuation Strategies in Divorce* (5th ed. Supp. 2016) 2

REPLY BRIEF FOR THE PETITIONER

Respondent's 37-page brief in opposition ("BIO") never contests the importance of the question presented. It hardly could. Holding that state courts may reallocate vested ERISA benefits "is a conclusion of seismic consequences" that "thwarts the intricate federal statutory scheme surrounding the antialienation of pension benefits." *Yale-New Haven Hosp.* v. *Nicholls*, 788 F.3d 79, 92 (2d Cir. 2015) (Wesley, J., concurring in part and dissenting in part). Given an "aging baby boomer population" and the prevalence of divorce, the issue presented here "will continue to grow in both frequency and significance," and its "resolution * * * will determine the distribution of a vast amount of wealth." Nathan R. Ross, *A Power Struggle of Mythic Proportion: In the World of ERISA, Are Retirement Plan Administrators the Real Gods of Olympus?*, 46 Val. U. L. Rev. 529, 530-531 (2012).

Respondent's assurance that "no conflict" exists on the question presented, BIO 15, is belied by the plan administrator's recognition of a "split of authority" that this Court "will need to resolve," "perhaps in this very case," Supp. Br. App. 10a-11a. Those statements, by someone whose "only interest * * * is to ensure that the Griffin Plan Account is distributed to the proper beneficiary," *id.* at 28a, confirm that ERISA practitioners harbor no illusion that immaterial distinctions between benefit types or the Department of Labor's 2010 regulations resolve the split.

Respondent's efforts to defend the Virginia courts' decision—which "require[s] [the] plan to provide a[]

type or form of benefit * * * not otherwise provided under the plan" and reallocates benefits that are no longer "payable with respect to a participant," 29 U.S.C. § 1056(d)(3)(B)(i)(I), (D)(i)—only highlight the need for immediate intervention. Absent this Court's review, similar disputes will continue to arise, delaying benefit distributions and squandering through litigation funds required for daily needs. Further delay will impose real harm on ordinary Americans.

A. The Split Is Real

1. Numerous courts and commentators have recognized that courts are "divided as to whether a former spouse's application for a deceased plan participant's pension benefits pursuant to a divorce decree is valid retroactive to the [participant's] death." Aaron Klein, Note, *Divorce, Death, and Posthumous QDROs: When Is It Too Late for a Divorcee to Claim Pension Benefits Under ERISA?*, 26 Cardozo L. Rev. 1651, 1651 (2005) (footnote omitted).[1] The Third, Fourth, and Fifth Circuits and the Minnesota Supreme Court have held that state courts lack authority to issue QDROs once benefits have vested upon death or retirement; the Second, Eighth, Ninth, and Tenth Circuits and the Hawaii and Virginia Supreme Courts have held to the contrary. See Pet. 11-17.

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[1] Accord, *e.g.*, *R.A.F.* v. *S. Co. Pension Plan*, No. 2:07-cv-192-WKW, 2008 WL 2397391, at *9 (M.D. Ala. June 10, 2008) ("circuit split"); *In re Marriage of Padgett*, 91 Cal. Rptr. 3d 475, 483 (Cal. Ct. App. 2009) ("two lines of authority"); Robert D. Feder et al., *Valuation Strategies in Divorce* § 15.74 (5th ed. Supp. 2016) ("courts have reached different decisions").

Because "there is no uniform answer to this question," ownership of "vast * * * wealth" depends on "the jurisdiction in which one lives." Ross, 46 Val. U. L. Rev. at 530-531. Indeed, for plan participants, beneficiaries, and alternate payees in Virginia (in the Fourth Circuit) or Minnesota (the Eighth Circuit), the answer depends on whether litigation proceeds in state or federal court. See Pet. 11-15. Even within jurisdictions that permit QDROs to reassign vested benefits, courts disagree about whether the plan administrator must be notified of the order before vesting. Ross, 46 Val. U. L. Rev. at 553 ("even posthumous-permitting jurisdictions cannot fully agree" whether plan must "have notice of the forthcoming QDRO before the participant's death"). The splintered law on this recurring issue undermines ERISA's goal of a nationally "uniform regulatory regime." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004).

2. Respondent offers three arguments why "[t]here is no conflict of authority on the question presented." BIO 15. None withstands scrutiny.

a. *Lump-sum benefits versus annuities.* Respondent first argues (BIO 16-21) that no conflict exists because this case involves lump-sum benefits rather than an annuity. That argument fails.

Although respondent asserts that "annuity benefits trigger distinct ERISA requirements and present distinct policy concerns," *id.* at 19, she identifies *no* basis in ERISA's text for differential treatment of posthumous DROs based on whether they divest beneficiaries of annuities or lump sums. Decisions on both sides of the split apply regardless

whether benefits involve one-time or recurring payments. *Hopkins* v. *AT&T Global Information Solutions Co.*, 105 F.3d 153, 156 (4th Cir. 1997), for example, "turn[ed] on whether [the beneficiary's] interest in the * * * [b]enefits vested" before the alternate payee obtained the QDRO. *Hopkins* reasoned that once a beneficiary's rights vest, benefits no longer satisfy the QDRO prerequisite of being "'payable with respect to a [plan] *participant*'"—instead, benefits are "payable to [the] *beneficiary*." *Ibid.* (emphasis added) (quoting 29 U.S.C. § 1056(d)(3)(B)(i)(I)); accord *Rivers* v. *Cent. & Sw. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) ("adopt[ing] [*Hopkins*'] rationale").

Hopkins' reasoning "equally appli[es] to non-annuitized benefits" like those here. Pet. App. 9a (Millette, J., dissenting); see also Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. Marshall L. Rev. 919, 998 (2007) ("The *Hopkins* court's vesting argument * * * may be extended to prevent any former spouse from using a QDRO to displace a new spouse."). Under the Plan's explicit terms, David Griffin's surviving spouse and designated beneficiary, Kimberly Cowser-Griffin, became entitled to an "immediate lump sum distribution" upon his death. Pet. App. 79a. Under *Hopkins*, once Cowser-Griffin's rights vested, Virginia courts could not issue a posthumous QDRO reallocating those benefits, which were no longer "payable with respect to a participant." Respondent's self-serving assurances that *Hopkins* does not apply to lump-sum payments ring hollow given the *plan administrator's* conclusion that *Hopkins* is "controlling ERISA authority" requiring that "[u]pon

David Griffin's death, his interest in the Plan transferred to Cowser-Griffin." Supp. Br. App. 12a-13a.

The Ninth Circuit has expressly rejected the Fourth Circuit's interpretation of § 1056(d)(3)(B)(i), concluding that beneficiaries can "sensibly be said to receive their benefits 'with respect to'—in the sense of 'on account of'—the participant even after the beneficiary's benefits become payable." *Trustees of Directors Guild of Am.-Producer Pension Benefits Plans* v. *Tise*, 234 F.3d 415, 424 (9th Cir. 2000). This fundamental disagreement on a pure question of statutory interpretation highlights the need for this Court's review. Any doubt that *Tise*'s rationale can apply equally to one-time and recurring payments is eliminated by respondent's insistence in her merits argument that the same reasoning applies here. See BIO 28 n.7.

There is no legal basis for respondent's claim that annuities can be distinguished from lump-sum payments based on "policy concerns against altering * * * beneficiary-specific actuarial calculations." BIO 2. Annuity payments could be shifted from beneficiary to alternate payee without revisiting actuarial assumptions or recalculating payments; a QDRO could simply redirect payments that would have been made to the beneficiary (tied to the beneficiary's life expectancy and terminated on the beneficiary's death). But in the preamble to its 2010 regulations, the Department of Labor stated that ERISA prohibits shifting *vested* annuity benefits; thus, a DRO cannot "assign[] to the participant's former spouse a shared payment of the * * * current

spouse's [vested] survivor [annuity] benefits." Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders, 75 Fed. Reg. 32,846, 32,848 (June 10, 2010); accord *ibid.* ("[T]he principle * * * that a domestic relations order issued after the annuity starting date does not violate [§ 1056(d)(3)(D)(i)] merely because the order requires the allocation of * * * the participant's determined monthly benefit payment to an alternate payee, * * * *does not apply* to a domestic relations order that *is received after the annuity starting date* and that *requires an allocation to an alternate payee of some or all of the death benefit that * * * is payable to another beneficiary*." (emphasis added)). The Department relied on *Hopkins*—a case respondent insists the 2010 regulations effectively overruled. *Id.* at 32,848 n.6.

Respondent's efforts to distinguish away the split are belied by her own merits arguments, which *make no distinction* between annuities and lump-sum payments. Respondent contends that "[n]othing in [ERISA] excludes posthumous QDROs," whether they divest a beneficiary of lump-sum benefits or recurring payments. BIO 27. By the same token, petitioner contends that ERISA does not "permit[] a state court to retroactively reassign plan benefits after the plan participant's death," Pet. I, regardless of their form. Respondent's proposed distinction fails.

b. *2010 Regulations.* Respondent urges this Court to postpone review until "lower courts have had the opportunity to consider the effect" of a *nine-year-old* statute (the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780) and *five-year-old*

implementing regulations. BIO 3, 22-25. But buried in a footnote, respondent concedes (*id.* at 22 n.5) that the Minnesota Supreme Court held *three years after* those regulations that an order purporting to transfer vested benefits was not a QDRO because the order required "a type or form of benefit not otherwise provided by the [p]lan in violation of 29 U.S.C. § 1056(d)(3)(D)(i)." *Langston* v. *Wilson McShane Corp.*, 828 N.W.2d 109, 117 (Minn. 2013). That court read the regulations to *support* its conclusion that a post-vesting DRO violates statutory QDRO requirements. *Ibid.* By contrast, the decisions below (Pet. App. 1a, 31a, 34a-38a) and the majority in *Nicholls*, 788 F.3d at 85-86, 88 n.7, cited the Pension Protection Act and the regulations in concluding posthumous QDROs were effective; the *Nicholls* dissent, however, concluded that "nothing in the 2006 Act or its regulations authorizes the use of a subsequent DRO, posthumous or not, to reallocate benefits vested in one payee to another," *id.* at 91; see also *Dahl* v. *Aerospace Emps.' Ret. Plan of the Aerospace Corp.*, No. 1:15-cv-611, 2015 WL 4874706, at *4 (E.D. Va. Aug. 13, 2015) (following *Hopkins* after 2010 regulations). The Act and regulations have not resolved the split.

That is hardly surprising. The 2006 Act merely instructed the Secretary of Labor to issue regulations clarifying that "a domestic relations order *otherwise meeting the requirements to be a qualified domestic relations order* * * * shall not fail to be treated as a qualified domestic relations order *solely* because * * * of the time at which it is issued." § 1001, 120 Stat. 1052-1053 (emphasis added). The Act did not provide that a QDRO may divest a beneficiary of vested

rights. Indeed, under the Act, such an order could not be treated as a QDRO because it would not "otherwise meet[] the [QDRO] requirements." See pp. 10-11, *infra*.

The rulemaking proceeding confirms that neither the Act nor the regulations resolved the question presented. Commenters specifically asked that the Department "clarify that a QDRO cannot extinguish or modify a benefit vested in a third party." Letter from Mark J. Ugoretz, President, ERISA Indus. Comm., to U.S. Dep't of Labor, at 1 (May 7, 2007), http://goo.gl/SKFSr7; see also Letter from Hewitt Assocs. LLC, to U.S. Dep't of Labor, at 2 (May 14, 2007), http://goo.gl/R8r3nO ("[T]he regulations should clarify that plans may deny any orders that are received after a beneficiary becomes entitled to payment (e.g., after the death of the participant)."). Although the Department did not make the requested amendment, it did not dispute that posthumous QDROs cannot reallocate vested benefits. Indeed, the Department included preamble language suggesting agreement with the commenters. See 75 Fed. Reg. at 32,848 (DRO cannot "assign[] to the participant's former spouse a shared payment of the * * * current spouse's [vested] survivor [annuity] benefits").[2]

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[2] Unlike other regulatory examples, *see* 29 C.F.R. § 2530.206(b)(2) Example 2; *id.* § 2530.206(d)(2) Example 3, there is no subsequent spouse in Example 1 to § 2530.206(c), belying respondent's suggestion that the example "applies directly to the material facts" here. BIO 23. Because the Department has issued no regulation resolving the question presented in respondent's favor, respondent's plea for deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (BIO 24, 32-34), is misplaced.

c. *Posthumous versus post-retirement reassignment*. Respondent's assertion that "most of petitioner's cases involved post-retirement rather than posthumous" DROs, BIO 18, highlights respondent's inability to identify *material* distinctions between cases in the split. Respondent identifies no statutory text supporting differential treatment of benefits vesting at retirement and those vesting at death. As the dissenters below explained, the fact that this case involves "death benefits" has "no substantive impact on the outcome." Pet. App. 10a. Moreover, respondent's argument ignores *Samaroo* v. *Samaroo*, 193 F.3d 185, 189-191 (3d Cir. 1999), which—contrary to the decision below—held that a posthumous divorce-decree amendment was not a QDRO.

* * * * *

ERISA practitioners, including the plan administrator here, recognize a "split of authority" that this Court "need[s] to resolve," "perhaps in this very case." Supp. Br. App. 11a. The persistent confusion on the question presented undermines ERISA's goal of "minimiz[ing] the administrative and financial burden[s]" on plan administrators. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990). Certiorari is warranted.

If anything, deference to the Department's views would assist *petitioner*. See pp. 5-6, 8, *supra*.

If the Court has questions regarding the Department's position, it could solicit the Solicitor General's views (although that step is unnecessary given the clear conflict).

B. The Decision Below Is Wrong

The court below erred by concluding that respondent's "proposed QDRO meets the specific requirements of 29 U.S.C. § 1056(d)(3)." Pet. App. 45a. As the plan administrator explained, the posthumous order here "cannot qualify as a QDRO * * * because it seeks to assign to the Alternate Payees the right to receive benefits already payable to Cowser-Griffin." Supp. Br. App. 14a.

Congress provided that individual account plans like the one here are exempt from 29 U.S.C. § 1055's spouse-protecting annuity requirements *only* if the plan provides an alternative protection: It must provide that "the participant's nonforfeitable accrued benefit * * * is payable in full, on the death of the participant, to the participant's surviving spouse" (absent the surviving spouse's consent to an alternative beneficiary). 29 U.S.C. § 1055(b)(1)(C)(i); see also *Boggs* v. *Boggs*, 520 U.S. 833, 843 (1997) (§ 1055(b)(1)(C) "protects * * * surviving spouse[s]"). Accordingly, the Plan "expressly provides that upon David Griffin's death * * * , his account 'shall be paid to his surviving spouse,' Cowser-Griffin." Supp. Br. App. 12a. Thus, "Cowser-Griffin had the right [to the funds] under the terms of the Plan." *Id.* at 12a-13a.

The order respondent sought here does not satisfy statutory QDRO requirements for at least two reasons. First, it "require[s] [the] [P]lan to provide a[] type or form of benefit, or an[] option, not otherwise provided under the [P]lan," 29 U.S.C. § 1056(d)(3)(D)(i), because it purports to reallocate benefits that the Plan provides "shall be paid" to Cowser-Griffin, Supp. Br. App. 12a. Second, because

the order seeks to reassign benefits vested in a third party, it purports to reallocate benefits that are no longer "payable with respect to a participant," as required by 29 U.S.C. § 1056(d)(3)(B)(i)(I). See *Hopkins*, 105 F.3d at 156.

Respondent's two principal arguments supporting her contrary interpretation of 29 U.S.C. § 1056(d)(3) fail. First, respondent contends that some information that must be specified in a QDRO, such as an alternate payee's mailing address, "can only be detailed at the time of eligibility to receive benefits." BIO 30. But a QDRO can specify the address *at the time the order is issued*, providing a means of identification beyond the payee's name alone.

Second, respondent relies on the 18-month QDRO-determination period under 29 U.S.C. § 1056(d)(3)(H). That provision, however, merely specifies how a plan administrator must handle benefit payments while the administrator or a court determines whether a DRO is a QDRO. It does not purport to modify the QDRO prerequisites of § 1056(d)(3)(B)-(D). At most, § 1056(d)(3)(H) might be read as permitting posthumous QDRO modifications to relate back to a DRO submitted to a plan administrator for review before the participant's death. See *Nicholls*, 788 F.3d at 95-96 (Wesley, J., concurring in part and dissenting in part). But there is no evidence the Plan here had notice of competing claims before Mr. Griffin's death. Pet. App. 71a. Interpreting § 1056(d)(3)(H) to give effect to DROs plan administrators first learned of after vesting "would wreak havoc on the administrability and predictability of plan benefits." *Nicholls*, 788 F.3d at

94 (Wesley, J., concurring in part and dissenting in part).

C. This Recurring And Important Question Warrants Immediate Review

As noted, respondent does not, and cannot, dispute the importance of the question presented. See p. 1, *supra*. Contrary to respondent's contention, this case presents no "antecedent question" of "whether the strictures of § 1055 apply * * * to a lump-sum plan." BIO 34. Both parties agree § 1055 "protect[s] * * * surviving spouses" under plans otherwise exempt from the section's annuity requirements by ensuring "the[ir] right to receive nonforfeitable accrued benefits in a lump sum." *Id.* at 35-36. And the distinction between lump sums and annuities has no bearing on the question presented. See pp. 3-6, *supra*.

There is no reason to "await a [different] case" to address this recurring question. BIO 3. Absent this Court's intervention, disputes over post-vesting DROs will continue. Litigation costs will consume a share of benefits that beneficiaries can ill afford, given that the median 401(k)-account balance is only about $18,433 and approximately 90% of 401(k) balances are below $200,000. Jack VanDerhei et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013*, EBRI Issue Brief No. 408 (Employee Benefit Research Inst., Wash., D.C.), Dec. 2014, at 11, 13-14, http://goo.gl/ZzWhzB. Disputes also delay distribution of funds beneficiaries may need for basic

necessities.[3] Postponing review would thus inflict substantial harm on ordinary Americans.

CONCLUSION

The petition should be granted.

Respectfully submitted.

[3] Given the costs and delays of further litigation, this Court should not deny certiorari based on the pending interpleader action, which respondent acknowledges "is irrelevant to * * * disposition of this petition." BIO 26. Additional litigation would further consume the benefits at issue—just $372,056.18 as of Mr. Griffin's death. Supp. Br. App. 20a.

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DECEMBER 2015