No. 16-1432

IN THE

# Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

*Petitioners*,

v.

KAYE MELIN,

*Respondent*.

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## INTRODUCTION

State statutes that revoke life insurance beneficiary designations in favor of a spouse upon divorce have existed for more than twenty-five years. Nonetheless, only three federal courts of appeals and a small smattering of state high courts have been called upon to decide the question presented—whether retroactive application of such statutes violates the Contracts Clause.

The rarity with which this issue arises is unsurprising. The number of contracts to which these decades-old statutes might retroactively apply diminishes every day. And even among that shrinking set, the problem rarely comes up. For one thing, many divorce settlements (and divorce decrees) dictate what will become of key assets such as life insurance policies, and none of these statutes makes any difference where the parties themselves have allocated these assets. For another, these statutes cannot apply to the substantial portion of life insurance policies governed by ERISA or the Federal Employees' Group Life Insurance Act (FEGLIA) because federal law preempts them. In other words, the question presented generally matters only where, years ago, a couple had the foresight to obtain life insurance outside the confines of an employer's program; their state later adopted a revocation-upon-divorce statute; and the couple divorced but neglected to specify what would happen to the policy. Surely the Court has more pressing business to attend to.

The Court also need not worry that, absent its intervention, error will go uncorrected in cases like this one, because the decision below is correct.

Although revocation-upon-divorce statutes prove decisive in only a handful of cases, when they do, they directly alter a critical provision of the contract—the identity of the beneficiary. Nobody buys life insurance for the joy of knowing that the insurance company will pay some random person; "[s]election of a beneficiary is the entire point of a life insurance policy." *Parsonese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998). Applying these statutes retroactively thus substantially impairs contractual obligations without adequate justification.

The petition for certiorari should be denied.

## STATEMENT

### A. The Contracts Clause

The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. It protects legitimate contractual expectations and flows from "the high value the Framers placed on the protection of private contracts." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

Where, as here, the contract in question is between two private parties, this Court begins by asking "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 244 "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). Importantly, "[t]he obligations of a contract . . . includ[e] not only the express terms, but also the contemporaneous state law pertaining to interpretation and enforcement." *U.S. Trust Co. of*

*N.Y. v. New Jersey*, 431 U.S. 1, 19–20 n.17 (1977). Thus, "the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Id.* at 20 n.17.

Under the "literal[]," "unambiguous[]" terms of the Contracts Clause, one might think that a finding of substantial impairment would end the case. *U.S. Trust*, 431 U.S. at 20; *Spannaus*, 438 U.S. at 240. Nonetheless, this Court has said that "the contract clause is not an absolute and utterly unqualified restriction of the State's protective power," *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934), and that states may thus impair contractual obligations in certain circumstances. To do so, however, they must "have a significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411. And even if the State puts forward such an interest, its law can be upheld only if "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (quoting *U.S. Trust*, 431 U.S. at 22 (alterations in original)).

### B. Revocation-Upon-Divorce Statutes

States began enacting revocation-upon-divorce statutes governing insurance policies over a quarter century ago. Under these statutes, divorce revokes life insurance and other beneficiary designations in favor of an ex-spouse (and, in many cases, in favor of any relatives of an ex-spouse not independently related to the decedent).

Today, such laws exist in approximately half of the fifty states. Among them is the 2002 Minnesota statute at issue here, which provides that "the dissolution or annulment of a marriage revokes any revocable . . . disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument." Minn. Stat. § 524.2-804, subd. 1. This rule of revocation is overcome "by the express terms of a governing instrument . . . executed prior to the dissolution or annulment of an individual's marriage, a court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan." *Id.* But in the absence of any of these or an express re-designation of the ex-spouse as a beneficiary, Minnesota treats such designations "as if the former spouse died immediately before the dissolution or annulment." *Id.* subd. 2.

### C. Factual and Procedural Background

In December 1997, Respondent Kaye Melin married Mark Sveen. Pet. App. 9a. In April 1998—four years before Minnesota enacted its revocation-upon-divorce statute—Sveen designated Melin as the primary beneficiary of a life insurance policy. Pet. App. 9a–10a. He designated his children from a previous marriage, Petitioners Ashley and Antone Sveen (together, "the Sveens"), as contingent beneficiaries. Pet. App. 9a–10a. Mark Sveen also maintained other life insurance policies designating his children as primary beneficiaries, Pet. App. 2a, and Melin purchased a policy designating Sveen as the primary beneficiary, Dist. Ct. Dkt. #46 ¶ 3.

Sveen and Melin divorced in 2007, and Sveen died in 2011. Pet. App. 2a–3a. Sveen never altered his designation of Melin as the primary beneficiary on the policy at issue in this case, Pet. App. 2a, nor did Melin alter her selection of Sveen as the primary beneficiary of her policy until after his death, Dist. Ct. Dkt. #46 ¶ 15. After Sveen's death, the insurance company filed an interpleader action in U.S. District Court for the District of Minnesota to determine the proper beneficiary of the approximately $180,000 in policy proceeds. Pet. App. 10a. Melin and the Sveens filed competing claims. Pet. App. 3a. Melin relied on her express designation as the primary beneficiary. The Sveens argued that Minnesota's revocation-upon-divorce statute voided that designation and entitled them to the proceeds as the contingent beneficiaries. Melin responded that the statute violated the Contracts Clause as applied to beneficiary designations made prior to its enactment by impairing the contract between the decedent and the insurance company. Pet. App. 3a.

On cross-motions for summary judgment, the District Court agreed with the Sveens. The court concluded that the revocation-upon-divorce statute applied. It further held that application of that statute to the insurance contract in this case did not violate the Contracts Clause because Melin had only an expectancy interest in the proceeds, not a protectable contractual right. Pet. App. 15a.

The Court of Appeals for the Eighth Circuit reversed. It explained that although Melin herself lacked a contractual right to the policy proceeds, application of the Minnesota statute would impair Mark Sveen's contract with the insurance company by "disrupting

[his] expectations and right to rely on the law governing insurance contracts as it existed when the contracts were made." Pet. App. 5a (internal quotation marks omitted).

The Eighth Circuit and Justice Alito each declined to stay the Eighth Circuit's ruling, and the Sveens filed a petition for certiorari.

## REASONS FOR DENYING THE PETITION

### I. ANY SPLIT IS STALE AND INSIGNIFICANT.

Revocation-upon-divorce statutes have been on the books for over a quarter century and are currently in place in more than half the states. But in that time only six federal circuit or state high courts have confronted the question presented. There are good reasons for this rarity, which undermines Petitioners' claim (Pet. 17) that the question presented is "practically significant."

First, the number of contracts even potentially affected by the answer to the question presented decreases every day. Of the twenty-six revocation-upon-divorce statutes cited by Petitioners that would apply here,[1] fully half became effective over twenty years ago, including those of Texas, Ohio, Virginia,

[1] Three of the statutes Petitioners cite would not apply on the facts of this case. California's statute (in effect since January 1, 2002) expressly excludes life insurance contracts, Cal. Prob. Code §§ 5040(e), 5048(a), as does Missouri's statute (in effect since 1989), Mo. Rev. Stat. § 461.073(6). And Oklahoma's statute now applies only to contracts formed after the law's effective date. Okla. Stat. Ann. tit. 15, § 178(D).

and Washington.[2] Six more—including Michigan's, New Jersey's, and Wisconsin's—became effective between ten and twenty years ago.[3] Only three states have enacted such statues in the past five years.[4] And the Petition suggests (Pet. 18 & n.6) that only one state is seriously considering adding another.

Given this chronology, whatever theoretical importance the question presented might have once had is rapidly dissipating; everyone agrees that these

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[2] 1996 Alaska Laws Ch. 75 (H.B. 308) §§ 3, 20 (effective Jan. 1, 1997); 1994 Ariz. Sess. Laws, Ch. 290, §§ 6, 21 (effective Jan. 1, 1995); 1995 Colo. Legis. Serv. S.B. 95-43 §§ 14, 18 (effective July 1, 1995); 1996 Haw. Laws Act 288 (S.B. 2993) §§ 1, 5, 11 (effective July 1, 1997); 1993 Mont. Laws Ch. 494 (S.B. 119) § 71 (effective Oct. 1, 1993); 1993 N.M. Laws Ch. 174 (H.B. 12) §§ 63, 85 (effective July 1, 1993); 1993 N.D. Laws Ch. 334 (H.B. 1111) § 40; 1995 North Dakota Laws Ch. 322 (H.B. 1111) §§ 20, 27 (effective Jan. 1, 1996); 1995 S.D. Laws Ch. 167 (S.B. 66) §§ 2-804, 8-101 (effective July 1, 1995); 1990 Ohio Laws File 137 § 1 (effective May 31, 1990); Pa. Legis. Serv. Act 1992-152 (S.B. 1118) §§ 21, 28 (effective Dec. 16, 1992); 1997 Tex. Sess. Law Serv. Ch. 7 (S.B. 334) § 1 (effective Apr. 17, 1997); 1993 Va. Laws Ch. 417 (H.B. 1686) (effective July 1, 1993) (applies only to cases where the divorce occurred after the effective date); 1993 Wash. Legis. Serv. Ch. 236 (S.H.B. 1077) § 1, 1994 Wash. Legis. Serv. Ch. 221 (S.H.B. 2270) (effective Jan. 1, 1995).

[3] 2007 Iowa Legis. Serv. Ch. 134 (S.F. 540) §§ 4, 28 (effective July 1, 2007); 2002 Minn. Sess. Law Serv. Ch. 347 (S.F. 2540) § 2 (effective Aug. 1, 2002); 1998 Mich. Legis. Serv. P.A. 386 (S.B. 209) (effective Apr. 1, 2000); 2004 N.J. Sess. Law Serv. Ch. 132 (Senate 708) § 17 (effective Feb. 27, 2005); 1998 Utah Laws Ch. 39 (S.B. 75) §§ 84, 105 (effective July 1, 1998); 1998 Wis. Legis. Serv. Act 188 (1997 A.B. 645) §§ 175, 233 (effective Jan. 1, 1999).

[4] 2015 Ala. Laws Act 2015-312 (S.B. 222) §§ 1, 2 (effective September 1, 2015); 2016 Idaho Laws Ch. 362 (S.B. 1300) § 2 (effective July 1, 2016); 2013 S.C. Laws Act 100 (S.B. 143) §§ 1, 4 (effective Jan. 1, 2014).

statutes lawfully apply to contracts entered into after the statutes' effective dates, and the number of contracts that fall outside that category shrinks every day. For the same reason, Petitioners' observation (Pet. 17) that "[i]t is not every day that a federal court strikes down a duly-enacted state statute under the Contracts Clause" is overblown. There is no doubt that states may apply these statutes prospectively, and invalidating a handful of retroactive applications of them hardly impugns state sovereignty in some unusual fashion.

Second, even with respect to the contracts whose benefits might theoretically be affected by the question presented, the issue still rarely arises. Revocation-upon-divorce statutes do not apply where the parties negotiate—or where the divorce court specifies—the treatment of the benefits in question. For example, Minnesota's statute falls away where the "express terms" of a "court order" or a "contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment" addresses the issue. Minn. Stat. § 524.2-804, subd. 1.

The parties or the court will do so in a great many cases. A divorcing couple necessarily confronts the issue of splitting financial resources. For many families, life insurance policies and analogous post-employment benefits represent some of the now-divorcing couple's most significant assets. Accordingly, "[l]ife insurance often assumes an important role in a marital settlement agreement or divorce decree," either simply to support the "former spouse as beneficiary" or "as security for alimony or other payments to the former spouse." Danielle E. Miller,

*Estate Tax Impact of Life Insurance Required by Divorce*, 43 Est. Plan. 19, 19 (2016). Indeed, model agreements, treatises, and practitioners' guides are full of advice about addressing these issues and then carrying out the parties' (or the court's) instructions,[5] so much so that it is *malpractice* not to counsel a client about the need for and terms of such a settlement

[5] *See, e.g.*, Joel R. Brandeis & Carole L. Weidman, LAW AND THE FAMILY: NEW YORK FORMS § 9:4 (Aug. 2017 update) (including in model separation agreement provisions that require the "Husband" to maintain life insurance in "such . . . amount as is necessary to insure his life for the full amount of all payments then due to the Wife by the Husband" with "the Wife as sole primary beneficiary thereof," as well as requiring the "Husband" to make the "Wife" the "irrevocable beneficiary" of enumerated existing policies); Louise Everett Graham & James E. Keller, Kentucky Practice Series, 15 DOMESTIC RELATIONS LAW § 9:8 (2016 update) (noting that "[c]arefully drafted agreements" should address "[t]he right to take insurance proceeds"); John J. Scroggin, *Divorce Planning from a Tax and Estate Planner Perspective*, 43 Est. Plan. 29, 34, 36 (2016) (noting that "[a]s a part of divorce settlements, one or both spouses may be required to maintain life insurance on their life for the benefit of an ex-spouse" and advising "divorcing couples" to "review their life insurance beneficiary designations and make changes as a result of the divorce"); Robert S. Hunter, 17 Illinois Practice Series, ESTATE PLANNING AND ADMINISTRATION § 28:30 (4th ed. 2016 update) (noting the importance of including "a provision in a property settlement agreement"); Sandy B. Giralamo & Pamela M. Magnano, A PRACTICAL GUIDE TO DIVORCE IN CONNECTICUT § 9.3.4 (1st ed. 2014) ("[I]f the practitioner is representing a spouse who is to be named the beneficiary of a life insurance policy . . . , the practitioner needs to request provisions in the divorce agreement or proposed orders for proof of life insurance and needs to either take steps to notify the insurer of the divorce orders or advise the client to take said steps.").

agreement.[6] And even if the issue somehow escapes the divorcing couple's, their lawyers', and the court's attention, the problem still rarely leads to litigation because "[i]n many cases" where the couple wishes to change the designated beneficiary, the policyholder does so "immediately following the entry of the divorce judgment" or in the years that follow. Megan Randlett et al., *A Divorce Judgment and a Beneficiary Designation: What Happens When They Conflict?*, 28 Me. B.J. 128, 128 (2013). In other words, there are strong incentives—and myriad opportunities—for divorcing and divorced couples to specify any change in the desired beneficiary, and the vast majority of couples will likely do so.

Third, even if a contract is old enough to predate a revocation-upon-divorce statute, and even if the parties failed to address the issue in their divorce instruments, and even if they forgot to update a supposedly outdated beneficiary designation afterward, the question presented still won't matter in a large percentage of the (few) remaining cases. Revocation-upon-divorce statutes cannot apply to many life insurance policies because ERISA preempts them as to the employer-provided policies it governs, *see Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), and FEGLIA does the same for the federal employee life insurance policies it controls, *see Hillman v. Maretta*, 133 S. Ct. 1943, 1949 (2013) (noting parties' agreement that revocation-upon-divorce statute was preempted); *id.* at 1949–55 (further holding that provisions attempting to evade

[6] *See, e.g.*, *Rice v. Poppe*, 881 N.W.2d 162, 173–74 (Neb. 2016); *Beaver v. Monaghan*, No. CV 09-5010965, 2009 WL 3286111, at *1 (Conn. Super. Ct. Sept. 11, 2009).

preemption by giving alternative beneficiaries a private cause of action against ex-spouses were themselves preempted). Together, policies governed by these laws make up a substantial portion of the American life insurance market; for example, group policies—which are governed by ERISA or FEGLIA when provided through a private or federal government employer—made up 42% of the life insurance policies in force in 2015. American Council of Life Insurers, Life Insurers Fact Book 2016, at 72 tbl.7.9. In these cases, too, the question presented is irrelevant.

If more were needed, the last twenty-five years have provided additional hard evidence that the question presented rarely arises. Petitioners point (Pet. 9–16) to only five federal circuit or state high courts that have been called upon to answer the question presented. Indeed, only one court has broken new ground on the issue in the almost ten years since the South Dakota Supreme Court decided *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007).[7] The other four courts Petitioners cite reached their decisions between 1991 and 2003—that is, between fourteen and twenty-six years ago.

Nor is this just a case of litigation failing to bubble up to federal circuit or state supreme courts. As far as Respondent can tell (and as far as Petitioners have proven), there are barely any of these cases at the lower rungs of the state and federal judiciary either. Fewer than two dozen decisions available on Westlaw

[7] *See Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017) (decided after the Petition was filed).

rely on any of these cases from the past two decades in addressing the question presented.

The absence of such cases is particularly striking in South Dakota. Petitioners worry (Pet. 20) about the possibility of a "rush to the courthouse" where "a South Dakota resident who could benefit from the Eighth Circuit's rule will have an incentive to file a diversity-jurisdiction suit in federal court as quickly as possible following an ex-spouse's death," while a competing out-of-state claimant will seek to file as quickly as possible in state court. Sounds good in theory, but where are the cases? The difference between the Eighth Circuit's position and the South Dakota Supreme Court's position has existed for almost a decade. But Petitioners have pointed to *no* case on this issue—nor is Respondent aware of any—that has been filed in those ten years in South Dakota federal *or* state court. In all likelihood, this dog didn't bark for a very good reason: it doesn't exist.

* * *

The question presented arises only where, many years ago, a couple had the foresight to purchase life insurance or other benefits outside the scope of employer-provided ERISA or FEGLIA plans and to expressly designate one spouse as the beneficiary, but lacked the wisdom to make their new intentions clear at some point prior to, during, or in the wake of their divorce. As the last twenty-five years of litigation have demonstrated, that scenario simply does not exist with the frequency needed to justify this Court's intervention.

## II. THE EIGHTH CIRCUIT'S DECISION IS CORRECT.

There is also no need to intervene to correct error in this case, because there is none. As applied to pre-existing beneficiary designations, revocation-upon-divorce statutes alter a critical term of the contract without sufficient justification.

1. Revocation-upon-divorce statutes "directly alter[] the obligations and expectations of the contracting parties" on a key contract term: the identity of the beneficiary. *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991). "Selection of a beneficiary is the entire point of a life insurance policy." *Parsonese*, 706 A.2d at 818; *see also Whirlpool*, 929 F.2d at 1322 ("[O]ne of the primary purposes of a life insurance contract is to provide for the financial needs of a person . . . designated by the insured."). These laws thus "substantially impair[] contracts" by causing "a fundamental" "change in the[ir] very essence." *Whirlpool*, 929 F.2d at 1322; *see also Parsonese*, 706 A.2d at 818 ("[T]he contractual impairment . . . is indeed severe, virtually total.").[8]

[8]Altering beneficiary designations interferes with contractual expectations particularly severely in the context of life insurance. While a beneficiary designation is "the entire point of a life insurance policy," *Parsonese*, 706 A.2d at 818, the same does not necessarily hold true for other contracts affected by revocation-upon-divorce statutes. By contrast, in some cases, owners of retirement accounts and annuities might primarily expect to receive retirement income themselves, with the selection of an alternate beneficiary only an ancillary consideration. It should thus come as no surprise that most of the cases rejecting Contracts Clause claims arose outside of the life insurance context. *See Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret.*

2. Following the lead of a 1991 statement from the Joint Editorial Board for the Uniform Probate Code, *see Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules As Applied to Pre-Existing Documents*, 17 Am. College Trust & Est. Couns. 184 (1991), Petitioners first attempt (Pet. 13 & n.2) to avoid this straightforward conclusion by dividing life insurance contracts into two components: (1) a contractual component, under which the insurance company is obligated to pay out policy proceeds; and (2) a donative transfer component, identifying the person to whom the proceeds must be paid. Petitioners assert that only interference with the first component could support a Contracts Clause claim.

Petitioners' argument proves too much. On their view, the Contracts Clause would provide no obstacle to a state statute that revokes *all* beneficiary designations and requires that insurance companies pay *all* policy proceeds to the first person who files a claim, to another insurance company, to the State, or to anyone else of the legislature's choosing. After all, such a law would apply only to the so-called "donative transfer" component of the life insurance contract. That cannot be right.

Fortunately, there is no basis for artificially dividing the contracts in this way. As noted above, the identity of the beneficiary is just as important to the

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*Equities Fund*, 343 F.3d 1311 (10th Cir. 2003) (annuities); *Storsve*, 740 N.W.2d 107 (retirement plan); *Lazar*, 862 F.3d 1186 (retirement plan). By contrast, in every case in which a federal circuit or state high court found a Contracts Clause violation, the contract in question was for life insurance. Pet. App. 1a–8a; *Whirlpool*, 929 F.2d 1318; *Parsonese*, 706 A.2d 814.

policy owner as the payment. That is why a breach-of-contract claim against an insurance company for mistakenly paying policy proceeds to the wrong person is just as viable as a claim that it mistakenly failed to tender a check at all. *See, e.g.*, *Alexander v. Prudential Ins. Co. of Am.*, 292 N.W. 475, 476–77 (Mich. 1940); *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 284–85 (Tex. Ct. App. 2000); *see generally* 4 Couch on Insurance § 61.10 ("The insurer's payment of the proceeds of insurance to a person not entitled to the funds does not ordinarily relieve it of its liability to the proper beneficiary."). Petitioners' assertion (Pet. 21) that the insurance company's "contractual obligation was to pay out life insurance proceeds" is incorrect because it is incomplete. In fact, the contractual obligation was to pay out life insurance proceeds *to the beneficiary selected by the policy owner*. *See* Dist. Ct. Dkt. #52-2 at 3 (life insurance contract specifying that Respondent is the beneficiary); *id.* at 7, 19 (specifying the procedures required to change the beneficiary).

Accepting the donative transfer argument requires treating the life insurance contract as a different agreement than the one Mark Sveen struck with the insurance company—in other words, doing precisely what the Contracts Clause forbids. In effect, it treats Sveen himself as the beneficiary, who then gifts the proceeds on in a non-contractual transaction. To be sure, Sveen could have opted for something like that arrangement by designating his estate as the beneficiary and then separately disposing of the proceeds. But that is not what he did. Instead, he chose to contractually obligate the insurance company to pay the policy proceeds to Melin. In doing so, he was "entitled to expect that his wishes regarding the

insurance proceeds, as ascertained pursuant to . . . then-existing law, would be effectuated." *Whirlpool*, 929 F.2d at 1322.

3. Petitioners also argue that if revocation-upon-divorce statutes impair contractual obligations, they do not do so substantially because policy owners can reinstate ex-spouses' beneficiary status. Referring to the statutes as imposing a "default rule," Petitioners observe (Pet. 22) that "[i]f Mark Sveen had wanted to retain Respondent as his beneficiary, all he had to do was contact the life insurance company after the divorce to re-designate her." That is true as far as it goes, but it is equally true that "if Mark Sveen had wanted to [designate his children as his beneficiaries instead of Respondent], all he had to do was contact the life insurance company after the divorce to [so designate them]." Because the very premise of the revocation-upon-divorce statutes is that policy owners sometimes do not update their beneficiary designations, it makes no sense to think that their ability to do so renders the impairment of their contractual expectations "minimal." *See* Pet. 22; *cf. Whirlpool*, 929 F.2d at 1323 ("Having determined that some individuals are inattentive regarding their insurance policies, the . . . legislature can hardly expect these same individuals to be cognizant of changes in the law respecting those policies.").

Indeed, a policy owner's ability to re-designate his or her ex-spouse or expressly designate someone else as a beneficiary means that the statutes will prove decisive *only* when the policy owner takes no action. As noted above, Respondent questions the size of this set, particularly once policies governed by ERISA or FEGLIA and policies purchased after enactment of

revocation-upon-divorce statutes are properly removed from consideration. But whether the set is large or small, the fact remains that it consists of those who by hypothesis have not changed their beneficiary designations. The impairment of *these* policy owners' contractual expectations is therefore substantial.

4. Because retroactive application of revocation-upon-divorce statutes substantially impairs contractual obligations, such application is valid only if it furthers a "significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411. Moreover, "the adjustment of 'the rights and responsibilities of contracting parties [must be based] upon reasonable conditions and [must be] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (quoting *U.S. Trust*, 431 U.S. at 22) (third alteration in original). Petitioners cannot make the necessary showings.

Petitioners assert (Pet. 22) that "[r]evocation-upon-divorce statutes reflect the reality that divorcing spouses typically do not want their ex-spouses to receive their life insurance proceeds." But there is no such "reality," "certainly not a[s a matter of] universal truth." *Whirlpool Corp.*, 929 F.2d at 1323. To the contrary, "there are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds." *Hughes v. Sholl*, 900 S.W.2d 606, 607 (Ky. 1995). Some of these reasons are easily understood and widely applicable. For example, many couples use life insurance policies as a kind of investment, David F. Babbel & Oliver D. Hahl, *Buy Term and Invest the Difference Revisited*, 69 J. Fin. Serv. Profs. 92, 96 (2015), and want to ensure that both spouses get their fair share of that investment

after they have divorced. Other policyholders want their former spouses to have enough assets to care for their shared children after the policyholder's death, and they use the policy's proceeds to achieve that goal. *Whirlpool Corp.*, 929 F.2d at 1323. Still other former couples use life insurance proceeds to guarantee that each receives what he or she is due under the terms of the divorce settlement in the event of the other's early death. *See supra* at 9 & n.5.

Other reasons are more exotic. In one case, for example, the wife divorced her husband as a wake-up call to get help with his alcohol problem even though they continued to "live together and to function as a couple." *Am. Gen. Life Ins. Co. v. Jenson*, No. 11-5057, 2012 WL 848158, at *2 (D.S.D. Mar. 12, 2012). And in others, the parties desire to maintain the ex-spouse as the beneficiary for undisclosed reasons. *See State Farm Life Ins. Co. v. Davis*, No. 07-cv-164, 2008 WL 2326323, at *1 (D. Alaska June 3, 2008).

Regardless of why, many, many divorcing couples agree to maintain—or are ordered to maintain—life insurance coverage on one of the former spouses for the other's benefit.[9] Indeed, in the present case, Melin left Sveen as the beneficiary of her policy until after

[9] *See, e.g.*, *Jones v. Jones*, 206 F. Supp. 3d 1098, 1102 (E.D. Va. 2016); *Aderholt v. McDonald*, __ So. 3d __, 2016 WL 7321570, at *1 (Ala. Dec. 16, 2016); *Aramini v. Aramini*, 220 So. 3d 322, 325 (Ala. Civ. App. 2016); *Glanden v. Quirk*, 128 A.3d 994, 1006 (Del. 2015); *Ketcher v. Ketcher*, 188 So. 3d 991, 994 (Fla. Dist. Ct. App. 2016); *Sutherlin v. Sutherlin*, 802 S.E.2d 204, 207 (Ga. 2017); *Davis v. Davis*, 489 S.W.3d 225, 226 (Ky. 2016); *In re Lett Estate*, 887 N.W.2d 807, 814–15 (Mich. Ct. App. 2016); *Griner v. Griner*, __ So. 3d __, 2017 WL 2774610, at *8 (Miss. Ct. App. June 27, 2017); *Estate of Pierce*, 394 P.3d 316, 319 (Okla. Civ. App. 2016) (prenuptial agreement).

his death. Dist. Ct. Dkt. #46 ¶¶ 3, 15. In the era of no-fault divorce, the circumstances in which couples split are simply too varied for states to presume animosity and retroactively override beneficiary designations in favor of an ex-spouse. That may be why almost half of the fifty states have declined to do so, and why Congress has declined to implement a similar revocation-upon-divorce rule for policies covered by ERISA or FEGLIA. When applied retroactively, revocation-upon-divorce statutes are therefore not "of a character appropriate" to the supposedly intent-respecting purpose "justifying the legislation's adoption." *See Energy Reserves*, 459 U.S. at 412.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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