NO. 20-188

In the Supreme Court of the United States

ZHIHENG SHENG,

Petitioner,

v.

DANIEL MICHAEL SNYDER,
AS EXECUTOR OF THE ESTATE OF JAMES P. SNYDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondent attempts to reframe this case as a case simply regarding "the state law property rights of individuals" and one of a "state law contract claim". Brief in Opposition p.1. However, as discussed in Petitioner's Petition for Certiorari, the question for the Court is whether the Employee Retirement Security Act of 1984 ("ERISA") protects surviving spouses of plan participants.

If ERISA protects surviving spouses of plan participants, the Courts in Georgia erred in concluding that a surviving spouse's waiver of an ERISA plan benefit via a Georgia antenuptial agreement that fails to comply with the "spousal waiver" requirements of 29 U.S.C. § 1055(c)(2) may be enforced following the participant's death. The Georgia Courts relied on *Appleton v. Alcorn*, 291 Ga. 107 (2012) and disregarded the primary purpose of ERISA, as amended by the Retirement Equity Act of 1984 ("REA"), which is to protect plan participants and their beneficiaries and "to ensure a stream of income to surviving spouses". *Boggs v. Boggs*, 520 U.S. 833, 841, 843, 845 (1997). Instead, the Georgia Courts focused on the Georgia state law's potential interference with the plan administrator's duty to administer the plan and only considers the protections granted to a surviving spouse within the sphere of the plan administrator's duties. *See also Moore v. Moore*, 297 So.3d 359 (Ala. 2019) (prenuptial agreement does not constitute a waiver by decedent's widow of her surviving-spousal rights under ERISA to decedent's retirement and pension plans.)

This Honorable Court should grant review to clarify whether state law may circumvent ERISA's "spousal waiver" protections for a surviving spouse by enforcing an antenuptial agreement that does not comply with such protections. It should further clarify whether the Georgia Courts had a sufficient basis to grant summary judgment on the validity of an antenuptial agreement that included an alimony waiver despite undisputed evidence that there was no income disclosure prior to the marriage.

REASONS FOR GRANTING THE PETITION

I. THE MONIES WERE HELD IN AN ERISA ACCOUNT

Respondent attempts to reframe the issue by discussing the concept that ERISA does not preempt state law claims over money that is no longer held in an ERISA account. Brief in Opposition, p.6. However, the monies at issue were held in the Vanguard Account, a qualified retirement account under ERISA. At the time of decedent's death, the monies in question were still held in the Vanguard account, therefore, at the time of his death the money was not "no longer held in an ERISA account."

It was only after decedent's passing that Petitioner filed a claim and received the funds. Respondent then sued Petitioner, later amending his complaint to include a claim for breach of contract by failing to waive her rights to the Vanguard Account or pass through the funds to Respondent. Thus, Respondent is alleging that Petitioner was in breach when she filed the claim. At that moment, the funds were still held in the ERISA

account. Thus, the Respondent's reliance on these cases is misplaced.

Additionally, the cases cited by Respondent are distinguishable from the instant case. First, as discussed *supra*, the instant claim is that Ms. Sheng was in breach when she filed the claim to receive the funds. Several of the cases Respondent cites to involve disputes over monies already disbursed. In *Hoult v. Hoult*, the dispute surrounded monies deposited in a designated bank account to pay a verdict for childhood sexual abuse. *Hoult*, 373 F.3d 47, 49, (1st Cir. 2004). The father fraudulently conveyed over $130,000 in assets to avoid paying the judgment and was ordered to maintain his income in the designated bank account and limit withdrawals to cover his living expenses. *Id.* He moved to strike his social security benefits and ERISA pension benefits from that order. *Id.* at 50. The court denied the motion, finding that the benefits had already been disbursed. *Id.*

Similarly, the 10th Circuit held that garnishment of private pension benefits once they are received by the beneficiary does not run afoul of ERISA. *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F.3d 1078 (10th Cir. 1994). Guidry was ordered to repay embezzled funds, and the court found that ERISA protected pension funds from garnishment only until received by plan participants or beneficiaries. *Id.* at 1083. Because the pension had already been received by Guidry, they could be garnished. *Id.* at 1084-86.

Next, in *Robbins ex re. Robbins v. DeBuono*, the dispute was regarding Social Security and pension income paid to a person living in a nursing home. *Robbins*, 218 F.3d 197, (2d Cir. 2000), *abrogated by Wojchowski v. Daines*, 498 F.3d 99 (2d Cir. 2007). After

accepting an application for Medicaid, the Department of Social Services demanded that his wife contribute to the cost of his care from assets, which included the income they were receiving from his ERISA pension. *Id.* 198-99. Because the issue is whether Ms. Sheng was in breach at the time, she requested the monies, and not after the monies were paid, these cases are distinguishable.

Second, this case is distinguishable from cases wherein an ex-spouse waived rights to an ERISA-protected plan as part of a divorce. *Estate of Kensinger v. URL Pharma, Inc.* dealt with a waiver of rights to a named 401(k) as part of a divorce decree. *Estate of Kensinger*, 674 F.3d 131, 132, (3d Cir. 2012). Although the rights were waived, her husband neglected to replace her as the designated beneficiary prior to his death. *Id.* The Court held that ERISA required that the benefits be paid out to the divorced spouse and that, after distribution, any challenge to those rights, would be litigated as an ordinary contract dispute. *Id.* at 136.

Similarly, the issue in *Andochick v. Byrd*, was whether ERISA required an ex-husband turn over disbursed benefits disbursed. *Andochick*, 709 F.3d 296, 297, (4th Cir. 2013). The couple separated and entered into a marital settlement agreement, whereby he expressly waived any interest in her 401(k) *Id.* When they divorced, the judgment incorporated this agreement. *Id.* Because Ms. Sheng and the deceased were married at the time of his death, these cases are distinguishable.

Third, *Central States, Southeast & Southwest Areas Pension Fund v. Howell* involves one side of a divorcing couple changing the beneficiary designation

to an ERISA policy, in violation of a court order. *Central States*, 227 F.3d 672, 673, (6th Cir. 2000). In that matter, the wife filed for divorce and the court entered an order prohibiting either party from "acting to dispose of, to destroy, sell, transfer, or conceal any of the marital assets of the parties" during the pendency of the proceedings. *Id.* Notwithstanding this order, the husband changed the beneficiary designation on the policy and died while the divorce was pending. *Id.* The Court found that the injunction did not comply with 29 U.S.C. § 1056(3)(C), because it did not provide required information and was, therefore preempted by ERISA. *Id.* at 677-78. The plan administrator was obligated to pay the insurance proceeds to the named beneficiaries. *Id.* at 678. The court then found that, because the husband violated a court order, that once the benefits are released, the district court may impose a constructive trust upon the benefits and remanded for consideration of the equities. *Id.* As Ms. Sheng and her husband were not divorcing, and there was no court order involved, this case is distinguishable.

Fourth, Respondent cites to two cases involving prison wardens garnishing funds from prisoner's institutional financial accounts. In *DaimlerChrysler Corp. v. Cox*, the question was whether Michigan's practice of garnishing pension payments runs afoul of ERISA. *DaimlerChrysler*, 447 F.3d 967, 968-69, (6th Cir. 2006). The benefits were paid out to the beneficiaries and deposited into the prisoner's institutional accounts. *Id.* Once the monies were deposited, the State Correctional Facility Reimbursement Act (SCFRA) allowed the warden to garnish up to 90% of each deposit. *Id.* at 968. Under the SCFRA, prisoners were required to inform DaimlerChrysler to send

their payments to their prison addresses. *Id.* When a prisoner failed to comply the SCFRA allowed the warden to send notice changing their address for payment to the prison address, thereby making the monies open to garnishment. *Id.* at 970. The Court noted that this case was distinguishable from *Central States*. *Id.* at 974. It also found that this constituted an alienation of benefits under ERISA and that the monies must be disbursed at the direction of the prisoner, not the prison. *Id.* at 976.

Similarly, *Wright v. Riveland* involved a class action suit against the Secretary of the Washington Department of Corrections for authorizing a 35% deduction from all funds received by inmates, including ERISA-qualified pension plans. *Wright*, 219 F.3d 905, 919-21, (9th Cir. 2000). The court held that ERISA did not preclude the Department of Corrections from deducting funds once they were disbursed. *Id.* at 921. Not only is Ms. Sheng not incarcerated, but the monies at issue were not disbursed at the time of the alleged breach, so these cases are distinguishable.

Fifth, Respondent cites to two cases that do not address state law claims at all. *National Labor Relations Board v. HH3 Trucking, Inc.* addresses a trucking company ordered to pay back pay, due to unfair labor practices. *HH3 Trucking*, 755 F.3d 468, 469, (7th Cir. 2014). When the company failed to comply, the Board petitioned for judicial enforcement by the federal court *Id.*

Similarly, *United States v. Novak* does not address state claims, rather whether the Mandatory Victims Restitution Act (MVRA), a federal law, authorized enforcement of restitution orders against retirement plan benefits. *Novak*, 476 F.3d 1041 (9th Cir. 2007).

The Court found that Congress intended to override ERISA's anti-alienation provision and allow the government to reach ERISA-covered retirement plan benefits when enforcing criminal restitution orders. *Id.* at 1049. Because both *HH3 Trucking* and *Novak* involve conflicts with federal law, they are distinguishable.

Finally, contrary to Respondent's contention, *Metlife Life & Annuity Co. of Connecticut v. Akpele*, 886 F.3d 998 (11th Cir. 2018), the court did not find an "estate may attempt to recover funds by bringing a suit directly against an ex-spouse to enforce [a] waiver". Respondent's Brief, p.8. *Akpele* does not address an ex-spouse at all. Rather, divorce proceedings had been initiated, but were pending at time of death. *Akpele*, 886 F.3d at 1000. The case was brought by MetLife, seeking guidance as to the identity of the proper beneficiary. *Id.* Further, this case does not address a waiver, rather it found that a party who is not a named beneficiary of an ERISA plan may not sue the plan for any benefits. *Id.* at 1007. It also found that the party may sue, but only after the beneficiary has received the benefits. *Id.*

II. THE ERISA STATUTORY SCHEME IS THE ISSUE

Respondent attempts to reframe the issue as a post-distribution case, however the question is whether Ms. Sheng was entitled to request the funds. Petitioner submits that she was, and is, entitled to the funds.

The ERISA plan administrator was correct to distribute benefits to Ms. Sheng. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009). Respondent now claims they can sue because the funds were distributed. However, their suit is based upon an alleged breach

of contract that occurred while the plan still held the monies, and that led to the monies being distributed. Thus, Petitioner's reliance on the series of decisions involving "pre-distribution" claims is correct, rather than the series of "post-distribution" claims the Respondent relies upon.

III. THE ANTENUPTIAL AGREEMENT IS INVALID AS RELATED TO THE VANGUARD ACCOUNT

Contrary to the Respondent's claim, the antenuptial agreement was required to comply with ERISA spousal waiver requirements as related to the Vanguard Account.

As discussed in Petitioner's Petition for Certiorari, the terms of the Antenuptial Agreement are insufficient to divest Petitioner's right in the Vanguard Account's QJSA benefit. While the waivers listed in the Agreement could apply to the Vanguard Account, none of them comply with ERISA.

Petitioner cannot waive a right or claim to "the estate, property, assets, or other effects . . . under any present or future law . . . " unless the waiver complies with the requirements provided for in such present or future law, namely § 1055(c)(2). The Georgia Courts' findings are an utter rejection of the doctrine of preemption.

The waivers in question do not meet the requirements of § 1055(c)(2). For Petitioner to be able to consent to Decedent's waiver of a QJSA benefit, she must know she is entitled to it in the first place. The QJSA benefit is unique in that it includes a federally protected interest for a spouse. Thus, for Petitioner's waiver of the benefit to be proper, it would have had

to have been included explicitly in the Antenuptial Agreement. Neither the Agreement nor any other writing signed by Petitioner makes any reference to a QJSA benefit. Further, none of the waivers include a designation of a beneficiary of the Vanguard Account. And none of the waivers include Petitioner's acknowledgement of the effect of an election by Decedent to waive the QJSA benefit. As a result, the Antenuptial Agreement does not comply with § 1055(c)(2).

Even if the Antenuptial Agreement complied with all other elements of § 1055(c)(2), Petitioner was not Decedent's spouse, yet, when she signed the agreement. In fact, the agreement stipulates as such. R 23. Because Petitioner was not yet Decedent's spouse when she signed the Agreement, the Agreement cannot constitute a valid waiver of the Vanguard Account's QJSA benefit under § 1055(c).

IV. THE GEORGIA COURTS ERRED IN GRANTING SUMMARY JUDGMENT

Finally, Petitioner contends that the Georgia Courts erred in granting summary judgment. Because the Respondent did not address this argument, Petitioner respectfully suggests this argument is conceded. *See*, *United States v. Osborne*, 807 Fed.Appx. 511, 526, (6th Cir. 2020) ("We may treat [defendant's] failure to respond to the Government's assertions as a concession of their validity."); *see also*, *W. Virginia Coal Workers' Pneumoconiosis Fund v. Bell*, 781 Fed.Appx. 214, 225) (4th Cir. 2019) ("an appellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture."); *see also Sang Geoul Lee v. Won Il Park*, 720 Fed.Appx. 663, 666, (3d Cir. 2017) ("failure

to respond to the pertinent opposition-brief argument acts as a concession of that argument").

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,

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