No. 16-1432

IN THE
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,
Petitioners,

v.

KAYE MELIN AND
METROPOLITAN LIFE INSURANCE CO.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent[1] does not dispute that there is a square conflict of authority on the question presented: whether the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violates the Contracts Clause. Nor does Respondent dispute that this case presents an ideal vehicle to resolve that conflict.

Instead, Respondent offers two arguments against certiorari. First, Respondent contends that the 4-2 split in this case reflects an insufficient number of judicial decisions to justify granting certiorari. Second, Respondent characterizes the split as "stale," despite the fact that in 2017 alone, the Eighth and Ninth Circuits have reached directly conflicting conclusions.

These contentions lack merit. A 4-2 split on a recurring issue of constitutional law is more than sufficient to warrant review under this Court's certiorari standards. The petition should be granted.[2]

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[1] "Respondent" refers to Kaye Melin. Petitioners identified Metropolitan Life Insurance Company as a respondent on the cover of the petition out of an abundance of caution, because that entity was identified as a party in the Eighth Circuit's case caption. But Metropolitan Life Insurance Company did not participate in the Eighth Circuit proceedings, did not file a Brief in Opposition here, and has no interest in the outcome of this case.

[2] By defending the merits of the Eighth Circuit's decision, Respondent draws into question the constitutionality of Minn. Stat. § 524.2-804, subd. 1, as applied to contracts signed before its enactment. Thus, Petitioners respectfully state that if the Court grants certiorari, 28 U.S.C. §2403(b) may apply. Petitioners also state that, in compliance with 28 U.S.C. §2403(b), the Eighth Circuit certified to the Attorney General of Minnesota the fact that the constitutionality of a Minnesota statute was drawn into

I. Respondent Does Not Dispute That This Case Presents An Ideal Vehicle To Resolve A Longstanding Conflict Of Authority.

The petition explained that there is a square and acknowledged conflict of authority on whether the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violates the Contracts Clause. As the petition set forth, the Eighth Circuit and the Pennsylvania Supreme Court have adopted Respondent's position that the answer is "yes," while the Tenth Circuit, South Dakota Supreme Court, and Colorado Supreme Court have adopted Petitioners' position that the answer is "no." Pet. 9-17.

Respondent does not dispute that this split exists. Indeed, she candidly acknowledges that the split has deepened in the time since the petition was filed. As Respondent notes (BIO 11), in *Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017), the Ninth Circuit acknowledged the split—and took Petitioners' side. The Ninth Circuit characterized *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), on which the decision below relied, and *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003), as "[d]ivergent [a]uthority." 862 F.3d at 1199-1200. It "agree[d] with the *Stillman* court" that the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment did not violate

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question, but Minnesota did not intervene. The Eighth Circuit's certification, dated April 4, 2016, is available on the Eighth Circuit's docket on PACER.

the Contracts Clause. *Id.* at 1200. Thus, there is now a 4-2 split among circuits and state high courts on the question presented.

Respondent's sole reference to the cases on Petitioners' side of the split consists of a footnote in the portion of the Brief in Opposition defending the Eighth Circuit's decision on the merits. In that footnote, Respondent states that the cases on Respondent's side of the split involve life insurance policies, whereas three of the cases on Petitioners' side of the split involved either annuities or retirement funds. BIO 13-14 n.8 (citing *Lazar*; *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003); and *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007)). Respondent makes no argument, however, that this distinction undermines the conflict of authority, or is a reason to deny certiorari.[3] To the contrary, Respondent acknowledges that all six of the cases in the 4-2 split "have confronted the question presented." BIO 6. Indeed, *Lazar*, *Stillman*, and *Buchholz* each expressly rejected the Eighth Circuit's *Whirlpool* decision, rather

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[3] Nor would such an argument be credible. No court has ever suggested that the Contracts Clause analysis would differ depending on whether the contract at issue was an annuity, retirement fund, or life insurance policy. Respondent theorizes that some people who obtain annuities or retirement accounts might not subjectively care about the identity of their beneficiary. BIO 13-14 n.8. Even assuming that dubious assertion is correct, Respondent does not explain its relevance to the *legal* question of whether the application of the revocation-upon-divorce statute to the beneficiary designation impermissibly revokes that designation.

than attempting to distinguish it. *Lazar*, 862 F.3d at 1199-1200; Pet. 12, 15-16 (discussing *Stillman* and *Buchholz*). Further, Respondent ignores *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), a case on Petitioners' side of the split arising in the specific context of life insurance. Pet. 13-15. Thus, even with respect to life insurance policies, there is an undisputed split, with the Colorado Supreme Court expressly parting ways with the Eighth Circuit and Pennsylvania Supreme Court. Pet. 14.

Nor is there any dispute that this is an ideal vehicle. The Petition explained the features of this case that made it a perfect vehicle. Pet. 17. In particular, Minnesota's statute reflects an implementation of Uniform Probate Code § 2-804, and this case presents a petition from a final judgment that turns entirely on the question presented. *Id.* Respondent does not dispute these points.

Several other premises of the Petition are similarly undisputed. Respondent does not dispute the inherent jurisprudential importance of a decision sustaining a constitutional challenge to a state statute. Pet. 17-18. Nor does Respondent dispute that a split is particularly harmful in the context of the Uniform Probate Code, which exists for the specific purpose of achieving uniformity. Pet. 18-19. Finally, Respondent does not dispute that this case presents a split between the federal and state courts in the same jurisdiction. Pet. 19-20.

The Court should grant certiorari in this case, where both parties agree that there is a square split on an issue of constitutional law, with no vehicle problems.

II. A 4-2 Split On A Recurring Question Of Law Warrants This Court's Review.

Rather than deny the split, Respondent insists that the question presented arises too rarely, and is too unimportant, to justify certiorari review. Those arguments are not persuasive.

First, Respondent argues that this case is too insignificant to warrant this Court's review because "only six federal circuit or state courts have confronted the question presented." BIO 6. That argument is inconsistent with this Court's certiorari practice. The Court routinely grants certiorari to resolve splits involving significantly fewer than six courts. Petitioners have identified eight different decisions from this Court since 2016 resolving 1-1 and 2-1 splits.[4] Petitioners are aware of at least three other such cases to be heard this Term.[5] A 4-2 split is more than sufficient to justify granting certiorari.

Equally unpersuasive is Respondent's contention

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[4] *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (1-1 split); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split).

[5] *Rubin v. Islamic Rep. of Iran*, 137 S. Ct. 2326 (2017) (1-1 split); *Digital Realty Trust, Inc. v. Somers*, 137 S. Ct. 2300 (2017) (2-1 split); *Leidos, Inc. v. Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (2-1 split).

that the question presented arises with insufficient frequency in trial-level courts. Respondent claims to identify only "two dozen" reported cases adjudicating the question. BIO 11-12. She emphasizes that in South Dakota, the location of the federal/state conflict, there are no reported cases in the time since the South Dakota Supreme Court issued its opinion rejecting the Eighth Circuit's rule. BIO 12. However, many life insurance disputes arise in state courts, where lower-court decisions are rarely reported; reported decisions from South Dakota lower courts are particularly rare. And in view of the settled law in both South Dakota's state and federal courts, life insurance disputes would be expected to settle rapidly rather than reach final judgment. In any event, two dozen reported cases reflect sufficient percolation to warrant review.

Respondent also argues that the question presented is of diminishing importance because it applies only to contracts signed before a revocation-upon-divorce statute's enactment. Of course, the same could be said for *any* Contracts Clause case—the question presented in a Contracts Clause case is *always* whether a particular statute impermissibly interferes with contracts signed before a statute's enactment. Yet Respondent does not seriously suggest that Contracts Clause cases are inherently not worthy of this Court's review.

Moreover, the same could be said for *any* case presenting the question whether a new constitutional rule or statute applies retroactively, yet the Court regularly grants certiorari to resolve circuit splits on such issues. *See Welch v. United States*, 136 S. Ct. 1257

(2016) (deciding whether new constitutional rule applied retroactively); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (same); *Dorsey v. United States*, 567 U.S. 260 (2012) (deciding whether new statute applied retroactively); *Vartelas v. Holder*, 566 U.S. 257 (2012) (same). In *all* of those cases, the question presented had practical significance with respect to a diminishing number of cases, yet that was no barrier to this Court's review.

Further, there are two reasons to believe that the question presented will continue recurring frequently. First, because people commonly make beneficiary designations many years before they die, this question may arise many years after a revocation-upon-divorce statute is enacted. In *Lazar*, for instance, the beneficiary designation was made in 1992; the revocation-upon-divorce statute was enacted in 1995; the contracting party died in 2012; and the decision was issued in 2017. 862 F.3d at 1192-93; *see also Buchholz*, 740 N.W.2d at 109 (beneficiary designation occurred 24 years before enactment of statute and 35 years before death).

Second, the legislative trend has been to enact revocation-upon-divorce statutes. *See* BIO 6-7 nn.2-4 (noting numerous such statutes enacted in past 25 years). Although Respondent is correct that the pace of legislative activity has slowed, Respondent identifies new revocation-upon-divorce statutes that became effective in 2014, 2015, and 2016 (BIO 7 n.4), and we are aware of pending legislation in two additional states.[6]

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[6] Those states are Maine, Pet. 18 n.6., and Mississippi, 2017 MS

These new statutes will yield additional disputes. And given the trend in favor of enacting these statutes, other states may well follow suit. Indeed, the fact that two appellate decisions—the decision below and *Lazar*—have reached conflicting conclusions on the question presented 26 years after *Whirlpool* illustrates that this issue has staying power.

Respondent's remaining arguments seeking to diminish the practical importance of this case are makeweights. For instance, Respondent argues that the issue is unimportant because it will not affect the 42% of life insurance policies covered by ERISA or FEGLIA. BIO 11. But an issue potentially affecting 58% of life insurance policies nationwide is sufficiently important to warrant review.

Respondent also states that if divorce lawyers are sufficiently careful, the problem of divorcees who forget to update their life insurance policies will not arise. Respondent thus theorizes that the problem that revocation-upon-divorce statutes seek to solve—that a divorcing party will forget to update the beneficiary designation—arises so infrequently as to warrant denying certiorari. But this problem evidently arises often enough that it has prompted 29 different state legislatures to enact revocation-upon-divorce statutes to address that specific scenario—and by Respondent's count, *26* would be invalidated as applied retroactively if Respondent's proposed rule is correct. BIO 6.

A decision invalidating even *one* state statute on

H.B. 806, § 22. We had not discovered the pending Mississippi legislation when we filed the petition.

constitutional grounds is inherently significant. Here, the question presented undisputedly implicates the constitutionality of statutes in *26* states. The Court should not deem the legislation of so many states to be so inherently unimportant that certiorari should be denied, especially in the face of an undisputed split on an issue of constitutional law.

III. The Decision Below Is Incorrect.

The Ninth and Tenth Circuits, and Colorado and South Dakota Supreme Courts, are correct on the merits: the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment does not violate the Contracts Clause.

1. The Joint Editorial Board for the Uniform Probate Code is correct. After the "insurance company interpleads or pays the proceeds into court for distribution to the successful claimant," its contractual obligations have been satisfied; the "donative transfer … component of the policy raises no Contracts Clause issues." Pet. 21-22 (quotation marks omitted). Rather, the donative transfer should be viewed as a matter of probate law, not contract law. *See Stillman*, 343 F.3d at 1322 ("There is no more an impairment of a contract than if Dale had made the beneficiary designation in his will, providing no instructions directly to TIAA-CREF."). Respondent maintains that this argument "proves too much," because it would imply that the Contracts Clause "would provide no obstacle to a state statute that revokes *all* beneficiary designations." BIO 14. Such a hypothetical statute is appropriately viewed as analogous to a state statute that revokes all beneficiary designations in a person's will. It would

raise grave policy concerns and perhaps concerns under other constitutional provisions, but not under the Contracts Clause.

2. Even if revocation-upon-divorce statutes impaired a contractual obligation, that impairment would not be substantial. As the Petition explained, if Mark Sveen had wanted to retain Respondent as his beneficiary, a simple letter to the life insurance company would have done the trick. Pet. 22. Respondent maintains that this argument "makes no sense," because "the very premise of the revocation-upon-divorce statutes is that policy owners sometimes do not update their beneficiary designations." BIO 16. Thus, Respondent argues, the "impairment of *these* policy owners' contractual expectations is therefore substantial." BIO 17. But revocation-upon-divorce statutes are intended to effectuate the presumed intent of policyholders—and when they accomplish that task, they advance, rather than impair, the policyholders' expectations. And for the few policyholders who want their ex-spouses to remain their beneficiaries, the burden of contacting the life insurance company is not a "substantial" impairment that warrants holding a state statute unconstitutional.

3. There is a "significant and legitimate public purpose behind the regulation" (Pet. 22): effectuating policyholders' presumed intent upon their divorce. Respondent theorizes a variety of "exotic" (BIO 18) reasons that policyholders may wish to maintain their ex-spouses as beneficiaries. But legislatures are entitled to legislate for the ordinary rather than the exotic case, and they are entitled to find that in the

ordinary case, people do not want their ex-spouses to receive life insurance proceeds. That legislative judgment deserves deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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