No. 15-1031

# In The
# Supreme Court of the United States

JOHN HOWELL,

*Petitioner,*

v.

SANDRA HOWELL,

*Respondent.*

**On Petition For Writ Of Certiorari To The Arizona Supreme Court**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner and Respondent agreed before their divorce that Respondent was entitled to fifty percent of Petitioner's military retirement pay, and the decree so awarded. Petitioner later elected to receive veterans' disability benefits and waived an equal amount of retirement pay, consequently reducing Respondent's vested interest. Does the Uniformed Services Former Spouses' Protection Act preempt the state court's enforcement or modification of a stipulated decree in order to indemnify Respondent and avoid depriving her of vested property without due process?

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## STATUTES INVOLVED

In addition to the provisions set out in the Petition (Pet. 1-3), the following provisions are also involved.

### U.S. CONST. amend. V

No person shall . . . be deprived of . . . property, without due process of law. . . .

### ARIZ. CONST. art. II, § 4

No person shall be deprived of . . . property without due process of law.

### 10 U.S.C. § 1408(e)(1)

The total amount of disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

### 10 U.S.C. § 1408(e)(4)(B)

Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered

under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

**10 U.S.C. § 1408(e)(6)**

Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

**A.R.S. § 25-317**

A. To promote amicable settlement of disputes between parties to a marriage attendant on . . . the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property. . . .

B. In a proceeding for dissolution of marriage . . . the terms of the separation agreement . . . are

binding on the court unless it finds . . . that the separation agreement is unfair.

* * * *

**A.R.S. § 25-318(A)**

In a proceeding for dissolution of the marriage . . . the court shall . . . divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind. . . . * * *

**A.R.S. § 25-318.01**

In making a disposition of property pursuant to 25-318 or 25-327, a court shall not do any of the following:

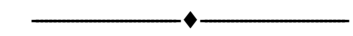
1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code section 1413a or 38 Unites States Code chapter 11.

2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

**A.R.S. § 25-325(A)**

A decree of dissolution of marriage . . . is final when entered, subject to the right of appeal. * * *



## STATEMENT OF THE CASE

Petitioner and Respondent agreed before entry of their Decree of Dissolution of Marriage that Respondent was entitled to fifty percent of Petitioner's forthcoming military retirement pay (MRP):

> The parties entered into an agreement on April 16, 1991. The agreement provided, "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner's] military retirement when it begins through a direct pay order."

Pet. App. 24a, 32a.

The Decree entered on April 16, 1991 tracks the settlement agreement verbatim:

> [Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner's] military retirement when it begins through a direct pay order.

Pet. App. 41a.

In 2004, Petitioner voluntarily petitioned for Veterans Administration disability benefits. Pet. App. 24a, 32a. He received a retroactive disability rating of

20% in 2005. *Id*. Because federal law prohibits duplication of MRP and disability benefits, *see* 38 U.S.C. §§ 5304-5305, Petitioner elected to waive MRP in an amount equal to his disability benefits of approximately $250 per month. Pet. App. 24a, 33a. Consequently, the amount of Respondent's share of MRP was reduced by one-half of the amount Petitioner waived. *Id*.

In 2013, Respondent petitioned to enforce the Decree's award of MRP. Pet. App. 25a, 31a. Petitioner agreed that Respondent had a vested interest in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Respondent's interest in the MRP. Pet. App. 35a. Petitioner argued, however, that a post-decree enactment, A.R.S. § 25-318.01, overruled prior case law by prohibiting the modification of a property division to indemnify a veteran's spouse for a reduction in MRP related to the veteran's receipt of disability benefits. *Id*.

The family court found:

- Respondent "had a vested property right in 50% of [Petitioner's] military retirement." Pet. App. 35a.
- "[Respondent] was dependent on and expecting this money." Pet. App. 24a, 33a.
- A.R.S. § 25-318.01 cannot be applied retroactively to vested property rights. Pet. App. 37a.
- Petitioner "had an obligation to pay [Respondent] 50% of the military retirement as ordered in the decree." Pet. App. 37a.

- Petitioner "violated the decree by unilaterally decreasing the retirement pay in favor of disability pay." Pet. App. 36a.
- "[Petitioner] owed [Respondent] 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." Pet. App. 37a.

Accordingly, the family court ordered that Petitioner "is responsible for ensuring [Respondent] receive her full 50% of the military retirement without regard for the disability." Pet. App. 28a.

On appeal, Petitioner argued for the first time that the Uniformed Service Former Spouses' Protection Act (USFSPA) preempted the family court's authority to order Petitioner to indemnify Respondent. The Arizona Court of Appeals deemed the issue waived, but the Arizona Supreme Court considered it.

Observing that "[Respondent] was awarded fifty percent of the MRP years before [Petitioner] unilaterally elected to receive disability pay in lieu of a portion of MRP" and that the "Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay," the Arizona Supreme Court concluded that "the family court did not violate the USFSPA or *Mansell* [*v. Mansell*, 490 U.S. 581 (1989)] because it did not treat the MRP subject to the VA waiver as divisible property." Pet. App. 7a.

Citing *Mansell*'s recognition that "domestic relations are preeminently matters of state law," and the corresponding requirement for positive evidence of preemption by direct enactment, the Arizona Supreme Court concluded:

> Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal prohibition.

Pet. App. 8a.

The Arizona Supreme Court therefore held "that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits." Pet. App. 14a.

Lastly, the Arizona Supreme Court ruled "[Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]." Pet. App. 12a. In that circumstance, the inapplicability of A.R.S. § 25-318.01 was affirmed. The Arizona Supreme Court held that the statute "cannot be applied to prohibit the [family] court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment." Pet. App. 14a. Otherwise, the statute would "diminish [Respondent's] vested

property right in violation of the due process guarantee." *Id*.[1]

## REASONS FOR DENYING THE PETITION

### I. A square and definite conflict does not exist among the highest state courts.

The Petition creates a mere mirage of a conflict. When each of the supposedly conflicting decisions is approached, the illusion of a conflict vanishes.

A. *Youngbluth v. Youngbluth*, 188 Vt. 53 (2010), rests primarily on the interpretation of its property division order and state law regarding the finality of such orders. It does not hold that "under federal law, a state court may *not* require a veteran to indemnify a former spouse for the reduction in MRP effected by a post-divorce disability waiver." Pet. 17.

Wife was awarded a percentage of Husband's MRP and sought a larger percentage after the dollar amount was reduced by his election of disability benefits. Wife's attempt to enforce the order by changing its percentage was rejected:

> [W]e hold that, under the plain language of the original property division order and under settled law that state courts cannot grant a former spouse an interest in a military

[1] The Arizona Supreme Court did not hold A.R.S. § 25-318.01 unconstitutional, as Petitioner reports. Pet. 10.

> servicemember's disability benefits, the original property division order does not allow wife to now receive a greater percentage of husband's disposable retirement benefits.

*Id*. at 60.

> The holding was explicitly narrow:
>
> We therefore leave for another day the question of whether a military servicemember's actions shifting retirement benefits to disability benefits can ever trigger relief from judgment under Rule 60(b). Our decision today applies only to situations where a trial court uses an enforcement proceeding to adjust a former spouse's percentage of a military servicemember's disposable retirement benefits.

*Id*. at 60-61.

> [W]e hold that the trial court erred when it used an enforcement proceeding to increase wife's percentage of husband's disposable retirement benefits. Our holding today is a narrow one. We express no view on whether a former spouse in another case could receive an increased share of a military servicemember's disposable retirement benefits either through an indemnity provision in the original property division order or through meeting the standard in Rule 60(b) for relief from judgment. We hold only that in this case an enforcement proceeding cannot

> provide the mechanism for this type of adjustment.

*Id*. at 73.

Noteworthy also is that there was no property settlement agreement in *Youngbluth*, the opinion did not discuss whether wife had a vested interest in husband's MRP, and it took no position on indemnification for waived MRP. Thus, *Youngbluth* does not squarely conflict.

B. *Mallard v. Burkart*, 95 So.3d 1264 (Miss. 2012), is merely a case following *Mansell*'s holding that disability benefits are not divisible. The trial court found that "[wife's] interest in [husband's] total retirement pay, *including his disability benefits*, had vested at the time of the entry of the final judgment of divorce. . . ." *Id*. at 1268 (emphasis added). Accordingly, it was "determined that [wife] was entitled to forty percent of the disability benefits" that husband elected after divorce to receive. *Id*. at 1266.

The Supreme Court of Mississippi stated the same issue as in *Mansell* – "whether federal law preempts state law, thus precluding state courts from treating as property divisible upon divorce, military retirement pay waived by the military spouse in order to receive military [veterans'] disability benefits." *Id*. at 1268. Needless to say, the court followed the holding of *Mansell*.

Because the case does not discuss the propriety of an indemnification order, it does not conflict.

C. *Ex parte Billeck*, 777 So.2d 105 (Ala. 2000), involved an impermissible assignment of disability benefits as alimony. Pursuant to the parties' agreement, the divorce judgment ordered husband "to pay to Wife his monthly U.S. Army retirement check" as alimony. After he was declared partially disabled and the amount of MRP paid to wife was reduced, "she requested the trial court to order the husband to pay her his monthly veteran's disability benefits in addition to his military retirement benefits, as periodic alimony." *Id*. at 107. The court did so, ordering husband to pay "'all of his military retirement pay . . . from whatever source, be it defined as military retirement pay or VA disability,'" and further stating that "'[f]or the purpose of this Order, VA disability [benefits] shall be considered as part of military retirement benefits.'" *Id*. at 109, quoting order.

The Supreme Court of Alabama held that the "order directly contradicts the plain language of [10 U.S.C.] § 1408 and the *Mansell* decision which provides that veteran's disability benefits are not considered disposable military retirement pay subject to division or assignment." *Id*.

*Billeck* took no position on whether a spouse has a vested interest in pre-waiver MRP, or on the use of indemnification orders. Consequently, it is not in conflict.

D. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), is uniquely distinctive. Alaska, an equitable distribution state, requires by statute that the trial

court "'fairly allocate the economic effect of divorce' based, *inter alia*, on the earning capacity and financial condition of the parties involved." *Id*. at 1259. The Clausons divorced and "'the division of [their] property [was] found to be fair and equitable.'" *Id*. That division included a fractional share of husband's MRP to wife. Husband later waived all of his MRP for disability benefits. Wife moved to amend the decree, arguing that husband's waiver of MRP destroyed the fair and equitable division of property. *Id*. at 1259-60. Rather than reconsidering the division of property, "the trial judge simply ordered [husband] to pay an amount equivalent to [wife's] share of the waived retirement pension as if the waiver had never occurred." *Id*. at 1259.

The Alaska Supreme Court considered two issues: whether the circumstances justified relief from the decree's original division of property, and whether federal law precluded such relief to compensate for the loss of waived MRP. After concluding that the circumstances were sufficiently extraordinary to justify relief, the court held that "federal law does not preclude our courts from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay." *Id*. at 1264.

Thus, the court remanded to the trial court to redistribute the marital estate under the new circumstances of husband's waiver, if wife's motion was found to be timely. In doing so, the court disapproved redistribution by "simply shift[ing] an amount of

property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side," as was done in granting wife's motion to amend. *Id*. at 1264.

Given its unique procedural setting, *Clauson* does not take a side on the pertinent issues – the nature of the ex-spouse's interest in a pre-waiver share of MRP, and the permissibility of relief other than redistributing the marital assets, *e.g*., a "make up" order. Thus, it presents no conflict.

E. Neither of the holdings in the consolidated appeals in *Kramer v. Kramer*, 252 Neb. 526 (1997), creates a conflict. After entry of an amended decree awarding wife a percentage of husband's MRP, he was awarded disability benefits retroactive to a date before the original decree. Husband therefore sought to recover the percentage of his disability benefits paid to wife. Wife in turn applied to modify the decree to increase the amount of alimony because the parties' relative economic circumstances had changed.

The trial court granted husband's motion for summary judgment over wife's nominal opposition, and the Supreme Court of Nebraska affirmed, holding that "[t]o permit [wife] to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is prohibited by [U.S.C.] § 1408(a)(4)(B) and (c)(1)." *Id*. at 540-41. In other words, the court simply obeyed the express language of the statute, but did not decide any issue presented in the instant case so as to create a conflict.

As to wife's application, the court stated the issue as "whether the USFSPA as interpreted in *Mansell* . . . precluded the district court from considering a former spouse's military disability benefits and corresponding waiver of retirement pension benefits in determining whether there had been a material change in circumstances justifying modification of the decree." *Id*. at 542. After recognizing that *Mansell* prohibited the inclusion of disability benefits in the marital estate, the court held that "it may consider such benefits and the corresponding waiver of retirement benefits . . . in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits." *Id*. at 546. That holding does not decide an issue relevant to this case, let alone create a conflict.

## II. The decision below is correct.

### A. The USFSPA does not preclude state court indemnification orders that do not divide disability benefits.

The Uniformed Services Former Spouses' Protection Act authorizes state courts to treat a veteran's disposable retired pay as the property of the veteran and his spouse in accordance with state law. 10 U.S.C. § 1408(c)(1). Accordingly, Arizona, a community property state, can treat disposable retired pay as community property and divide it "equitably" in a proceeding for dissolution of marriage or legal separation.

A.R.S. § 25-318(A); *In re Marriage of Howell*, 238 Ariz. 407, 412, ¶ 21 (2015).

"Disposable retired pay" is defined as the veteran's total retired pay less certain deductions such as amounts deducted as a result of a waiver of retired pay required by law in order to receive Veterans Administration disability benefits. 10 U.S.C. § 1408(a)(4). Thus, the USFSPA does not authorize state courts to treat disability benefits as community property. *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). Consequently, if before divorce a veteran waives retired pay to receive disability benefits, a state court cannot thereafter divide the retired pay that has been waived. *Id.* at 594-95.

Conversely, as the Arizona Supreme Court noted, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP." Pet. App. at 8a.

A direct prohibition is necessary to preemption of the states' authority to remedy a veteran's unilateral reduction of an ex-spouse's vested interest in property. As this Court has said: "Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. Thus we have held that we will not find preemption absent evidence that it is positively required by direct enactment." *Mansell*, 490 U.S. at 587 (citations and quote omitted).

Because the prohibition in the USFSPA is expressly limited and does not positively preempt relief to rectify a post-decree dilution of an ex-spouse's vested share of MRP, it does not preclude state court indemnification orders that do not divide disability benefits.

### B. The USFSPA cannot divest a vested interest in military retirement pay.

Petitioner conceded below that Respondent had a vested interest in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Respondent's interest in the MRP. Pet. App. 35a. The Arizona Supreme Court agreed, stating, "[Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]." Pet. App. 12a.

"The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments." *Mansell*, 490 U.S. at 592. Whatever the reason, it cannot extend to MRP that has been divided, and thus vested in the non-military spouse, before any waiver. Because the USFSPA lacks any positive provision compelling its application to that conclusion, any court that would so apply the Act would thereby deprive Respondent of her property without due process.

### C. The USFSPA does not preempt agreements between spouses to divide military retirement pay.

Petitioner and Respondent expressly agreed she was entitled to fifty percent of his MRP. Pet. App. 24a, 32a. That agreement was made before any waiver of MRP to receive disability benefits.

The USFSPA does not positively preclude such an agreement or a decree implementing it. And the usual presumption against preemption in the domain of family law, *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013), is especially strong because settlement agreements are to be encouraged in domestic relations cases. Indeed, such agreements are expressly promoted by statute in Arizona. A.R.S. § 25-317(A). Plus they are binding on the court if they are fair. A.R.S. § 25-317(B).

Neither does *Mansell* suggest that freedom to contract to divide MRP is prohibited by the Act. Although the parties therein agreed to a division of "total military retirement pay" including disability benefits, *Mansell*'s holding that state courts cannot divide disability benefits stops there. It does not limit the parties' ability to make an agreement to divide MRP that is properly divisible.

An agreement to divide MRP is ineffective only if it includes disability benefits, as did the agreements in *Mansell* and *Mallard v. Burkart*, *supra*. The agreement in this case does not.

Given that fact and that "[t]he regulation of domestic relations is traditionally the domain of state law," *Hillman v. Maretta*, 133 S.Ct. at 1950, the USFSPA does not preempt the parties' agreement, its incorporation in the Decree, or the family court's 2014 Order to ensure that Respondent receive the benefit of her bargain.

### D. State courts must have flexibility to fashion equitable remedies appropriate to each case.

Petitioner sought disability benefits some fourteen years after his divorce from Respondent and the division of their marital estate. Respondent did not move to enforce the decree for eight years more. At either point in time, it was likely impractical, if not impossible, to equitably redistribute the estate in kind to account for Petitioner's unilateral waiver of MRP awarded to Respondent. The only practical remedy available to the family court was a monetary indemnification order.

The indemnification order herein making Petitioner "responsible for ensuring [Respondent] receive her full 50% of the military retirement without regard for the disability," Pet. App. 28a, does not divide or otherwise directly affect Petitioner's disability benefits. As the Arizona Supreme Court noted, the "Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him

to pay any amount to [Respondent] from his disability pay." Pet. App. 7a.

Petitioner can simply indemnify Respondent from his other assets. No finding was made that he has no other assets, and he did not make that argument. Nor could he because he has at least his own share of the MRP.

Finally, an order to indemnify Respondent from Petitioner's share of MRP is not prohibited by the USFSPA:

> Nothing in this section [10 U.S.C. 1408] shall be construed to relieve a member of liability for . . . payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). [50 or 65 percent of disposable retired pay, respectively.] Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6). That "savings clause" defeats "any inference that the [Act's] federal direct payments

mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Mansell*, 490 U.S. at 590. Thus, a state court order can properly be directed at MRP not being paid directly to Respondent. In other words, MRP paid to Petitioner. "'Nothing' in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of gross retirement pay." *Mansell*, 490 U.S. at 601 (O'Connor, J., dissenting.)

## CONCLUSION

This is not a preemption case. It is instead a breach of contract, due process, and equity case. No compelling conflict exists and the Arizona Supreme Court's decision is correct. The Petition should be denied.

Respectfully submitted,

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