No. 15-574

In the Supreme Court of the United States

CHRISTOPHER MUELLER, PETITIONER

v.

SHELLEY L. MUELLER

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's brief in opposition is remarkable for many reasons. Just to start, it does not cite, let alone seriously address, any of the cases on the minority side of the split, except for the present one. See p. 8-10, *supra*. It also repeatedly mischaracterizes petitioner's position in order to grapple with a strawman. See p. 11, *supra*. And, perhaps most breathtaking, its merits arguments are so broad and blunt that they undercut the decisions that respondent herself sets forth without objection. See p. 11-12, *supra*. Petitioner responds to each of respondent's three larger substantive arguments in turn.

I. No Adequate and Independent State Grounds Support the Judgment Below

Respondent argues against review because in her eyes the judgment below rests on two independent and adequate state grounds. Br. in Opp. 9. Her first argument strains credulity; her second is specious.

"In *Michigan* v. *Long*, this Court laid down a rule" to identify when "a state court's reference to state law constitutes an adequate and independent state ground for its judgment": "if 'it fairly appears that the state court rested its decision primarily on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a '"plain statement" that [its] decision rests upon adequate and independent state grounds.'" *Harris* v. *Reed*, 489 U.S. 255, 261 (1989) (quoting *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983)).

The Illinois Supreme Court repeatedly made clear that "its decision [rested] primarily on federal law" and no "plain statement" suggests otherwise. The Illinois Supreme Court, for example, summarized its holding as follows:

> [We] adhere to *Crook*, and *Hisquierdo*, and hold that Congress intended to keep Social Security benefits out of divorce cases. Failing to consider Social Security benefits may paint an unrealistic picture of the parties' future finances, but "it is not the province of this court *** to interfere with the federal scheme, no matter how unfair it may appear to be." *Crook*, 211 Ill. 2d at 452.

Pet. App. 16a. Its "plain statement" shows it held "that *Congress*[, not the Illinois legislature,] intended to keep Social Security benefits out of divorce cases" and that the controlling "scheme" was "federal," not state. *Ibid*. Moreover, the two cases it cited as grounding its holding, *Hisquierdo* and *Crook*, both concern the reach of *federal* law. And if there were any doubt as to the basis of its holding in *Crook*, the court took pains to dispel it: "[t]he foundation for our decision [there] was *Hisquierdo* * * * where the Supreme Court held that retirement benefits under the Railroad Retirement Act of 1974 * * * could not be subject to * * * an offset award during state divorce proceedings." *Id*. 10a-11a.

The Court's exclusive focus on the preemptive effect of federal law is not surprising. That is all that the parties briefed, see Pet. App. 8a; Br. of Resp.-Appellant, *In re Mueller*, 34 N.E.3d 538 (Ill. 2015) (No.

117876) (not arguing over whether Illinois law independently barred consideration of Social Security benefits); Br. of Pet./Appellee, *In re Mueller*, 34 N.E.3d 538 (Ill. 2015) (No. 117876) (same); Reply Br. of Resp.-Appellant, *In re Mueller*, 34 N.E.3d 538 (Ill. 2015) (No. 117876) (same), and all that the oral argument concerned, see Video of Oral Arg., *In re Mueller*, 34 N.E.3d 538 (Ill. 2015) (No. 117876) (same), http://multimedia.illinois.gov/court/SupremeCourt/Video/2015/031115_117876.mp4.

Against these "plain statement[s]," *Long*, 463 U.S. at 1042, that the judgment rests on federal, not state, law, respondent musters several strained arguments that Illinois law "was central to the decision below." Br. in Opp. 10. First, she notes that the opinion "cit[ed] the statute no fewer than ten times in its opinion," *ibid.*, and "also referenced its decision in *Crook* at least twenty times," *id.* at 11. But it certainly would be unusual for an opinion discussing whether federal law preempts a particular state statute *not* to cite the state statute several times. And a quick look at the opinion reveals that the first five citations just identify the background state law subject to preemption. Pet. App. 2a, 9a. The more than twenty citations to *Crook*, of course, actually undercut respondent's position. As the Illinois Supreme Court itself stated "[t]he foundation for [that] decision" was "*Hisquierdo*," a case from this Court discussing the preemptive effect of federal law. *Id.* at 10a-11a.

Odder still, respondent claims that the numerous "decisions of other state and of federal courts" cited by the Illinois Supreme Court amount only to "persuasive

authority[] that does not undermine the controlling nature of the Dissolution Act and Illinois precedent[, presumably *Crook*,] in the Illinois Supreme Court's decision." Br. in Opp. 11. Those cases, however, almost uniformly discuss the preemptive effect of federal law and "the foundation" of *Crook*, as noted by the Illinois Supreme Court itself, was federal, not state, law. Those cases could have been "persuasive authority" only on the question they all addressed: whether *federal* law barred a state from considering Social Security benefits.

Merely reading the opinion below dispels respondent's claim that the court's "extensive and express analysis of the [Illinois] Dissolution Act and state precedent" indicates that adequate and independent state grounds support its judgment. Br. in Opp. 11. The court's mention of the state statute falls far short of "extensive" and hardly amounts to "analysis." Discussion of *Crook*, the "state precedent" interpreting federal law, does, by contrast, amount to "extensive and express analysis," but, as noted above, it represents "analysis" of the preemptive effect of federal law.

Finally, respondent argues that comparison to two pre-*Long* cases, *Florida* v. *Casal*, 462 U.S. 637 (1983), and *Jankovich* v. *Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965), shows that adequate and independent state grounds exist here. Br. in Opp. 11. Whatever the merits of those cases at the time, however, *Long* expressly rejected their approaches. In *Long*, this Court (i) "openly admit[ted] that we have thus far not developed a satisfying and consistent approach for

resolving this vexing issue," 463 U.S. at 1038, (ii) held that "none of the various methods of disposition that we have employed thus far recommends itself," *id*. at 1039, and (iii) therefore rejected its prior "ad hoc method of dealing with [these] cases," *ibid*.

Respondent's second argument for adequate and independent state grounds is more puzzling still. She argues that the Illinois Supreme Court's reasoning "'grounded in [state] policy'" amounts to a holding of state law. Br. in Opp. 9 (quoting Pet. App. 12a) (addition in respondent's brief). This seemingly direct quotation of the Illinois Supreme Court is misleading to say the least. The Illinois Supreme Court actually stated that its reasoning was "grounded in policy" simpliciter, not in any form of "state" policy. Pet. App. 12a. And the court made clear, in fact, that these policies concerned the interpretation of *federal*, not *state*, law. See Pet. App. 13a-14a ("[A]s a matter of policy, any rule permitting trial courts to consider the mere existence of Social Security benefits without considering their value, *and thereby violating federal law*, is nearly impossible to apply.") (emphasis added).

The four cases the Illinois Supreme Court discusses in this part of its opinion, Pet. App. 14a-15a, make this clear. They all *rejected* arguments that federal law completely barred states from considering Social Security benefits in distributing marital property. See *In re Marriage of Herald & Steadman*, 322 P.3d 546, (Ore. 2014) (holding that "considering Social Security benefits in this case did not violate * * * 42 USC § 407(a)"); *Biondo* v. *Biondo*, 809 N.W.2d 397, 401-403 (Mich. Ct. App. 2011) ("Having determined that

federal law preempts the [particular] social security equalization formula [used by the lower court] we hold that the circuit court may consider the parties' anticipated social security benefits as one factor, among others, to be considered when devising an equitable distribution of marital property."); *Litz* v. *Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009) (similar); *Johnson* v. *Johnson*, 734 N.W.2d 801, 808 (S.D. 2007) ("[S]ocial security benefits may be considered as a factor, among others, when dividing marital property. This adheres to the federal restrictions, for it is not a direct division of * * * social security."). These cases were relevant to the Illinois Supreme Court's discussion not because they threw any light on Illinois state law, but because the Illinois Supreme Court thought they revealed practical difficulties with holding that federal law allowed consideration of Social Security benefits. See Pet. App. 14a ("The difficulties stem from the vagueness of the term 'consider' in this context, and reviewing courts have struggled to provide guidance on how to do so.").

II. The Case Implicates a Deep Split over Whether § 407(a) Bars States from Considering Social Security Benefits in Dividing Marital Assets

Respondent attempts in two ways to deny the depth of the split. First, perhaps unsurprisingly for someone who believes that the opinion below rests on phantom adequate and independent state grounds, she argues that a small number of the cases involved in the conflict rest on state law too. Second, she attempts to reframe the remaining cases, which she concedes *do*

involve federal law, in a way that simply excludes those states that do not allow any consideration of Social Security benefits. That done, she argues that the conflict concerns only an intramural debate among a few jurisdictions over how best to allow generalized consideration of benefits. Neither argument works.

1. The four cases respondent argues rest on state law, Br. in Opp. 17-18, do not. In *Neville* v. *Neville*, 791 N.E.2d 434, 436-437 (Ohio 2003), for example, the Ohio Supreme Court identified "[s]pecifically, Section 407(a) [as] forbid[ding] any transfer or assignment of Social Security benefits and, in general, protect[ing] these benefits from 'execution, levy, attachment, garnishment, or other legal process'" and spent two paragraphs reviewing the holdings and reasoning of cases from other courts discussing the preemptive reach of § 407(a), including *Mahoney* v. *Mahoney*, 681 N.E.2d 852 (Mass. 1997), and *In re Marriage of Zahm*, 978 P.2d 498 (Wash. 1999), both of which respondent herself concedes rest on federal law, Br. in Opp. 20.

In *Kelly* v. *Kelly*, 9 P.3d 1046 (Ariz. 2000), the Arizona Supreme Court held that § 407(a) did not bar a lower court from excluding the value of a husband's hypothetical in-lieu-of Social Security benefits from marital property and specifically rejected the view of those "courts [that] refuse to consider social security in any way at divorce." *Id.* at 1049. Because "the anti-attachment language in the Social Security Act is * * * not identical" to that that of the anti-attachment provision at issue in *Hisquierdo* and because "we are today neither dividing social security benefits nor providing an offset," it held, "*Hisquierdo* is not violated

by our holding," *ibid*., proof of the federal basis of the decision.

Likewise, in *Schaffner* v. *Schaffner*, 713 A.2d 1245 (R.I. 1998), the Rhode Island Supreme Court held that federal law did not bar the reduction of a husband's payment of part of his pension to his wife by half of her social security benefits. *Id*. at 1247. It rested its decision primarily on a series of Pennsylvania cases, see *id*. at 1248 (discussing cases), which had all held, following *Cornbleth* v. *Cornbleth*, 580 A.2d 369 (Pa. Super. 1990), that "there is no federal preemption obstacle in the way of considering appellant's pension a marital asset," *id*. at 371; *see*, e.g. *McClain* v. *McClain*, 693 A.2d 1355, 1358 (Pa. Super. 1997) (same) (quoting *Cornbleth*, 580 A.2d at 371).

In *Phipps* v. *Phipps*, 864 P.2d 613 (Idaho 1993), the Idaho Supreme Court could hardly have identified the central argument more clearly: "We fail to see what issue Mrs. Phipps is arguing, if it is not the enforceability of the agreement pursuant to 42 U.S.C. Sec. 407." *Id*. at 616.

2. Respondent next tries to minimize the conflict among the cases that she concedes rest on federal law by arguing that they present a more "*general*" issue and "thus do not conflict with the decision below." Br. in Opp. 18. This attempt to reframe the cases represents clumsy sleight of hand. For starters, as a glance at her table of authorities reveals, she does not cite *any* of the state supreme court cases (apart from the present one) on the minority side of the split. See Pet. 16 (listing cases holding that federal law bars

consideration of Social Security benefits). She refers to them as a group only once—and then obliquely—and never identifies them as forming one side of the split. Br. in Opp. 21. Even after burying them so deeply, however, she concedes, as she must, that the cases on the majority side of the split, "do conflict with [these unnamed] cases cited by petitioner that reach a contrary conclusion." *Ibid.*

Anxious to row back that devastating concession, she then offers two reasons why that "conflict" should not trouble anyone: "[N]one of these decisions questions the impropriety of direct dollar-for-dollar offsets. Nor do they address the precise issue of using hypothetical benefits for offsetting purposes," Br. in Opp. 21. Even if both assertions were true, however, which they are not, neither is relevant. Whatever else these cases may or may not "question[]" or "address," they do *hold* that federal law bars the form of consideration that the decisions on the other side allow—as respondent describes it, "generalized consideration of Social Security benefits." *Id.* at 19.

Just consider the present case. Respondent wisely does not contend that Illinois might permit, under its understanding of federal law, any "generalized consideration." The Illinois Supreme Court held below that *any* consideration is unlawful: "[we] hold that Congress intended to keep Social Security benefits out of divorce cases." Pet. App. 16a. And, lest there be any doubt, *Crook*, the earlier case the Illinois Supreme Court "adhere[d] to," *ibid*, held that *Hisquierdo* required it to reject exactly this type of consideration: "Although the courts in a number of other states have

permitted a trial judge to consider a spouse's anticipated Social Security benefits as one factor, among others, in making an equitable distribution of the distributable marital assets, we reject that analysis." 813 N.E.2d at 204. The conflict between the Illinois rule, particularly as extended in the present case, and allowing "generalized consideration" could hardly be more direct. "Accordingly, the decision below is * * * an appropriate vehicle for addressing the conflict identified by petitioner." Br. in Opp. 21.[1]

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[1] Respondent's final argument, Br. in Opp. 23, that there is no conflict with the Oregon Supreme Court's decision in *In re Marriage of Herald & Steadman* is puzzling indeed. Respondent first argues that "the Oregon court did not address whether the Social Security Act might prohibit the transfer of a non-participant's hypothetical Social Security benefits," Br. in Opp. 23, but this is almost word-for-word what the Oregon Supreme Court describes itself as doing. The court stated:

> The question presented in this case * * * is whether federal law forbids a division of property by which the value of retirement benefits belonging to the nonparticipating spouse is reduced by the present value of hypothetical Social Security benefits to which that spouse would have been entitled if she had been a Social Security participant. Because we conclude that the trial court did not violate federal law by "considering" Social Security benefits in that way, we affirm.

322 P.3d 546, 549 (Or. 2014).

Nor does her alternative argument, that "[t]o the extent [the cases] are in tension, the difference between them can be explained by differences in the relevant state laws," Br. in Opp. 23, fare any better. She asserts this without any supporting argument and the Illinios Supreme Court did not identify any relevant differences in state law. It rejected the Oregon approach instead because it "violates the core holding of *Crook*," Pet. App. 12a, its prior case discussing the preemptive reach of § 407(a).

III. The Illinois Rule Violates Federal Law

Respondent makes two moves on the merits. First, she mischaracterizes petitioner's request as "[o]ffsetting dollar-for-dollar the value of [his] hypothetical Social Security benefits against the value of [his wife's] actual benefits" in the hope of creating a strawman that, she can argue, "contravenes the terms of the Act." E.g., Br. in Opp. 23-24. Whatever the merits of that position, however, it is not petitioner's. Under petitioner's approach, the amount of Social Security benefits he would receive had Illinois allowed him to participate in Social Security would be excluded from marital property. It would not be not deducted from the value of his wife's benefits, let alone on a "dollar-for-dollar" basis. Mistaking one approach for the other leads to several puzzling questions. If, for example, petitioner had participated in Social Security would respondent argue that excluding his *actual* benefits from marital property would similarly lead to a prohibited offset?

Second, respondent's merits argument proves too much. In her view, since the exclusion of part of [petitioner's] pension from marital property would be "triggered by * * * [her] receipt of Social Security benefits," his approach "would upset the statutory balance[,] impair [her] economic security[,] mechanically deprive [her] of a portion of the benefit Congress * * * indicated was intended for [her] alone[, and] frustrate[] the congressional objective." Br. in Opp. 25-26 (internal quotation marks omitted). Just as much, however, could be said of the "generalized consideration" approach. Her objection, in fact, would

apply even more powerfully there. Not only would "generalized consideration" be similarly "triggered" by her receipt of benefits, but it would also determine the amount of the adjustment partly by the amount of benefits she receives. Petitioner's approach, by contrast, would not. The value of her benefits makes *no difference* to how much of his benefits the court would exclude from marital property.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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