No. 15-574

In the Supreme Court of the United States

CHRISTOPHER MUELLER,

Petitioner,

v.

SHELLEY L. MUELLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below, which rejected a contention that "hypothetical" Social Security benefits should be used to modify a division of marital property, (1) rests on an adequate and independent state ground and (2), if not, is consistent with federal law prohibiting the assignment of Social Security benefits.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner asks the Court to decide whether the Social Security Act bars a state court "from considering in any manner future Social Security payments in dividing marital property upon divorce." Pet. i. But whether or not the Court ever should decide that question, it should not do so in this case.

Here, the decision of the Illinois Supreme Court challenged in the petition expressly rests on *two* separate independent and adequate state grounds, each of which fully supports the decision below. And although petitioner insists that the state courts are widely divided on the very general question he presents, the narrow issue actually addressed below—petitioner's bizarre contention that a divorcing spouse who is not eligible for Social Security benefits may calculate *hypothetical* benefits that he would have received had he been eligible, and may subtract those hypothetical benefits from his *actual* (non-Social Security) pension benefits to diminish his spouse's share of the marital estate—has barely been addressed by the courts. For these reasons, and because the decision below is correct, the petition should be denied.

A. Statutory Background.

1. The Social Security Act and its amendments, codified at 42 U.S.C. § 401 *et seq.*, create a system of social insurance for retirees. Workers contribute to the program through payroll taxes and become eligible to receive benefits later in life. Not everyone, however, is eligible to receive Social Security benefits. With a few exceptions, the Social Security Act

provides benefits only to those who contributed to the program during their working years.

Some local and state government employees do not contribute to Social Security because they participate in other public retirement plans. Petitioner Christopher Mueller, for instance, participates in the Springfield Police Pension Fund, a city-specific pension fund in Illinois that will provide him with retirement benefits for his service as a city police officer. Pet. App. 2a. Under current law, Christopher does not contribute to Social Security so long as he contributes to the Police Pension Fund. He will not receive Social Security benefits for the years during which he did not pay into the federal system; he instead will receive his local public pension benefits. *Ibid.*; *id.* at 5a-6a.

2. States use different systems for dividing marital property upon divorce. Like most States, Illinois follows the common-law approach, which treats "all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage [as] presumed marital property." 750 Ill. Comp. Stat. 5/503(b)(1). When the marriage dissolves, state courts are required to equitably divide the marital property between the two ex-spouses. See generally 1 Peter Spero, Asset Protection: Legal Planning, Strategies and Forms ¶ 4.02 (Supp. 3d 2015), 2001 WL 1585116.

In particular, Section 503 of the Illinois Marriage and Dissolution Act ("Dissolution Act") provides that, upon dissolution of a marriage, a court must "divide the marital property * * * in just proportions" based on considerations of equity. 750 Ill. Comp. Stat. 5/503. Although Illinois law creates a presumption

that "all property acquired by either spouse after the marriage and before a judgment of dissolution" is marital property (*id.* 5/503(b)(1)), Section 503 requires that an asset or property actually be "acquired by" one of the spouses to count as marital property. *Id.* 5/503(a). Accordingly, if an asset or benefit is not actually "acquired by" one of the spouses, but is instead a hypothetical projection of benefits, it is not marital property and may not be subject to equitable division under state law.

In Illinois, state and local pension benefits "attributable to contributions made during the marriage are marital property." *In re Marriage of Crook*, 813 N.E.2d 198, 200 (Ill. 2004) (citing 750 Ill. Comp. Stat. 5/503(b)(2)). This means that, if one spouse earns local pension benefits, the other spouse may be entitled to a share of those benefits upon divorce.

Federal law, however, requires that a Social Security recipient's benefits be treated differently. With specified, and very limited, exceptions, the Social Security Act prohibits the legal transfer or assignment of any recipient's right to benefits:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a).

Thus, Social Security benefits generally are not reachable through any legal process, including those associated with divorce. The Act does carve out a

carefully crafted alimony and child support exception to this rule: Social Security benefits *are* reachable "to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. § 659(a). "Alimony," as defined by the Act, includes "periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual." *Id.* § 659(i)(3)(A). But the Act makes clear that, the alimony exception notwithstanding, courts are prohibited from transferring or assigning Social Security benefits pursuant to a *divorce settlement*. *Id.* § 659(i)(3)(B)(ii) (preventing "any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses").

B. Factual Background

1. Respondent Shelley and petitioner Christopher Mueller were married in 1992. Pet. App. 2a. Because "Shelley works for a private sector company[] and has Social Security tax withheld from her pay," she will be eligible for "full Social Security benefits in 2033 at age 67" unless she begins drawing Social Security benefits at an earlier date or Congress modifies the Social Security scheme. *Ibid*. Christopher, however, "does not have Social Security tax withheld from his pay. Instead, he contributes to the Springfield Police Pension Fund, and he can retire with full pension benefits in 2017 at age 50." *Ibid*. Unlike Shelley's anticipated Social Security benefits, Christopher's state pension benefits are protected by the Illinois Constitution. Ill. Const. art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district,

or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.").

At trial to divide the marital assets in 2013, "Christopher offered a report from Sheila Mack, owner of Equitable Solutions, a self-described 'pre-divorce planning' business." Pet. App. 3a. In an attempt to decrease the amount of marital property Shelley would receive, Ms. Mack made use of what she termed a "Windfall Elimination Provision" ("WEP") that purported to calculate what Christopher's *hypothetical* Social Security benefits would have been, had he actually paid into Social Security at all times. This calculation in turn made use of Social Security's "Online Calculator," itself an imprecise method of determining benefits that assumes the beneficiary will live at least until age 67; will not draw benefits before that age; and has an average lifespan after beginning to draw benefits. *Ibid*. Ms. Mack thus "input Christopher's wages through August 2012, as if they were 'covered by Social Security,' and determined that his monthly Social Security benefit at age 67 would be $1,778 per month." *Ibid*.

In fact, however, Christopher had only briefly participated in the Social Security program before he became a participant in the Springfield Police Pension Fund, so his *actual* earned Social Security benefits would be $230 per month at age 67, assuming that he did not draw benefits or die before then. Pet. App. 6a. These estimations produced a "WEP offset" of $1,548 per month (the difference between the hypothetical benefits and Christopher's actual Social Security benefits), which Ms. Mack described as what "Mr. Mueller would receive 'in lieu of Social Security.'" *Id.* at 3a. "[T]he difference between that

amount and the amount he would receive from his pension was $2,479 per month, which yielded an estimated present value [for Christopher's pension] of $639,720.74." *Id.* at 3a-4a.

2. Ultimately, the trial court held that Ms. Mack's proposed hypothetical offset was improper, and Ms. Mack "recalculated the present value of [Christopher's] pension benefits 'without the Social Security offset' as $991,830. The court adopted that figure, and ultimately awarded Shelley slightly more than 35% of Christopher's pension, or $350,000." Pet. App. 6a. In doing so, the trial court declined to offset the value of Christopher's pension by the value of the hypothetical Social Security benefits he would have received had he participated in the Social Security program, concluding that this would be "an offset by any other language and violates federal law." *Id.* at 5a. On appeal, a divided appellate court affirmed the trial court's judgment (*id.* at 26a-39a), in relevant part rejecting Christopher's argument that his proposed offset approach was consistent with federal law.

A divided Illinois Supreme Court affirmed in turn. Pet. App. 1a-25a. In reaching this conclusion, the court approved the lower courts' "refus[al] to decrease the value of * * * Christopher Mueller's municipal police pension by the value of hypothetical Social Security benefits that he is not entitled to receive as a nonparticipant in that program." *Id.* at 2a. The court stated three rationales for that conclusion.

First, the court recognized that, under federal law, "'Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings,'" meaning that courts may not use "anticipated Social Security benefits as a fac-

tor in making an equitable distribution of marital property." Pet. App. 11a (quoting *Crook*, 813 N.E.2d at 200, 204). As a consequence, although "[t]he valuation method proposed by Mack is not strictly speaking an offset, * * * it does consider the existence of Shelley's anticipated Social Security benefits to create parallel benefits for Christopher that would affect the division of marital property." *Id.* at 12a. The court held that result impermissible because it is inconsistent with the Social Security Act's anti-attachment policy.

Second, as one of "two additional reasons" for rejecting use of Ms. Mack's hypothetical valuation offset (Pet. App. 12a), the court held that "Social Security benefits are not marital property under the Dissolution Act." *Ibid*. As the court explained, "participants in the Social Security program do not have accrued property rights to their benefits. They have expectancies, or what the Supreme Court has termed 'noncontractual interest[s]' * * * in their benefits," and "they are never guaranteed to get out what they put into [Social Security] because Congress has reserved the ability to alter, amend, or even repeal parts of the Social Security Act." *Ibid.* (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 609-10 (1960)).

Therefore, the court continued, "[i]f Social Security benefits are not property 'acquired by' a spouse (750 ILCS 5/503(a)), then they are not marital property subject to division by a trial court. And if Social Security benefits are not marital property, then surely hypothetical Social Security benefits, like those calculated by Mack, are not marital property and cannot be used to pare down the value of marital property." Pet. App. 13a. "To hold otherwise," the court concluded, "would be to ignore section 503(d)

[of the Dissolution Act], which instructs trial courts to divide only marital property." *Ibid*.

Third, the Illinois Supreme Court affirmed the holding of the appellate court "as a matter of policy." Pet. App. 13a. The state supreme court noted that "any rule permitting trial courts to consider the mere existence of Social Security benefits [in apportioning marital property] without considering their value, and thereby violating federal law, is nearly impossible to apply." *Id*. at 14a. "The difficulties stem from the vagueness of the term 'consider' in this context." *Ibid*. Moreover, "placing a present value on Social Security benefits is contrary to the nature of such benefits. Placing a present value on fictional benefits is even worse; it is rank speculation." *Id*. at 16a. Accordingly, "[d]ecreasing Shelley's share of Christopher's pension based on the present value of his hypothetical Social Security benefits that, even if he had participated in that program, he may not ever receive is both illogical and inequitable." *Ibid*.

For all these reasons, the court held it impermissible to use a nonrecipient's hypothetical Social Security benefits as an offset against that person's actual, non-Social Security pension benefits, in an effort to remove from the Social Security recipient spouse the benefit he or she receives from entitlement to non-attachable federal payments. Pet. App. 1a-2a, 16a.

ARGUMENT

The issue actually decided by the court below is narrow: the Illinois Supreme Court held that a divorcing spouse who is ineligible for Social Security may not calculate the hypothetical benefits he would have received had he been eligible, and then subtract

those hypothetical benefits dollar-for-dollar from his actual pension benefits, in an effort to reduce the portion of the marital estate awarded to the other spouse, who will receive Social Security benefits that are made non-attachable by federal law. That holding does not warrant this Court's review. Although the court below invoked federal law, it also expressly rested its decision on adequate and independent state-law grounds. In doing so, it addressed a peculiar factual circumstance that, unsurprisingly, has been considered by very few courts. And its treatment of federal law is consistent with the language and policy of the Social Security Act. The petition, accordingly, should be denied.

A. This Court Lacks Jurisdiction Because The Illinois Supreme Court Based Its Decision On Two Independent And Adequate State Grounds.

To begin with, there is a fundamental reason this Court should deny review: the holding below rests on state law. Although the Illinois Supreme Court addressed issues of federal preemption, that court also expressly offered "two additional reasons" for rejecting petitioner's approach, "one related to the Dissolution Act and one grounded in [state] policy." Pet. App. 12a. Those rationales stand as independent and adequate state-law bases for the holding below.

As this Court has held, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). And when a state-court decision is grounded on state law, this Court is, "of course, bound to accept the interpretation of [State] law by the highest court of the State." *Hortonville Joint School Dist. No. 1* v. *Hor-*

tonville Educ. Ass'n, 426 U.S. 482, 488 (1976). That principle is dispositive of the petition in this case.

1. First, the Illinois Supreme Court based its ruling on the independent ground offered by the Illinois Marriage and Dissolution Act. Section 503 of the Dissolution Act establishes how Illinois courts must "divide the marital property" and what interests count as marital property. 750 Ill. Comp. Stat. 5/503. To qualify as marital property subject to consideration or division, the asset or interest must be "acquired by" a spouse. *Id.* at 5/503(a). As the Illinois Supreme Court "noted in *Crook*, 211 Ill. 2d at 442, participants in the Social Security program do not have accrued property rights to their benefits." Pet. App. 12a. Thus, as "expectancies," "Social Security benefits are not marital property under the Dissolution Act." *Ibid*. And because "Social Security benefits are not property 'acquired by' a spouse (750 ILCS 5/503(a)), then they are not marital property subject to division by the trial court * * * and cannot be used to pare down the value of marital property." *Id.* at 13a.

There is no doubt that this reasoning was central to the decision below that Christopher's hypothetical Social Security benefits could not be used to modify the marital estate. The Illinois Supreme Court demonstrated its reliance on the Dissolution Act by citing the statute no fewer than ten times in its opinion. Pet. App. 1a-17a. And the court below interpreted and applied complex aspects of the Dissolution Act, such as the statutory inclusion of "'[p]ension benefits attributable to contributions made during the marriage [as] marital property' (*Crook*, 211 Ill.2d at 442 (citing 750 ILCS 5/503(b)(2))"). *Id.* at 12a (se-

cond alteration added). That court also referenced its decision in *Crook* at least twenty times. *Id*. at 1a-17a.

Although the court below also cited to the decisions of other state and of federal courts as persuasive authority, that does not undermine the controlling nature of the Dissolution Act and Illinois precedent in the Illinois Supreme Court's decision. State courts often utilize decisions of other jurisdictions to inform the proper understanding of state law. See, *e.g.*, *State* v. *Santiago*, 122 A.3d 1, 15 (Conn. 2015) (utilizing "nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution" including "persuasive relevant federal precedents" and "persuasive precedents of other states").

In this respect, the Illinois Supreme Court's extensive and express analysis of the Dissolution Act and state precedent contrasts with *Michigan* v. *Long*, where the state court "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law." 463 U.S. 1032, 1037 (1983). Indeed, this Court has dismissed writs of certiorari as improvidently granted in cases where the reliance on state law was less clear than it is here. See, *e.g.*, *Florida* v. *Casal*, 462 U.S. 637, 637 (1983) (Burger, C.J., concurring in the dismissal) (case dismissed even where "[t]he Florida Supreme Court did not expressly declare that its holding rested on state grounds, and the principal state case cited for the probable cause standard is based entirely upon this Court's interpretation of the Fourth Amendment of the Federal Constitution.") (citation omitted); *Jankovich* v. *Indiana Toll Rd. Comm'n*, 379 U.S. 487, 492 (1965).

2. In addition, and separately, the Illinois Supreme Court also based its holding on state policy that disfavors consideration of "hypothetical" benefits in the division of marital property absent an express statutory mandate. Pet. App. 12a-13a. Looking to state principles "grounded in policy," the court held that "[d]ecreasing Shelley's share of Christopher's pension based on the present value of his hypothetical Social Security benefits that, even if he had participated in that program, he may not ever receive is both illogical and inequitable." *Id*. at 12a, 16a. "[P]lacing a present value on Social Security benefits is contrary to the nature of such benefits," and, according to the Illinois Supreme Court, "is rank speculation" contrary to State practice. *Id*. at 16a. "[P]lacing a present value on such benefits overlooks that the amount of Social Security benefits cannot be calculated until the participant collects them. Moreover, if the participant were to die before age 62, there would be no benefits at all." *Ibid*. (citation omitted).

This state policy is well established in Illinois case law, and Illinois courts have refused to consider unvested expectancies or assets with uncertain values in other contexts.[1] If the Illinois legislature wishes to override this state policy against consider-

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[1] See, *e.g.*, *In re Marriage of Zells*, 572 N.E.2d 944, 945 (Ill. 1991) (contingent fees); *In re Marriage of Winter*, 996 N.E.2d 25, 30 (Ill. App. Ct. 2013) (surviving spouse benefits); *In re Marriage of Centioli*, 781 N.E.2d 611, 616 (Ill. App. Ct. 2002) (unvested beneficial interests in a trust); *In re Marriage of Tietz*, 605 N.E.2d 670, 679 (Ill. App. Ct. 1992) (future earned fees); *In re Marriage of Weinstein*, 470 N.E.2d 551, 559 (Ill. App. Ct. 1984) (professional license or degree).

ation of uncertain benefits absent an express statutory provision, it could amend the Dissolution Act. Indeed, the Illinois legislature has done so in the past by creating exceptions in the Dissolution Act for such uncertain assets as stock options. See 750 Ill. Comp. Stat. 5/503(b)(3); *In re Marriage of Evans*, 426 N.E.2d 854 (Ill. 1981) (ruling before the amendment to the Dissolution Act that stock options were not marital property). But the Illinois legislature has not overridden the state policy against consideration of hypothetical benefits in this context, and the Illinois Supreme Court pointed to this state policy as an independent and adequate ground in its decision.

3. To be sure, the court below also pointed to federal law as a basis for its decision. But that treatment of a federal issue does not mean that the state policy is "interwoven with the federal law." *Michigan* v. *Long*, 463 U.S. at 1040. Here, "nothing in the court's opinion suggests that its conclusion * * * flows from a federal rather than a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision." *Jankovich*, 379 U.S. at 491. In such circumstances, "notwithstanding the copresence of federal grounds," this Court lacks jurisdiction due to the independent and adequate state policy against consideration of uncertain benefits. *Fay* v. *Noia*, 372 U.S. 391, 428 (1963).[2]

[2] In its analysis of the Dissolution Act and the equities of considering Social Security benefits, the Illinois Supreme Court looked to federal precedents to understand the *nature* of those benefits. See, *e.g.*, Pet. App. 12a ("They have expectancies, or what the Supreme Court has termed 'noncontractual interest[s]' (*Flemming* v. *Nestor*, 363 U.S. 603, 609-610 (1960)), in their

Indeed, given the independent force of both the Dissolution Act and the state policy against consideration of hypothetical benefits, a decision of this Court holding it consistent with federal law for States to consider Social Security benefits (either actual or hypothetical in nature) when calculating marital property offsets would be advisory because Illinois still would not permit consideration of those benefits under state law. See *Michigan* v. *Long*, 463 U.S. at 1042. Because the Illinois Supreme Court based its holding on "two additional reasons—one related to the Dissolution Act and one grounded in policy"—those bases for the decision constitute independent and adequate state grounds for the holding below.

B. This Case Does Not Implicate The Alleged Conflict Over Whether The Social Security Act Prohibits States From Considering Social Security Benefits When Equitably Dividing Assets During Divorce.

The absence of federal jurisdiction is, of course, a sufficient reason for this Court to deny review here. But even if the decision below were based entirely on federal law, it still would not implicate the conflict in the lower courts identified by petitioner. The Social Security Act prohibits state courts from transferring or assigning a spouse's future Social Security benefits to the other spouse during divorce proceedings.

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benefits."). But the nature of Social Security benefits is not in dispute, and the *holding* below that those benefits may not affect the distribution of marital property under the Dissolution Act and Illinois policy rests on state-law rules.

42 U.S.C. § 407(a). As a corollary to this restriction, courts uniformly have agreed that the Social Security Act prohibits States from reducing dollar-for-dollar the value of either spouse's share of the marital assets by the estimated value of future Social Security benefits. A state court therefore may not offset the wife's share of the marital assets by $100,000 simply because she is expected to receive $100,000 in future Social Security benefits.

Where courts disagree, as petitioner asserts, is over whether the Social Security Act permits States to consider a Social Security participant's future benefits as a general factor when equitably dividing assets during divorce. State courts thus disagree about whether, for instance, they may unequally divide marital property—"using, for example, a 60-40 formula instead of 50-50" (*Johnson* v. *Johnson*, 734 N.W.2d 801, 808 (S.D. 2007))—based on the fact that one beneficiary will likely receive more in Social Security benefits than the other.

This case, however, has little to do with that divide of authority among state courts. The decision below addressed a far narrower question: whether a state court may offset a Social Security recipient's share of the non-recipient ex-spouse's pension benefits by the exact estimated dollar amount the non-recipient would have received from Social Security had he contributed to Social Security instead of to his state pension plan—when this dollar-for-dollar offset is triggered by the fact that the disfavored spouse will receive non-attachable Social Security benefits.

Here, federal law prohibits Shelley's Social Security benefits from being divided during divorce, while state law allows Christopher's pension benefits to be

divided. Characterizing this as unfair, Christopher's expert calculated how much Christopher hypothetically would have received from Social Security had he participated in the program. She then offset this amount dollar-for-dollar against the value of his actual pension benefits, reducing his overall contribution to marital property—and reducing Shelley's share of Christopher's pension benefits—in exact proportion to his estimated hypothetical Social Security benefits. The Illinois Supreme Court concluded that this dollar-for-dollar reduction in Christopher's contribution to marital assets is inappropriate.

Manifestly, however, the dollar-for-dollar offset considered in this case is nothing like the generalized consideration of Social Security benefits that has divided the lower courts. State courts *all* agree that the Social Security Act prohibits States from directly offsetting the value of Social Security benefits dollar-for-dollar against other assets, and the decision below was consistent with that uncontroversial principle. The decision below thus does not implicate the conflict alleged by petitioner and does not offer an appropriate vehicle for use in resolving that conflict.

In fact, the Illinois Supreme Court is one of just three state supreme courts to have addressed the question that actually is presented in this case. And neither of the other two state-court decisions to have addressed the issue squarely conflicts with the decision below.

1. Petitioner incorrectly alleges that the decisions of twelve state supreme courts conflict with the decision below. Pet. 18. This assertion rests on a mischaracterization both of those decisions and of the issue presented here.

a. Several decisions cited by petitioner were decided on state-law grounds and thus could not conflict with the decision below.

Neville v. *Neville*, 791 N.E.2d 434 (Ohio 2003), concluded that Ohio *state law* permitted state courts to consider Social Security benefits as one factor when equitably dividing assets during divorce. The Ohio Supreme Court examined Ohio Rev. Code Ann. § 3105.171 and concluded that Social Security benefits "may be considered by the trial court under the [state statute's] catchall category as a relevant and equitable factor." *Neville*, 791 N.E.2d at 437. The decision was not based on federal law.

Schnaffer v. *Schnaffer*, 713 A.2d 1245 (R.I. 1998), focused exclusively on Rhode Island state law. The ex-husband, who did not participate in Social Security, argued that the trial court "should have first deducted from the total amount of his [pension] benefits the amount that he would have received in Social Security benefits had he not decided to opt out of the Social Security system." *Id.* at 1247. The Rhode Island Supreme Court rejected the claim as a matter of state law. *Id.* at 1249. The case mentioned Section 407(a) of the Social Security Act just once, in a footnote. *Id.* at 1247 n.2.

Phipps v. *Phipps*, 864 P.2d 613 (Idaho 1993), involved a contract dispute decided under state law. The case turned on whether the term "from whatever source" in the parties' written divorce agreement included Social Security. The court answered no, pointing to the "plain language" of the agreement. *Id.* at 614, 617.

Kelly v. *Kelly*, 9 P.3d 1046 (Ariz. 2000), was also decided on state-law grounds. Nearly the entire opin-

ion focused on whether, for purposes of Arizona's community property statute, sufficient cause existed to justify an equitable adjustment to the division of community property based on the projected value of future Social Security benefits. *Id.* at 1048. The court concluded that "this situation compels an equitable response" under state law. *Ibid.* The court then explained that "other issues may arise as the rule is applied in future cases" and that the "decision is limited to the present facts." *Ibid.* In the final paragraph, the court acknowledged one such issue that could arise in future cases—federal preemption. But it noted only that it was "mindful that some courts refuse to consider social security in any way at divorce" and declined to definitively resolve the issue. *Id.* at 1049.[3]

b. Even among the decisions cited by petitioner that do rely on federal law, most implicate a divide far from the core of this case—the propriety of *general* adjustments to the division of assets based on the fact that, after considering each party's Social Security benefits, one spouse will likely be in better financial position than the other. None of these cited decisions has permitted a direct dollar-for-dollar offset against marital assets based on the court's calculation of hypothetical Social Security benefits, as was at issue in this case. And many of the cited decisions have explicitly acknowledged that the Social Security Act prohibits such direct dollar-for-dollar offsets regarding *actual* Social Security benefits. The decisions

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[3] Petitioner also cites *Forrester* v. *Forrester*, 953 A.2d 175 (Del. 2008) to establish a conflict, but that decision also relied exclusively on the state "legislation creating the * * * pensions, and our case law interpreting that legislation." *Id.* at 182.

cited by petitioner thus do not conflict with the decision below.

Depot v. *Depot*, 893 A.2d 995 (Me. 2006), disallowed a trial court's attempt to award one spouse a large portion of the other's IRA account to balance the disparity in Social Security benefits between them. The Maine Supreme Court noted that this direct offset ran "afoul of § 407(a)'s prohibition on the transfer or assignment of [Social Security] benefits." *Id.* at 1000. In dicta, the court did suggest that the trial court could have "consider[ed] evidence" of the parties' Social Security benefits as a general factor. *Id.* at 1002. Even so, the court sharply distinguished between generalized consideration of Social Security benefits and direct dollar-for-dollar offsets of those benefits (hypothetical or otherwise), as are at issue in this case. *Depot* thus does not conflict with the decision below.

Smith v. *Smith*, 358 P.3d 171 (Mont. 2015), held that federal law prevents States from requiring divorcing parties to divide their Social Security assets. The Montana Supreme Court noted that "[S]ocial [S]ecurity benefits may not be a basis for an offsetting award in state dissolution proceedings." *Id.* at 175. While the court did suggest that Social Security "may be considered as a factor, among others, when dividing marital property" (*id.* at 176), this was not necessary to the court's result. As in *Depot*, the court recognized that direct dollar-for-dollar offsets of Social Security benefits are invalid.

In re Marriage of Boyer, 538 N.W.2d 293 (Iowa 1995), explicitly distinguished between general adjustments to marital property and direct dollar-for-dollar Social Security offsets. The Iowa Supreme Court explained that "making a general adjustment

in dividing marital property on the basis that one party, far more than the other, can reasonably expect to enjoy a secure retirement" is permissible. *Id.* at 296. Making a "proportional" dollar-for-dollar adjustment to marital property based on the estimated value of Social Security benefits is not. *Ibid.* Although the court upheld a general adjustment to marital property, its reasoning sharply distinguishes the facts of this case, which involved a proposed dollar-for-dollar adjustment to the value of petitioner Christopher's pension benefits, and it did not approve the hypothetical offset proposed by petitioner here.

Likewise, both *Mahoney* v. *Mahoney*, 681 N.E.2d 852 (Mass. 1997), and *In re Marriage of Zahm*, 978 P.2d 498 (Wash. 1999) (en banc), upheld trial court decisions awarding one spouse a greater percentage of the marital estate in order "to equalize the standard of living both parties will enjoy." *Mahoney*, 681 N.E.2d at 854. But neither addressed the hypothetical award offset at issue here, and a generalized adjustment to Social Security is quite unlike the proportional, dollar-for-dollar adjustment at issue in this case. As the Washington Supreme Court explained, States may not "calculate a specific formal valuation of * * * social security benefits and award * * * a precise property offset based on that valuation." *Zahm*, 978 P.2d at 503. That holding is consistent with what the Illinois Supreme Court concluded in this case. For that reason, neither *Mahoney* nor *Zahm* conflict with the decision below.

Stanley v. *Stanley*, 956 A.2d 1 (Del. 2008), assessed whether a court could redistribute marital assets and revise a divorce agreement when the amount of one spouse's non-Social Security pension

unexpectedly declined. Although the decision addressed federal law, the case had little to do with whether Social Security benefits may be considered when allocating marital assets in divorce. The court did note that federal law does not prohibit generalized consideration of Social Security benefits. *Id.* at 5 (quoting *Johnson*, 734 N.W.2d at 808). But this belief did not affect the outcome of the case.

Some of these decisions, in stating that generalized consideration of Social Security benefits is permissible, do conflict with other cases cited by petitioner that reach a contrary conclusion (Pet. 16). But none 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 considered by the court below in this case. Accordingly, the decision below is not an appropriate vehicle for addressing the conflict identified by petitioner.

c. In a footnote, petitioner cites several intermediate appellate court decisions that allegedly conflict with the decision below. Pet. 18 n.2. Of course, these are not decisions of "state court[s] of last resort," so they cannot contribute to a formal conflict of authority meriting this Court's review. S. Ct. R. 10(b).

Moreover, none of these decisions actually conflicts with the holding below. At least one of the cited cases rests largely on state-law grounds. *Litz* v. *Litz*, 288 S.W.3d 753, 757-758 (Mo. Ct. App. 2009). Several others address factual situations distinct from those at issue here and thus do not conflict with the result below. *Matter of Marriage of Brane*, 908 P.2d 625 (Kan. Ct. App. 1995) (concluding that disparities in Social Security benefits may justify a general adjustment to the distribution of marital assets); *Gross*

v. *Gross*, 8 S.W.3d 56 (Ky. Ct. App. 1999) (same); *Olsen* v. *Olsen*, 169 P.3d 765 (Utah Ct. App. 2007) (same). And in some cases, the judgment actually supports, rather than conflicts with, the result below. *In re Marriage of Morehouse*, 121 P.3d 264 (Colo. App. 2005) (holding that including Social Security benefits as part of marital property violates federal law); *Young* v. *Young*, 931 So.2d 541, 546 (La. Ct. App. 2006) (concluding that Social Security benefits should not be counted as community property); *Biondo* v. *Biondo*, 809 N.W.2d 397, 402 (Mich. Ct. App. 2011) (striking down a provision in a divorce settlement requiring the equalization of Social Security benefits).

2. Just two allegedly conflicting cases identified by petitioner address the same set of legal issues as does the decision below.

Johnson, 734 N.W.2d 801, reached exactly the same result as the court below. In *Johnson*, the ex-husband received Social Security benefits, and the ex-wife received federal pension benefits and was therefore ineligible for Social Security. The ex-wife requested that her hypothetical Social Security benefits be subtracted from her federal pension benefits so that not all of her pension benefits would count as marital property. The South Dakota Supreme Court rejected her request. The court noted that under prevailing federal law, "a trial court may not distribute marital property to offset the computed value of Social Security benefits." *Id.* at 808 (quoting *In re Marriage of Morehouse*, 121 P.3d at 267). *Johnson* denied the ex-wife exactly the same relief that the Illinois Supreme Court denied petitioner in this case. The *Johnson* holding thus does not conflict with the decision below, as petitioner claims.

In re Marriage of Herald & Steadman, 322 P.3d 546 (Or. 2014), cert. denied sub nom. *Herald* v. *Steadman*, 135 S. Ct. 944 (2015), also does not conflict with the decision below. *Herald* did uphold a state court's decision to award a Social Security participant a lesser share of a non-participant's pension benefits to account for the fact that the participant's Social Security benefits were not subject to equitable division. In doing so, the court concluded that "the court's action did not constitute a transfer or assignment of [the participant's] Social Security benefits that was prohibited by [42 U.S.C. § 407(a)]." *Id.* at 558. But the Oregon court did not address whether the Social Security Act might prohibit the transfer of a *non-participant's hypothetical* Social Security benefits.

Moreover, the Oregon Supreme Court found that Oregon *state* law allowed the consideration of Social Security benefits in divorce, while the Illinois Supreme Court reached the opposite conclusion as a matter of Illinois state law. To the extent *Herald* and the Illinois decision in this case are in tension, the difference between them can be explained by differences in the relevant state laws. The decisions are not in direct conflict as a matter of federal law—and this Court's intervention therefore is unnecessary.

C. The Decision Below Is Correct As A Matter Of Federal Law.

Finally, it bears mention that, viewed as a matter of federal law, the holding of the Illinois Supreme Court is correct on the merits. The Social Security Act is a product of clear congressional intent to have federal rules govern this "highly complex and interrelated statutory structure." *Flemming* v. *Nestor*, 363 U.S. 603, 610 (1960). Offsetting dollar-for-dollar the

value of Christopher's hypothetical Social Security benefits against the value of Shelley's actual benefits contravenes the terms of the Act, the legislative intent behind it, and the precedent of this Court.

1. Congress expressly specified the circumstances in which Social Security benefits may be assignable in the event of a divorce, making the assignment of benefits permissible to satisfy child support and alimony obligations. See pages 3-4, *supra*. Those provisions, however, are coupled with a broadly worded anti-assignment clause providing that, in other circumstances, "any future payment under this subchapter shall not be transferable or assignable." 42 U.S.C. § 407(a). Congress further amended the anti-assignment provision to make it *more* expansive by requiring that "[n]o other provision of law * * * be construed to limit, supersede, or otherwise modify the provisions of [Section 407] except to the extent that it does so by express reference." 42 U.S.C. § 407(b). As noted by the Illinois Supreme Court, "the amendment clarified Congress' intent that Social Security benefits remain nonassignable until Congress chooses to modify its position on this issue." *Crook*, 813 N.E.2d at 204.

This conclusion follows not only from the language of the Social Security Act, but from this Court's holding in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), which construed the anti-assignment provision of the Railroad Retirement Act, 45 U.S.C. § 231m. Addressing statutory language that is "legally indistinguishable from the antiassignment provisions of 42 U.S.C. § 407(a)" (*Matter of Marriage of Swan*, 720 P.2d 747, 752 (Or. 1986)), the Court in *Hisquierdo* held that statutory benefits could not be assigned as part of the division of property following

divorce. 439 U.S. at 585-91. It necessarily follows from this conclusion that the amount of a divorcing spouse's Social Security benefits may not, dollar-for-dollar, be transferred to the other spouse from the Social Security recipient's remaining assets, in an attempt to circumvent the anti-assignment rule; petitioner does not appear to contend otherwise.

In nevertheless attempting to distinguish the effect of *Hisquierdo*, petitioner here does maintain that, under his proposed division of property, Shelley's Social Security benefits are untouched and "[t]he consideration of Social Security benefits affects only how *other* assets are divided." Pet. 27. This rationale, however, entirely disregards the reality of the situation. As the court below explained, although petitioner's approach "is not strictly speaking an offset," "it does consider the existence of Shelley's anticipated Social Security benefits to create parallel benefits for Christopher that would affect the division of marital property." Pet. App. 12a. Accordingly, notwithstanding the Rube Goldberg nature of petitioner's hypothetical benefits calculation, his proposed offset is triggered by—and is an attempt to circumvent—Shelley's receipt of "'Social Security benefits [that] are exempt from equitable distribution.'" *Id*. at 3a.

In these circumstances, petitioner's proposed "offsetting award * * * would upset the statutory balance and impair [Shelley's] economic security just as surely as would a regular deduction from [her] benefit check." *Hisquierdo*, 439 U.S. at 588. That outcome "would mechanically deprive [Shelley] of a portion of the benefit Congress * * * indicated was

intended for [her] alone" and would "frustrate[] the congressional objective." *Id*. at 583, 585.[4]

2. Against this background, the contrary arguments offered by petitioner lack force. Thus, petitioner emphasizes that matters of domestic relations ordinarily are a state concern. Pet. 25-26. But although, generally speaking, domestic relations are the principal concern of the States, federal preemption will be recognized when necessary to prevent "'major damage' to 'clear and substantial' federal interests." *Hisquierdo*, 439 U.S. at 581. And because the Social Security system is "plainly national in area and dimensions," this Court has recognized that it is necessary for federal law to preempt state law on matters involving Social Security benefits. *Helvering* v. *Davis*, 301 U.S. 619 (1937).

In making this determination, this Court has stated that federal preemption is necessary for three reasons: *First*, the Social Security program "rest[s]

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[4] Petitioner places some emphasis on the inclusion of a prohibition on "anticipat[ing]" payments in the Railroad Retirement Act's anti-assignment clause, language that does not appear in the Social Security Act. Pet. 31-32. But this Court in *Hisquierdo* focused on the prospect of "depriv[ing] [the beneficiary] of a portion of the benefit," on the need to "ensure[] that the benefits actually reach the beneficiary," on the importance of "preempt[ing] all state law that stands in [the] way" of that outcome, and of the propriety of precluding "[a]ny automatic diminution of that amount" (439 U.S. at 583-85)—all policies that apply with full force here and that made no mention of the "anticipation" language. Compare *id*. at 588-89 (addressing "anticipation" language in course of describing how offsetting awards would impose harm on the recipient of federal benefits that "might well be greater" than that imposed by "a regular deduction from his benefit check").

on predications as to expected economic conditions" and must be able to respond to changes in the national economic climate. *Flemming*, 363 U.S. at 610. *Second*, "[s]tate and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged" and are reluctant to do so. *Helvering*, 301 U.S. at 644. *Third*, federal preemption is necessary to ensure that the Social Security program is equally applied throughout the country because "[a] system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Ibid*. For these reasons, the Court has recognized that federal preemption is critical to the functioning of the Social Security program and that "[o]nly a power that is national can serve the interests of all." *Ibid.*

Nor do the equitable concerns advanced by petitioner undermine the holding below. Pet. 29-30. As the Illinois Supreme Court explained, "placing a present value on Social Security benefits is contrary to the nature of such benefits" and "[p]lacing a present value on fictional benefits is even worse; it is rank speculation." Pet. App. 16a. Consequently, "[d]ecreasing Shelley's share of Christopher's pension based on the present value of his hypothetical Social Security benefits that, even if he had participated in that program, he may not ever receive is both illogical and inequitable." *Ibid.*

In any event, we can assume that Congress weighed the equities here and concluded that the better course was "ensur[ing] that the [federal] benefits actually reach the beneficiary." *Hisquierdo*, 439

U.S. at 584. This Court has said precisely that: "Whether wisdom or unwisdom resides in the scheme of benefits * * * is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Flemming*, 363 U.S. at 611 (quoting *Helvering*, 301 U.S. at 644). For the present, what matters is that petitioner's proposed approach "causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck." *Hisquierdo*, 439 U.S. at 590.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The representation of respondent by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.