15-1031

No. ____

IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.

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PETITION FOR WRIT OF CERTIORARI

John Howell petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 361 P.3d 936. The decision of the Arizona Court of Appeals (Pet. App. 15a) is unreported but is available at 2014 WL 7236856. The decision of the Arizona Superior Court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982), is codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--
>
> . . .
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> . . .

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except . . . to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made concurrently to any person based on such person's own service . . . .

38 U.S.C. § 5305 provides, in pertinent part:

> . . . [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, . . . and who would be eligible to receive pension or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such

retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.

STATEMENT OF THE CASE

This case concerns the proper treatment in divorce of a veteran's military retirement pay when the veteran also suffers from a service-connected disability. In many cases, disabled veterans are eligible for disability pay or retirement pay, but not both; thus, when a veteran elects to take disability pay, he must waive a portion of his retirement pay. As this Court has previously held, the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, permits the division of retirement pay, but prohibits the division of disability pay, in divorce proceedings. *Mansell v. Mansell*, 490 U.S. 581 (1989).

In the decision below, Petitioner's disability arose *after* a divorce judgment had already divided his military retirement pay between Petitioner and Respondent, his former spouse. After Petitioner elected to take disability pay and waived a portion of his military retirement pay, the divorce court issued an order requiring Petitioner to indemnify Respondent for the reduction in her share of Petitioner's military retirement pay that resulted from his post-divorce election of disability compensation. The Arizona Supreme Court upheld the divorce court's order, finding that the modification of the decree did not conflict with the USFSPA. Four other state supreme courts have adopted the same interpretation of the USFSPA, but five have squarely rejected it, holding that such orders are preempted by the USFSPA. That entrenched and well-recognized division of authority with respect to a recurring question of federal law warrants this Court's review.

A. Statutory Framework

The Federal Government provides a pension for members of the Armed Forces who retire after serving for a minimum period (generally twenty years). *Mansell*, 490 U.S. at 583; *see, e.g.*, 10 U.S.C. § 8911(a) (Air Force). This pension is known as Military Retirement Pay ("MRP"). In addition, veterans who suffer from service-connected disabilities are entitled to compensation. *See* 38 U.S.C. §§ 1110, 1131. The amount of compensation for a given disability is based on a scale that reflects "the average impairments of earning capacity resulting from such injuries in civil occupations." *Id.* § 1155.

In order to receive disability compensation, veterans who are entitled to MRP generally must waive an equivalent portion of their MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305.[1] Veterans in that position often elect to receive disability compensation because, unlike MRP, disability compensation is exempt from federal, state, and local taxation. *See Mansell*, 490 U.S. at 583-84.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law did not permit states to treat MRP as divisible property in divorce proceedings. As the Court explained, Congress conferred MRP as a "personal entitlement" of service members, and state

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[1] A veteran whose disability is rated as at least 50 percent disabling is permitted to receive overlapping disability compensation and MRP. 10 U.S.C. § 1414(a). Because Petitioner is 20 percent disabled, that provision does not apply in this case. Pet. App. 3a.

courts were therefore barred from awarding an interest in a veteran's MRP to a former spouse in a divorce. *Id.* at 232. The Court noted that Congress was free to afford greater protection to former spouses if it so chose. *Id.* at 235-36.

Congress responded by passing the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part: it authorized state courts to treat MRP as divisible property, but it excluded from this authority, inter alia, any portion of MRP that is waived in order to obtain disability compensation. Specifically, as relevant here, the Act provides that "a court may treat *disposable retired pay* payable to a member . . . either as property solely of the member or as property of the member and his spouse," 10 U.S.C. § 1408(c)(1) (emphasis added), and it defines "disposable retired pay" to exclude "amounts which . . . are deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive [disability] compensation," *id.* § 1408(a)(4).

In *Mansell v. Mansell*, this Court confirmed that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. Mr. Mansell was a military retiree who had waived a portion of his MRP in favor of disability compensation. When Mr. Mansell and Mrs. Mansell divorced, they entered into a property settlement that obligated Mr. Mansell to pay Mrs. Mansell "50 percent of his total

military retirement pay, including that portion of retirement pay waived so that [Mr.] Mansell could receive disability benefits." *Id.* at 586. Mr. Mansell later petitioned the state courts to modify the divorce decree to remove this provision, but they refused to do so. This Court reversed. As the Court explained, the USFSPA did not disturb the prior federal rule of non-divisibility with respect to the portion of MRP that a military retiree waives in favor of disability compensation. *Id.* at 592-94.

B. Proceedings Below

Petitioner John Howell and Respondent Sandra Howell divorced in 1991. The dissolution decree issued by the Arizona Superior Court provides that "[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.[2] Petitioner retired from the Air Force in 1992 after a twenty-year career, and the parties began receiving MRP shortly thereafter. *Id.* at 2a-3a.

In 2005, the Department of Veterans Affairs (VA) determined that Petitioner suffers from degenerative joint disease in his shoulder and that this impairment qualifies as a service-connected disability. The VA estimated that Petitioner's disability reduces his earning capacity by twenty percent. *Id.* at 3a; *see* 38

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[2] A "direct pay order" authorizes the Federal Government to make payments directly to a former spouse who has been awarded a portion of a veteran's MRP. *See* 10 U.S.C. § 1408(d); *Mansell*, 490 U.S. at 585.

U.S.C. § 1155 (explaining disability-rating system). Accordingly, he qualifies for monthly payments of tax-exempt disability compensation to replace his lost earnings. Pet. App. 3a. In order to obtain this compensation, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). He therefore executed such a waiver, effective from July 2004. Pet. App. 3a. As a consequence, the MRP payments to both Petitioner and Respondent declined.

In 2013, Respondent brought an action to "enforce" the provision of the divorce decree regarding MRP, arguing that it entitled her to half of the full value of the MRP for which Petitioner is eligible (notwithstanding any waiver on his part). *Id.* at 3a-4a. The Arizona Superior Court agreed and ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability." *Id.* at 28a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

In the Arizona Supreme Court, Petitioner argued that the USFSPA, as construed in *Mansell*, denies state courts the authority to award a former spouse an interest in the waived portion of a veteran's MRP. *Id.* at 5a.[3] The Supreme Court acknowledged that *Mansell* barred state courts from "dividing MRP that has been waived to receive federal disability benefits." *Id.* at 6a (citing *Mansell*, 490 U.S. at 589). But, the court

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[3] Although Petitioner had not raised this argument in the Superior Court, the Supreme Court exercised its discretion to decide the federal question on the merits, explaining that the issue was "of public importance" and "likely to recur." Pet. App. 5a.

explained, this case presents the distinct question "how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP." *Id.* The court noted that "[c]ourts in other jurisdictions have divided on the issue." *Id.* It concluded that although "the family court cannot divide MRP that has been waived to obtain disability benefits at the time of the decree or thereafter," the court was free to order Petitioner to *indemnify* Respondent for the reduction in her share of MRP. *Id.* at 7a. As the court explained:

> The 2014 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. Under these circumstances, the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property. . . . 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.

Id. at 7a-8a. The Arizona Supreme Court thus concluded that, because the family court had not awarded Respondent an interest in the disability compensation itself, but rather an equal sum to be satisfied by any of Petitioner's assets, *Mansell* and the USFSPA did not apply.

The court also rejected Petitioner's alternative arguments under state law. Pet. App. 8a-14a. The

court acknowledged that "[b]ecause the decree did not require John to indemnify Sandra for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." *Id.* at 10a. But it rejected Petitioner's argument that an Arizona statute barred such modifications, holding that the statute violated the Arizona Constitution. *Id.* at 11a-14a.

REASONS FOR GRANTING THE WRIT

I. The State Courts Are Squarely Divided On The Question Presented.

As the Arizona Supreme Court acknowledged below, and as many other courts have also noted, the question presented has sharply divided the state courts. In Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona, a state court may require a veteran to indemnify a former spouse for the reduction in MRP brought about by a post-divorce disability waiver. In Vermont, Mississippi, Alabama, Alaska, and Nebraska, federal law is understood to prohibit such an order. These decisions are in direct conflict regarding the meaning of the USFSPA and of this Court's decision in *Mansell*. This Court should grant review to resolve that entrenched conflict regarding a recurring question of federal law.

A. The Supreme Courts Of Maine, Tennessee, Massachusetts, And Rhode Island, As Well As Arizona, Interpret The USFSPA To Permit Indemnification Orders.

In the decision below, the Arizona Supreme Court held that the USFSPA permits a family court to order a veteran to indemnify a former spouse for the reduction in MRP that results from the veteran's choice to receive disability compensation. Four other state supreme courts have reached the identical conclusion.

1. In *Black v. Black*, 842 A.2d 1280 (Me. 2004), the Supreme Judicial Court of Maine interpreted the USFSPA in the same manner as the decision below.

When David and Lorraine Black divorced in 1993, the divorce judgment provided that each would receive "fifty per cent (50%) of [David's] disposable [military] retirement pay." *Id.* at 1282. Seven years later, the VA increased David's disability rating, and David waived his retirement pay in order to obtain the increased disability compensation available to him. *Id.* In response, Lorraine moved to enforce the original judgment, or, alternatively, to modify it to vindicate her claim to compensation based on the amount of MRP that David had previously received.

The Supreme Judicial Court noted that "[s]ince *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay allocated to a former spouse in an earlier divorce judgment." *Id.* at 1284. The court reasoned that *Mansell* had only "explicitly addressed" the treatment "*upon* divorce" of MRP that had already, at the time of the divorce, been waived in favor of disability compensation. *Id.* at 1284-85 (emphasis in original; internal quotation marks omitted). It therefore concluded, in accord with the decision below, that "the USFSPA does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property." *Id.* at 1285. The family court was therefore free to enter an "order that results in David paying to Lorraine some or all of the

amount she would have received directly from the United States Government absent David's conversion of his retirement pay to disability pay." *Id.*

2. The Supreme Court of Tennessee has reached the same conclusion on the same facts. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). James and Willie Jean Johnson divorced in 1996. *Id.* at 894. At the time, James was an active-duty member of the Marine Corps. The marital dissolution agreement, incorporated into the divorce decree, provided that "[u]pon [James's] retirement, [Willie Jean] shall receive one-half of all military retirement benefits due [James]." *Id.* Both parties began to receive MRP when James retired. Thereafter, James waived a portion of his MRP in order to receive disability compensation, thereby reducing the MRP payments to both parties. *Id.* Willie Jean petitioned for a modification of the divorce decree to increase her payments by an equal amount, which the Supreme Court construed as a motion to enforce the original decree. *Id.* at 895-96.

The Supreme Court instructed the family court to grant Willie Jean's motion. It reasoned that Willie Jean had a "vested right" in the expected value of the MRP at the time of the divorce, which could not be "unilaterally diminished by an act of the military spouse." *Id.* at 897-98. The court held that *Mansell* posed no obstacle to this result because the divorce decree did not "divide Mr. Johnson's disability benefits in violation of *Mansell*." *Id.* at 898. As the court explained, its construction of the divorce decree would not require James to pay Willie Jean from his disability benefits (or from the waived portion of his MRP), but

would rather require him to pay her an amount equal to the MRP she would have received in the absence of his disability-based waiver. *Id.*

3. The Supreme Judicial Court of Massachusetts has confronted the same question and has adopted the same position. *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003). Albert and Constance Krapf divorced in 1985. *Id.* at 319. Under the terms of their separation agreement, which was incorporated in the divorce judgment, Albert committed to to "allocating half his pension rights with the U.S. Army to [Constance]." *Id.* Albert retired from the Army in 1994, and both Albert and Constance began receiving MRP payments. *Id.* at 320. In 1997, the VA determined that Albert suffered from post-traumatic stress disorder, and, in order to obtain disability compensation, he waived the majority of his MRP. *Id.* at 320-21. Constance then filed suit against Albert, arguing that he was obligated to restore her to the position she would have enjoyed in the absence of that waiver. *Id.* at 321.

The Supreme Judicial Court sided with Constance. The court reasoned that Albert had breached the settlement agreement "by converting his and [Constance's] military retirement benefits to VA disability benefits for his own benefit." *Id.* at 324. The court also concluded that *Mansell* and the USFSPA did not preclude an order requiring Albert to pay Constance the amount of MRP she would have received in the absence of a disability waiver. *Id.* at 326. The court acknowledged that *Mansell* "does not permit State courts 'to treat as property divisible upon divorce military retirement pay that has been waived to

receive veterans' disability benefits.'" *Id.* (quoting *Mansell*, 490 U.S. at 595). But it reasoned that "[t]he judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforce[s] the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources." *Id.*

4. The Rhode Island Supreme Court has adopted the same rule as well. *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006). When Ronald and Susan Resare divorced in 1986, the divorce decree incorporated a property settlement agreement, which provided that "[Susan] shall be entitled to receive as a property settlement, a sum equal to thirty-five (35%) percent of the gross pension of [Ronald]." *Id.* at 1007-08 & n.2. Both parties then received MRP payments directly from the government. *Id.* at 1008. In 1997, Ronald began to receive disability compensation from the VA, and the MRP payments to both Ronald an Susan were reduced as a result. *Id.* Susan filed suit to enforce the terms of the decree, which, she argued, entitled her to 35% of the *total* pension Ronald would have received if he had not obtained disability compensation. *Id.*

The Supreme Court accepted that argument. It first interpreted the divorce decree to provide that Susan was entitled to 35% of the MRP for which Ronald would have been eligible in the absence of a disability waiver. *Id.* at 1009-10. It then explained that *Mansell* and the USFSPA did not foreclose this interpretation, or the ensuing order that Ronald pay Constance what she would have received in the absence of disability compensation. Specifically, the court

explained that, "[i]n *Mansell*, the property settlement agreement sought to divide the husband's disability benefits that he was receiving at the time of the divorce," but "[t]hat is not what happened here." *Id.* Rather than "divid[ing] Ronald's disability benefit in contravention of *Mansell*," the order that Constance sought would simply enforce the division of property contemplated by the original agreement, when Ronald was not receiving disability compensation at all. *Id.* at 1010.

The highest courts of Maine, Tennessee, Massachusetts, and Rhode Island, as well as Arizona, are thus in agreement. Each has held that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP. Such indemnity orders are not precluded by *Mansell* or the USFSPA, according to this view, because they do not divide *disability benefits* (or, equivalently, the waived portion of MRP), but permit the veteran to satisfy this obligation out of any of his or her assets.

B. The Supreme Courts Of Vermont, Mississippi, Alabama, Alaska, And Nebraska Interpret The USFSPA To Prohibit Indemnification Orders.

Five other state supreme courts have interpreted *Mansell* and the USFSPA to prohibit the same orders that the decisions described above understood them to permit.

1. The Vermont Supreme Court has squarely broken with the decisions recounted above by holding 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. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). Bruce and Elisabeth Youngbluth divorced in 2005, shortly after Bruce retired from the Marine Corps. The divorce decree awarded Elisabeth "19.81% of [Bruce's] monthly retirement benefits." *Id.* at 679. Shortly thereafter, the VA rated Bruce as 30% disabled, and he therefore waived a portion of his MRP, which was "replaced dollar-for-dollar" by disability compensation. *Id.* The MRP payments to both Bruce and Elisabeth decreased accordingly. Elisabeth then petitioned the family court to increase her percentage share of the MRP to cancel out the reduction in its total size, and the court did so. *Id.* at 679-80.

The Vermont Supreme Court reversed, holding that federal law barred the family court from increasing Elisabeth's share of the MRP to compensate for Bruce's disability-based waiver. The court first surveyed the extensive body of case law dealing with this question and concluded that "[s]tate courts are split on this issue," with "no clear majority viewpoint." *Id.* at 684, 687. It then specifically declined to "join[] those courts that have found 'creative solutions' around *Mansell*." *Id.* at 684 (quoting *In re Smith*, 56 Cal. Rptr. 3d 341, 345 (Cal. App. 2007)). Among the decisions that the Vermont Supreme Court rejected as unpersuasive was *In re Marriage of Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), which the Arizona Supreme Court adopted

in the decision below. *Compare Youngbluth*, 6 A.3d at 686-87 (noting that *Gaddis*, and other out-of-state opinions, "directly support wife in the appeal before this Court"), *with* Pet. App. 6a (adopting *Gaddis*'s reasoning).

In rejecting that line of authority, the Vermont Supreme Court observed that "a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts." *Youngbluth*, 6 A.3d at 685 (internal quotation marks omitted). The court then held that *Mansell* squarely foreclosed the divorce court's order, reasoning that "[b]y raising [Elisabeth's] percentage of [Bruce's] disposable retirement benefits, the trial court was clearly offsetting the effect that [Bruce's] receipt of disability benefits had on the payments due to [Elisabeth]." *Id.* at 688-89. That "represented an attempt to attach funds that federal law does not allow the trial court to distribute as property in a divorce proceeding." *Id.* at 688. The court therefore reversed the family court's order and reinstated the terms of the original decree.[4]

2. The Mississippi Supreme Court has taken the same side of the split. *Mallard v. Burkart*, 95 So. 3d

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[4] Justice Johnson concurred and noted her agreement that the family court's modification to the original decree amounted to "an end-around to the Supreme Court's holding in *Mansell*." *Youngbluth*, 6 A.3d at 692 (Johnson, J., concurring). She wrote separately to emphasize that when a divorce decree is based on fraudulent representations by a veteran regarding his or her plans to seek disability compensation, the court remains free to grant relief from the original decree under the state analogue of Rule 60(b) of the Federal Rules of Civil Procedure. *Id.* at 691-95.

1264 (Miss. 2012). Tonya Burkart and James Mallard divorced in 2001. *Id.* at 1267. At the time, Mallard was an active-duty member of the Air Force. The divorce judgment incorporated a property settlement agreement, which provided that "[Burkart] is awarded 40% of [Mallard's] disposable military retired pay." *Id.* In 2002, Mallard retired and began sending Burkart forty percent of his monthly MRP income. In 2003, the VA determined that Mallard was entitled to disability compensation; he waived a portion of MRP in order to obtain that compensation; and he decreased his monthly payments to Burkart as a result. *Id.* Burkart petitioned for modification of the divorce judgment, asserting "that Mallard had structured his retirement from the Air Force in such a way as to defeat her forty-percent interest in the retirement pay." *Id.* The family court agreed, holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually had received." *Id.* at 1268.

On appeal, the Mississippi Supreme Court first noted that "[s]everal other states have addressed whether state trial courts have any authority to distribute disability benefits, where the military spouse goes on disability after the divorce property settlement is finalized," and that "[t]here is a split of authority on this question, and no clear majority view." *Id.* at 1271. Whereas the family court had relied on the Tennessee Supreme Court's analysis in *Johnson*, *see supra* pp. 13-14, the Mississippi Supreme Court adopted the reasoning advanced by the Vermont Supreme Court in *Youngbluth*. *Id.* at 1272. As the court explained,

"[w]hatever the equities may be, state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* The court found "the holding of *Mansell* to be both specific and clear," and, like the Vermont Supreme Court, declined to follow other state courts that had "established 'creative solutions' around the literal meaning of the *Mansell* holding." *Id.* (quoting *In re Smith*, 56 Cal. Rptr. 3d at 345). The court concluded that the USFSPA, as construed in *Mansell*, has the unavoidable consequence that payments to a former spouse could be reduced "simply because [the military spouse] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.* (quoting *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting); alteration in original). The court therefore reversed the family court's order holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually received." *Id.* at 1273.

3. The Alabama Supreme Court has adopted the same interpretation of federal law in the same circumstances. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). When Edwin and Hellene Billeck divorced in 1989, the divorce judgment incorporated a settlement agreement providing that "[Edwin] agrees to pay to [Hellene] his monthly U.S. Army retirement check." *Id.* at 106. Edwin, who was already retired and receiving MRP at the time of the divorce, began remitting his MRP income to Hellene. In 1998, he waived a portion of his MRP in favor of disability

compensation, and his payments to Hellene accordingly decreased. *Id.* at 107. Hellene then petitioned the family court to order Edwin to pay her both his MRP and his disability income, which together equated to the sum she had received prior to Edwin's waiver. The court entered such an order. *Id.*

The Alabama Supreme Court reversed. As the court explained, *Mansell* "specifically limits the state courts from treating veteran's disability benefits received in lieu of retirement pay as divisible community property." *Id.* at 108. Accordingly, "[w]hen a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits, the trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." *Id.* at 109. The court therefore ruled that the family court could not order Edwin to remit his disability compensation to Hellene or to pay her an equal sum. *Id.*[5]

4. In *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), the Alaska Supreme Court took the same position, vacating a family court's order that would have required a veteran to indemnify a former spouse for the reduction in her share of MRP that resulted from his election of disability compensation. Dorothy and James Clauson divorced in 1984. *Id.* at 1259. At that time, James was a military retiree receiving MRP.

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[5] The court specifically rejected contrary decisions of several state appellate courts, including those in Florida, Arkansas, and Vermont. *Billeck*, 777 So. 2d at 108.

The parties entered into a property settlement that entitled Dorothy to "13/40 of [James's] current military pension and increases therein." *Id.* Four years later, in 1990, James waived his MRP in favor of disability compensation. *Id.* Dorothy then filed a motion to modify the divorce decree, and the family court entered an order requiring James to pay Dorothy, on a monthly basis, the sum that she had been receiving in MRP prior to his waiver. *Id.* at 1259-60.

The Alaska Supreme Court vacated that order. It first explained that *Mansell* "unequivocal[ly]" bars state courts from "equitably divid[ing] veterans' disability benefits received in place of waived retirement pay." *Id.* at 1262. It noted that this prohibition does not mean that courts must "completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." *Id.* at 1263. Rather, a court may "consider a party's military disability benefits as they affect the financial circumstances of both parties" in determining an equitable overall asset distribution. *Id.* at 1264. But the court noted the "risk" that this limited authorization "might lead trial courts to simply shift 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," emphasizing that "[t]his is unacceptable." *Id.* Under *Mansell*, "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Id.*

The court concluded that that was "precisely what happened in the case" at hand, because the court had

exactly replaced Dorothy's MRP income with a new obligation of support imposed on James. *Id.* Accordingly, the order sought to "regain the status quo as if the *Mansell* decision did not exist," and its "effect . . . was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.* The order approved by the Arizona Supreme Court in the decision below is materially identical to the order at issue in *Clauson*—Petitioner was ordered to exactly replace the lost MRP income to his former spouse—and therefore is unlawful under the Alaska Supreme Court's interpretation of federal law.

5. The Nebraska Supreme Court has taken the same position as well. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). Kathleen and Kenneth Kramer divorced in 1991. *Id.* at 103-04. At the time of the divorce, Kenneth had retired from the Air Force and was receiving MRP. The final divorce decree provided that "[Kathleen] is awarded 46% of [Kenneth's] military pension with the United States Air Force." *Id.* Kenneth therefore began making monthly payments to Kathleen. In 1994, the VA determined that Kenneth was eligible for disability compensation, and also made this benefit retroactive to his initial application in 1992. Kenneth waived a portion of his MRP in favor of disability compensation, and this waiver was also made retroactive to 1992. *Id.*

Both parties filed suit, and the Nebraska Supreme Court decided both actions together. First, Kenneth sought to recoup the portion of the MRP that he had been required to pay Kathleen before 1994 that was, by

operation of his later election of disability compensation, retroactively waived in favor of disability compensation. Second, Kathleen sought to modify the divorce decree to increase Kenneth's alimony obligation on the ground that the reduction in MRP effected a material change in the parties' relative economic circumstances.

As to the first claim, the court held that Kathleen was obligated to repay the relevant portion of the MRP she had previously received. As the court explained, "[t]o permit her to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is prohibited by [the USFSPA]." *Id.* at 110. In other words, once that money was converted from MRP to disability compensation (albeit retroactively), *Mansell* barred the divorce decree from ordering Kenneth to pay it to Kathleen, and Kathleen therefore lacked a legal claim to it. *Id.* at 109-10. This holding is in accord with the rule that post-divorce conversions to disability compensation remain subject to *Mansell*, and it squarely conflicts with the interpretation of *Mansell* adopted by the decision below.

As to the second claim, the court embraced both the rule and the reasoning of the Alaska Supreme Court in *Clauson*. Specifically, the court held that, in assessing the relative economic circumstances of the parties, a family court may consider (alongside all other relevant facts) the fact that Kenneth now receives disability compensation and Kathleen now receives diminished MRP payments. The court underscored, however, that its "holding does not permit the district court to treat

service-connected disability benefits as divisible marital property in form or substance." *Id.* at 113 (citing *Clauson*, 831 P.2d 1257). The court insisted that lower courts heed this "significant limitation" on their power to order "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

* * *

The supreme courts of Vermont, Mississippi, Alabama, Alaska, and Nebraska thus have all held that *Mansell* and the USFSPA bar court orders that seek to "make whole" a former spouse whose MRP income has been reduced as a consequence of a veteran's disability-based waiver. Each has specifically rejected the proposition—endorsed by the highest courts of Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona—that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP.

As the courts on both sides of the split have recognized, this division is stark and entrenched. *See, e.g.*, Pet. App. 6a ("Courts in other jurisdictions have divided on the issue."); *Youngbluth*, 6 A.3d at 684 ("State courts are split on this issue."); *Mallard*, 95 So. 3d at 1271 ("There is a split of authority on this question, and no clear majority view."); *Black*, 842 A.2d at 1284 ("Since *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay

allocated to a former spouse in an earlier divorce judgment.").

Both sides can claim a number of intermediate appellate courts as adherents as well.[6] These decisions are also due significant weight in gauging the breadth and depth of the split in authority. Because most state supreme courts (unlike the federal courts of appeals) exercise discretionary review, there is no reason to assume that they will all decide this issue eventually. Rather, if the state supreme court is content with the rule put in place by an intermediate appellate court—which, at a minimum, suffices to impose uniformity within the state—it will often let that precedent stand. *See, e.g., In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App.) (holding that a court "cannot order [a veteran] to pay his disability benefits to [his former spouse," and "the court may not do indirectly what it cannot do directly"), *rev. denied*, 268 Kan. 887 (1999); *Dexter v. Dexter*, 661 A.2d 171, 175 n.4 (Md. Ct. Spec. App.) (holding that a veteran may be required to reimburse a former spouse for the diminution in her MRP payments, because such an order does not "hinder [the veteran's] receipt of VA disability benefits"), *cert. denied*, 341 Md. 27 (1995). The split in authority in the

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[6] *See, e.g., Black*, 842 A.2d at 1284 n.3 (citing decisions in California, New Mexico, and Virginia that read *Mansell* narrowly, and contrasting them with decisions in Arkansas and Kansas that read it broadly); *Krapf*, 786 N.E.2d at 325-26 (citing decisions in Maryland, Montana, and Ohio that favor indemnification orders despite *Mansell*); *Youngbluth*, 6 A.3d at 688-89 (citing decisions in Kansas, Michigan, and Hawaii that prohibit indemnification orders based on *Mansell*).

states is thus even more entrenched than the ten supreme court decisions discussed above would suggest.

At this stage—twenty-seven years after *Mansell*—the issue has been fully aired. Accordingly, there is nothing to be gained by leaving the debate to continue in the lower courts. Rather, in the absence of this Court's intervention, the state courts that have not yet ruled will simply be left to choose between the two fully developed positions that are already on offer. Only review by this Court can resolve which of those interpretations of federal law is correct.

II. This Case Presents A Recurring Issue Of National Importance.

This Court's review is warranted because the question presented, which recurs frequently in the state courts, is of vital importance to both the Nation's veterans and their former spouses.

The decisions canvassed above confirm that the question at issue here has arisen frequently in the state courts and will continue to do so. Indeed, the Vermont Supreme Court alone identified two dozen cases in various states' appellate courts that concern whether a former spouse can assert a state-law right to "receive an increased percentage [of MRP] to offset the military servicemember's subsequent application and receipt of disability benefits." *Youngbluth*, 6 A.3d at 686-87 (collecting cases). Moreover, many family-law decisions that implicate this question are likely not appealed, and there is no reliable method to survey the vast universe

of unreported divorce decrees and enforcement or modification orders in state family and trial courts.

It is not surprising that this issue arises frequently in the state courts. Nearly 2 million veterans received MRP in 2014. Office of the Actuary, U.S. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2014*, at 18 (2015) [hereinafter "DOD Report"]. That number has climbed by roughly 100,000 people every five years, confirming that the question presented here is of mounting importance. *Id.* at 17-18. More than one in four current military retirees has waived a portion of MRP in favor of disability compensation. *Id.* at 154. It follows that there are hundreds of thousands of veterans for whom the proper treatment of disability compensation in a divorce proceeding is, or may become, a pressing concern—as well as hundreds of thousands of military spouses to whom the issue is equally important.[7] Because every state has elected to treat MRP as divisible property pursuant to the USFSPA, the post-divorce conversion question, too, will arise in every state. *See Krapf*, 786 N.E.2d at 320 n.4 (reporting that, as of 2003, "every State appears to consider military retirement pay to be divisible marital property").

The question is also important to both military retirees and their former spouses because MRP—including the waived portion that can be divided after divorce in some states, but not others—is often a vital

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[7] *See* DOD Report at 240 (indicating that roughly half of military retirees have named a spouse as a beneficiary of survivor benefits).

source of economic support for the parties involved. *See, e.g.*, *Krapf*, 786 N.E.2d at 324 (noting that "the defendant's military pension was among [the couple's] most substantial marital assets"). The average VA waiver in 2014 was $332 per month—7.4% of the median household income in the United States. *See* DOD Report at 154; U.S. Census Bureau, *Income and Poverty in the United States: 2014*, at 5 (2015). Under the status quo, either many veterans' federal rights to this source of economic support are wrongfully being subordinated to state law, or, alternatively, many of their former spouses are wrongfully being denied this same source of support based on an errant over-reading of what federal law requires. One or the other of these descriptions is accurate—and either circumstance would warrant this Court's review.

III. This Case Offers An Ideal Vehicle For Resolving The Question Presented.

This case presents an excellent opportunity for the Court to resolve the question presented and provide the needed guidance to state courts. The Arizona Supreme Court squarely decided the question presented, and it cleanly separated this issue—which would independently have required a judgment in Petitioner's favor—from the logically distinct questions of state law. Pet. App. 5a-8a. The case also has three further characteristics that help to narrow the issues and ensure that this Court can address the question presented in its clearest possible form.

First, the family court in this case specifically ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard

for the disability." *Id.* at 28a. In so doing, it blatantly ordered Petitioner to "reimburse the ex-spouse for reducing his or her share of MRP." *Id.* at 8a. The decision below therefore presents the challenge to the scope of this Court's holding in *Mansell* in its purest form. By contrast, a more difficult question may be presented when a family court modifies a divorce decree to incorporate a material change in the parties' relevant economic situations, taking account of the veteran's waiver of MRP in favor of disability compensation as one contributor to that change. *See Kramer*, 567 N.W.2d at 113 (noting the possibility of that scenario); *Clauson*, 831 P.2d at 1264 (same). In such cases, ambiguities in the state court record concerning whether, or to what extent, the state court incorporated the veteran's MRP waiver into its analysis may present barriers to this Court's review. That difficulty is not present here because the court made no such holistic assessment, and it invoked no such authority. Rather, it simply ordered Petitioner to indemnify Respondent for the reduction in her income on a dollar-for-dollar basis. This case therefore unambiguously presents the question of whether such an order is preempted by federal law.

Second, some cases in this area present challenging questions about the validity of provisions incorporated in a divorce decree that *specifically require* a veteran to indemnify a former spouse for subsequent reductions in MRP. *See Youngbluth*, 6 A.3d at 688 (contrasting, on this basis, *Morgan v. Morgan*, 249 S.W.3d 226, 233 (Mo. Ct. App. 2008), and *In re Marriage of Strassner*, 895 S.W.2d 614, 616 (Mo. Ct. App. 1995)). For instance, in

Strassner, a divorce decree specifically prohibited a veteran from taking any action that would diminish his former spouse's MRP and required him to indemnify her for any loss she might suffer as a result of his breach of this duty. 895 S.W.2d at 616. Similarly, in *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), the court upheld an indemnification order because the settlement agreement specifically "guarantee[d] a steady monthly payment to a former spouse through an indemnification provision providing for alternative payments to compensate for a reduction in non-disability retirement benefits." *Id.* at 236-37.

Cases of that kind present an analytically distinct question: "whether a trial court's order prohibiting a spouse from waiving retirement benefits in the future or, in the event of breach, requiring the spouse to indemnify the other spouse for such waived benefits is a prohibited division of disability benefits." *Strassner*, 699 So. 2d at 617; *see also Billeck*, 777 So. 2d at 109 (noting the possible effect of an "indemnification provision"). Cases of that kind may also present ambiguities as to whether the divorce court was interpreting the divorce decree to contain such an explicit indemnification provision, or was merely applying a generally-applicable rule that a veteran who waives MRP after a divorce must indemnify his ex-spouse. Such ambiguities would be impediments to this Court's review: threshold questions as to the state-law basis for a divorce court's order would complicate this Court's analysis of whether the order is permissible under federal law.

Here, however, neither the analytically distinct legal question nor the ambiguity is presented. The Arizona Supreme Court went out of its way to hold that, as a matter of state law, the divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision. As the Arizona Supreme Court explained, "[b]ecause the decree did not require [Petitioner] to indemnify [Respondent] for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." Pet. App. 10a; *see id.* ("The 2014 Order modifies rather than enforces the dissolution decree's property disposition terms[.]"). This case therefore directly presents the question whether a state court may order reimbursement when previously divided MRP is diminished by a post-divorce disability waiver.

Finally, some courts have noted that the analysis of post-divorce waiver cases is complicated by the possibility of fraud on the part of the military retiree. *See, e.g., Youngbluth*, 6 A.3d at 691-95 (Johnson, J., concurring). When a veteran enters into a property settlement based on the division of MRP, and then promptly waives MRP in favor of disability compensation, that concern is understandable. *See id.* at 691-92 (noting that the military spouse in *Youngbluth* applied for disability compensation one month after the divorce decree became final). This case presents no such complication. Petitioner and Respondent divorced in 1991, and both received equal MRP payments from 1992 to 2005. App 2a-3a. Petitioner did not even submit his disability claim until thirteen years after the divorce. *Id.* at 24a.

Because this case presents the central question that defines the split of authority in its clearest form, stripped of any extraneous factual complications, it offers an unusually good vehicle and warrants this Court's review.

IV. The Decision Below Is Incorrect.

Finally, the Arizona Supreme Court's decision warrants this Court's review because it is wrong.

In *Mansell*, this Court held that under the USFSPA, the portion of a military retiree's MRP that is waived in favor of disability compensation may not be divided between the veteran and his or her former spouse. 490 U.S. at 583. As the Court explained, Congress intended the statute "both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees." *Id.* at 594. It did so by permitting state courts to divide military pensions in divorce, while specifically excluding the portion of a pension that a veteran must forgo to claim disability compensation, the division of which would amount to dividing the disability compensation itself. *See id.* at 588-89. The Court therefore held that this portion of a veteran's MRP remains subject to the rule of *McCarty*, which recognized it as an asset "that Congress intended . . . [to] reach the veteran and no one else." *Id.* at 584; *see McCarty*, 453 U.S. at 232 (characterizing MRP as a "personal entitlement" reserved for military retirees).

As a matter of economic substance, the situation presented in this case is simply indistinguishable from the facts of *Mansell*. As modified by the family court,

the divorce decree now directs Petitioner to pay his former spouse (a) half of his MRP, plus (b) half of an amount equivalent to the portion of MRP that was converted to disability compensation (call that sum a + b). Yet *Mansell* held that a divorce court may award an ex-spouse *only* MRP, and may *not* award an amount equivalent to the portion of MRP that was converted to disability compensation. Thus, *Mansell* held that an *initial* divorce decree could not, under federal law, award a sum equivalent to $a + b$. It cannot possibly be the law that *Mansell* merely prohibited such decrees as an *initial* matter, but permitted such decrees if they arose as a result of a divorce court's modification order.

It is no answer for Respondent to argue that she acquired a vested interest in receiving a monthly payment corresponding to half of Petitioner's pre-waiver MRP. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested interest. Under federal law, a divorce decree can divide MRP, but it cannot divide the portion of MRP that is waived in order to receive disability compensation. A state court cannot evade this federal rule by creating a state-law entitlement to the very assets that federal law prohibits state courts from dividing.

It is true that, under Petitioner's position, a veteran may unilaterally reduce the compensation of his former spouse by electing to take disability benefits. But precisely the same was true in *Mansell* as well. Indeed, the dissent in that case argued that as a result of the majority's holding, "former spouses like Gaye Mansell can, without their consent, be denied a fair

share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." 490 U.S. at 595 (O'Connor, J., dissenting). The majority, however, held that awarding disability compensation in a divorce decree was nonetheless preempted. Granting that "reading the statute literally may inflict economic harm on many former spouses," the majority nonetheless "decline[d] to misread the statute in order to reach a sympathetic result." *Id.* at 594 (majority opinion). Identical reasoning applies here. The USFSPA does not distinguish between disabilities discovered before and after a divorce. Under the USFSPA, Petitioner's disability compensation is an asset "that Congress intended . . . [to] reach the veteran and no one else." *Id.* at 584. He thus should be permitted to keep that asset, regardless of whether his former spouse's monthly payments will decrease as a result.[8]

The Arizona Supreme Court also reasoned that the trial court's 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

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[8] Indeed, even *Mansell* itself arose as a result of the veteran's post-divorce unilateral action. In *Mansell*, the veteran initially agreed to "a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 586. The litigation arose when Major Mansell asked that the divorce decree be modified four years after the divorce. *Id.*

[Respondent] from his disability pay." Pet. App. 7a; *see also Black*, 842 A.2d at 1285 (adopting the same distinction as the decision below); *Krapf*, 786 N.E.2d at 326 (same); *Johnson*, 37 S.W.3d at 898 (same); *Resare*, 908 A.2d at 1010 (same). But the Arizona Supreme Court's rationale that a court may order Petitioner to pay Respondent the precise *amount* of her putative interest in his disability compensation—so long as the court does not require him to pay "*from* his disability pay"—rests on an untenable economic and legal fiction. "Money is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010); *Sabri v. United States*, 541 U.S. 600, 606 (2004) (same). Moreover, the Court has already rejected this very distinction in analogous circumstances. In *Wissner v. Wissner*, 338 U.S. 655 (1950), a service member had named his parents, rather than his spouse, as the beneficiaries of a federal life insurance policy. After the service member died, a state court concluded that the insurance proceeds were community property under state law and therefore ordered the parents to pay half of the sum to the widow. *Id.* at 658. This Court held the order preempted by the federal statute authorizing a service member to choose his or her beneficiary. As the Court explained: "*Whether directed at the very money received from the Government or an equivalent amount*, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659 (emphasis added).

That rule applies equally here. There is no economic difference between an order requiring

Petitioner to turn over 50% of his disability compensation, and an order requiring Petitioner to turn over a sum of money identical to 50% of his disability compensation. Indeed, by the Arizona Supreme Court's rationale, if the decree in *Mansell* had stated that Mrs. Mansell was entitled to receive "Mr. Mansell's retirement pay, plus a sum of money identical to the sum of money that Mr. Mansell waived when he began collecting disability pay," such an order would have complied with federal law. It is exceedingly unlikely that this Court would have adopted such a meaningless distinction.

The Court explained in *Mansell* that "Congress chose the language that requires us to decide as we do, and Congress is free to change it." 490 U.S. at 594. Congress declined to do so, and has instead now left *Mansell*'s protection for a veteran's disability compensation in place for nearly three decades. The Arizona Supreme Court therefore erred by substituting its judgment for the balance struck by Congress in the USFSPA and heeded by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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