No. 15-1031

In the Supreme Court of the United States

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the parties divorced and their property was divided, petitioner agreed that, going forward, he would pay respondent 50% of his military retirement pay each month. Petitioner later waived a portion of his retirement pay in favor of veteran's disability benefits, resulting in a reduction of the monthly payments made to respondent. The family court ordered petitioner to indemnify respondent for the amount of that reduction. The question presented is as follows:

Whether the state court's order violated the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

In the Supreme Court of the United States

No. 15-1031

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. This case concerns two types of veterans' benefits: retirement pay and disability benefits. Members of the military who have served the requisite number of years may retire and receive retirement pay. 10 U.S.C. 3911 *et seq.* (U.S. Army); 10 U.S.C. 6321 *et seq.* (U.S. Navy and U.S. Marine Corps); 10 U.S.C. 8911 *et seq.* (U.S. Air Force). In addition, veterans who become partially or totally disabled as a result of their military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits

only to the extent that he or she waives a corresponding amount of retirement pay. 38 U.S.C. 5305. Such waivers are common because disability benefits, unlike retirement pay, are exempt from taxation. 38 U.S.C. 5301(a); see *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating a service member's retirement pay as community property divisible between a service member and a former spouse upon divorce. *Id.* at 232-235.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. 1408. The USFSPA authorizes a state court to "treat disposable retired pay * * * 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(c)(1). The statute defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled," less certain amounts, including the amount waived "in order to receive compensation under * * * title 38"—*i.e.*, the amount waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, this Court construed the USFSPA to foreclose state courts from treating as community property the portion of military retirement pay that a veteran has waived in order to receive disability benefits. See 490 U.S. at 588-589. The veteran in *Mansell* had waived a portion of his retirement pay, and had begun to receive disability benefits, before the parties were divorced. See *id.* at 585. The settlement agreement between the parties specifically provided for the

division of the former military member's "total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586.

While recognizing that "domestic relations are preeminently matters of state law," and that Congress "rarely intends to displace state authority in this area," the Court found that the case before it "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Mansell*, 490 U.S. at 587. The Court held that, under the USFSPA's "plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." *Id.* at 589 (emphases added). The Court concluded 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." *Id*. at 594-595.[1]

---

[1] The veteran in *Mansell* argued that the state court's division of his total retired pay violated not only the USFSPA, but also the anti-attachment provision applicable to veterans' disability benefits. Under that provision, disability benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. 5301(a)(1) (formerly 38 U.S.C. 3101(a) (1988)). In light of its holding that the USFSPA precludes the division of retirement pay waived in favor of disability benefits, the Court in *Mansell* found it unnecessary to address whether the anti-attachment provision would independently preclude such a divi-

2. In 1991, petitioner John Howell and respondent Sandra Howell divorced. Pet. App. 2a. "Pursuant to the parties' agreement," the decree of dissolution issued by the family court provided 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." *Id.* at 2a, 41a. The following year, petitioner retired from the Air Force, and the parties began to receive military retirement pay. *Id.* at 2a-3a. In 2005, petitioner qualified for a 20% disability rating that resulted from a service-connected shoulder injury, and he elected to waive a corresponding portion of his military retirement pay in order to receive disability benefits. *Id.* at 3a. That waiver had the effect of reducing respondent's monthly share of petitioner's retirement pay by approximately $125 per month. *Ibid.;* see *id.* at 33a.

Respondent asked the family court to enforce the decree's division of military retirement pay, and she sought an arrearage for the reduced amounts she had received. Pet. App. 31a-32a. Petitioner moved to dismiss on the basis of Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015), which was enacted in 2010 and provides that a court making a disposition of property shall not "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits." Pet. App. 31a-32a. The family court granted respondent's motion to enforce, holding that she had a vested property right in 50% of the original military retire-

---

sion. See 490 U.S. at 587 n.6. The anti-attachment provision is not at issue in this case.

ment-pay amount, and that petitioner had "violated the decree by unilaterally decreasing the retirement pay in favor of disability." *Id.* at 36a; see *id.* at 34a-36a.

3. The Court of Appeals of Arizona, Division 2, affirmed the family court's order on the ground that Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) does not apply to post-decree enforcement proceedings. Pet. App. 15a-21a.[2]

4. The Supreme Court of Arizona affirmed, albeit on different state-law grounds than the court of appeals. Pet. App. 1a-14a.

a. The Supreme Court of Arizona first addressed petitioner's contention that the USFSPA preempts the family court's indemnification order. The court held that federal law would prohibit the family court from dividing military retirement pay "that has been waived to obtain disability benefits either at the time of the decree or thereafter." Pet. App. 7a. The court explained, however, that although the family court's indemnification order had the effect of "diminish[ing] the overall income increase [petitioner] received when he elected [to waive retirement pay,]" the indemnification order did not treat petitioner's disability pay "as divisible property" and did not "order [petitioner] to rescind the waiver, or direct him to pay any amount to

---

[2] Petitioner did not raise a federal preemption defense in the trial court, raising this argument for the first time in the Court of Appeals of Arizona. Pet. App. 20a-21a. The court of appeals declined to consider the argument on the ground that it had been waived below. *Ibid.* The Supreme Court of Arizona, however, decided as a matter of discretion to entertain and resolve petitioner's argument that the USFSPA preempted the family court's indemnification order. *Id.* at 5a.

[respondent] from his disability pay." *Id.* at 7a-8a. The court concluded that "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a.

b. The Supreme Court of Arizona then addressed the question whether the family court's indemnification order was precluded by Section 25-318.01. Pet. App. 8a-14a. The court found that Section 25-318.01 applies to the modification, but not the enforcement, of existing dissolution decrees. *Id.* at 10a. The court held that the indemnification order in this case "modifies rather than enforces the dissolution decree's property disposition terms, and § 25-318.01 therefore applies," because the 1991 dissolution decree "did not require [petitioner] to indemnify [respondent] for her loss of [military retirement pay]." *Ibid.*

The Supreme Court of Arizona further held, however, that application of Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) to prevent modification of the divorce decree at issue here, which was entered before Section 25-318.01's enactment, would violate the due process provision of the Arizona Constitution, Ariz. Const. Art. 2, § 4, because it would deprive respondent of a vested property right. Pet. App. 11a-14a. The court explained that, although the 1991 divorce decree did not expressly require indemnification, its effect under Arizona law was to "create[] an immediate right to future payment of fifty percent of the [military retirement pay], including cost-of-living increases, earned during the marriage." *Id.* at 13a. The court stated that, under Arizona law, "[o]ne spouse cannot invoke a condition solely within his or

her control to defeat the community interest of the other spouse." *Ibid.* (citing *Koelsch* v. *Koelsch*, 713 P.2d 1234, 1239 (Ariz. 1986)). The court found that, "[b]y electing the VA waiver, [petitioner] did precisely that by essentially converting [respondent's military retirement pay] share," and that the family court's indemnification order "restored [respondent's] share of community assets." *Ibid.* The Supreme Court of Arizona concluded that "the family court correctly refused to apply § 25-318.01 to these facts" because "application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish [respondent's] vested property right in violation of the [Arizona constitution's] due process guarantee." *Id.* at 14a.

DISCUSSION

The Supreme Court of Arizona upheld a family-court order that required petitioner to indemnify respondent for the economic loss that respondent suffered when petitioner waived a portion of his military retirement pay in order to receive disability benefits. Petitioner contends (Pet. 33-37) that the court's decision violates the USFSPA, as interpreted by this Court in *Mansell* v. *Mansell*, 490 U.S. 581 (1989). He further asserts (Pet. 11-27) that state courts are divided on the question whether the USFSPA preempts state-court indemnification orders in these circumstances.

The Supreme Court of Arizona correctly rejected petitioner's contention that the USFSPA barred the family court from requiring petitioner to indemnify respondent. The USFSPA does not preclude a state court from ordering indemnification of a former spouse who, under the applicable state law, obtained a vested interest to military retirement pay and later

sought to avoid a reduction in her share due to the veteran's post-divorce waiver of retirement pay in favor of disability benefits. We agree with petitioner, however, that state supreme courts have expressed sufficiently divergent views on this issue that the Court's review is warranted to clarify the USFSPA's preemptive scope. The petition for a writ of certiorari therefore should be granted.

A. The USFSPA Does Not Preempt A State-Court Indemnification Order That Is Based On A Former Spouse's State-Law Vested Right To A Share Of A Veteran's Military Retirement Pay

At the time the parties in *Mansell* were divorced, the veteran spouse had already retired from the military and had waived a portion of his retirement pay in order to receive disability benefits. See 490 U.S. at 585. The divorce decree provided that the veteran would pay his ex-wife "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [the veteran] could receive disability." *Id.* at 586. The Court held that the USFSPA prohibits state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 595. The Court explained that the USFSPA authorizes a State to treat only "disposable retired * * * pay" as community property, while "specifically defin[ing]" that term to exclude retirement pay waived in favor of disability benefits. *Id.* at 588-589 (quoting 10 U.S.C. 1408(a)(4)(B) and (c)(1) (1988)).

In this case, by contrast, petitioner's waiver of retirement pay occurred well *after* the divorce decree and division of marital property. The parties were divorced in 1991; petitioner retired from the military

in 1992; and petitioner waived a portion of his retirement pay in 2005. See Pet. App. 2a-3a. Neither the original dissolution decree (which long predated petitioner's waiver of retirement pay and election of disability benefits) nor the 2014 indemnification order purported to treat petitioner's waived retirement pay as community property.

Rather, in requiring petitioner to indemnify respondent for the economic loss that respondent had suffered as a result of the waiver, the family court and the Supreme Court of Arizona both explained that the original dissolution decree had given respondent a vested right to 50% of petitioner's full retirement benefits; that petitioner had violated his state-law obligations by unilaterally decreasing the amount to which respondent was entitled; and that an indemnification order was an appropriate remedy for that breach. See Pet. App. 35a-37a (family-court decision); *id.* at 12a-14a (Supreme Court of Arizona decision). The USFSPA did not prohibit that remedy because the indemnification order "did not divide the [military retirement pay] subject to the VA waiver, order [petitioner] to rescind the waiver, or direct him to pay any amount to [respondent] from his disability pay." *Id.* at 7a. As the Supreme Court of Arizona recognized, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a.

Petitioner argues (Pet. 33-34) that the indemnification order in this case had substantially the same economic effect as an order that treated waived retirement pay as divisible community property, and

that the indemnification order must therefore be preempted as well. The *Mansell* Court recognized, however, that "domestic relations are preeminently matters of state law," that Congress "rarely intends to displace state authority in this area" when it passes general legislation, and that this Court therefore "will not find pre-emption absent evidence that it is 'positively required by direct enactment.'" 490 U.S. at 587 (quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), in turn quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). The Court concluded that *Mansell* "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *ibid.*, because the USFSPA directly addresses the authority of state courts to treat military retirement pay as community property and specifically excludes from that authorization "military retirement pay waived in order to receive veterans' disability payments," *id.* at 589. By contrast, the USFSPA does not "directly and specifically" address the interpretation and enforcement of property-settlement agreements that are entered *before* any waiver has occurred and that guarantee the former spouse a fixed proportion of military retirement pay.

There is also no indication that the money petitioner was ordered to pay would come out of his disability benefits. The family court did not "direct [petitioner] to pay any amount to [respondent] from his disability pay." Pet. App. 7a. And while "requiring [petitioner] to reimburse [respondent] diminishes the overall income increase he received when he elected the VA waiver," *id.* at 7a-8a, petitioner was still receiving approximately $610 per month in disposable retire-

ment pay and was ordered to pay respondent only an additional $127.50 per month (adjusted for cost of living). *Id.* at 3a.

B. State Courts Of Last Resort Have Divided On The Question Whether Indemnification Orders Like The One At Issue Here Are Preempted By The USFSPA

A number of state courts of last resort have addressed fact patterns similar to the circumstances here, where the divorce decree entitled a veteran's ex-spouse to a specified percentage of the veteran's military retirement pay, the veteran thereafter waived a portion of his retirement pay in order to obtain disability benefits, and the ex-spouse sought compensation for the economic loss she suffered as a result of that waiver. The highest courts of six States—Maine, Massachusetts, Nevada, Rhode Island, South Dakota, and Tennessee—have approved indemnification orders in those circumstances, rejecting arguments that such orders were preempted by the USFSPA.[3] The

---

[3] See, *e.g.*, *Black* v. *Black*, 842 A.2d 1280, 1285 (Me. 2004) ("[T]he USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay."); *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003) ("The judgment in this case does not divide the defendant's * * * disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * * , even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but

highest courts of two other States (Alaska and Florida) have held that, if the original divorce decree contains an indemnification provision or directs the veteran not to take unilateral action that reduces his spouse's share of retirement benefits, that provision is valid and enforceable through an indemnification order if the veteran subsequently waives military retirement pay.[4]

---

simply held [the veteran] to the terms of the original [property settlement agreement]."); *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (*Mansell* "does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to [the agreed-upon percentage of] a veteran's retirement entitlement[s]" if the veteran subsequently waives a portion of the entitlements in favor of disability pay.); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property.").

[4] See *Glover* v. *Ranney*, 314 P.3d 535, 543 (Alaska 2013) (holding that the trial court in entering a divorce decree "may expressly order [a service member] not to reduce his disposable retired pay and require [the service member] to indemnify [a former spouse] for any amounts by which her payments are reduced below the amount set on the date [an] amended qualified order is entered.") (brackets in original) (quoting *Young* v. *Lowery*, 221 P.3d 1006, 1012-1013 (Alaska 2009)); *Abernethy* v. *Fishkin*, 699 So. 2d 235, 240 (Fla. 1997) ("[W]hile federal law prohibits the division of disability benefits, it does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay" and includes an "indemnification provision[] ensuring such payments.").

Petitioner contends (Reply Br. 2-9, Pet. 16-27) that the Supreme Court of Arizona's decision conflicts with decisions of the supreme courts of Vermont (Pet. 17-18), Mississippi (Pet. 18-20), Alabama (Pet. 20-21); Alaska (Pet. 21-22), and Nebraska (Pet. 23-25). Only the Supreme Court of Mississippi has explicitly rejected the "vested rights" rationale for post-waiver indemnification that the courts below invoked in this case. Those decisions appear, however, to adopt a view of the USFSPA's preemptive scope that is significantly broader than that applied by the Supreme Court of Arizona in this case, and by other state courts of last resort. This Court's review is warranted in light of the disuniformity among state supreme courts and the frequency with which USFSPA preemption issues arise.[5]

1. In *Mallard* v. *Burkart*, 95 So. 3d 1264 (Miss. 2012), the divorce decree awarded the non-veteran spouse a specified percentage (40%) of the veteran's "disposable military retired pay," the veteran subsequently waived a portion of his retirement pay in order to receive disability benefits, and the non-veteran spouse sought relief in the trial court. *Id.* at 1266-1267. "[T]he chancellor held that [the veteran] unilaterally had breached the settlement by going on disability and denying any portion of the disability benefits to [his ex-wife]." *Id.* at 1267. The chancellor

[5] Petitioner also observes (Pet. 26 & n.6) that state intermediate appellate courts are divided on the propriety of indemnification orders in circumstances like those presented here. Such a division, standing alone, is not ordinarily a sufficient ground for this Court's review. See Sup. Ct. R. 10(b). The existence of these decisions, however, provides further evidence that the question presented here recurs with significant frequency.

further held that the ex-wife's "interest in [the veteran's] total retirement pay, including his disability benefits, had vested at the time of the entry of the final judgment of divorce." *Id.* at 1268. The chancellor ordered the veteran to pay his ex-wife "the difference between what [the ex-wife] would have received had [the veteran] not gone on disability and what she actually had received, plus six percent interest." *Ibid.*

The trial court in *Mallard* thus awarded indemnification to the non-veteran spouse on the same vested-rights rationale that the Supreme Court of Arizona relied on in this case. The Supreme Court of Mississippi reversed, holding that the trial court's order was in substance an impermissible attempt to order distribution of the veteran's disability benefits. See *Mallard*, 95 So. 3d at 1268-1273. In so holding, the court relied unambiguously on the preemptive force of the USFSPA. See *id.* at 1268 (framing the dispositive issue as "whether federal law preempts state law"); *id.* at 1273 (reversing the chancellor's indemnification order on the ground that "[f]ederal law preempts state law"). The decision in *Mallard* thus squarely conflicts with the Supreme Court of Arizona's ruling in this case.

2. *Youngbluth* v. *Youngbluth*, 6 A.3d 677 (Vt. 2010), involved a similar sequence of events, in which the division-of-property agreement granted the wife a 19.81% share of her veteran husband's military "retirement pay." *Id.* at 679. The husband subsequently waived a portion of his military retirement pay in favor of disability benefits, thus reducing the monthly amount his former wife received. *Ibid.* At the wife's request, the trial court then increased the wife's share of her husband's retirement pay "from 19.81% to

22.4%, based upon expert testimony that 22.4% of the smaller number would equate to the roughly $700 monthly payment that the trial court had in mind when it decided the initial allocation." *Id.* at 680.

The Supreme Court of Vermont held that this increase was impermissible. The court explained that, "[g]iven that *Mansell* held that state courts are without power to divide disability benefits in a property division order," the original division-of-property order's reference to "retirement pay" "cannot be read to have granted wife an interest in husband's disability benefits." *Youngbluth*, 6 A.3d at 683. In holding that the trial court could not increase the wife's percentage of the veteran's retirement pay in order to offset the economic effect of the waiver, the Supreme Court of Vermont relied in part on principles of USFSPA preemption, see *id.* at 684-685 & n.2, 687, and in part on state-law decisions emphasizing the need for finality of judgments, see *id.* at 686.

The Supreme Court of Vermont did not suggest that, but for the USFSPA's preemptive effect, Vermont law would have barred the veteran from taking unilateral action that reduced the value of his former wife's 19.81% share. The difference in outcomes between this case and *Youngbluth* therefore might plausibly be attributed to the Supreme Court of Arizona's reliance on a state-law rule that may have no analogue in the law of Vermont. Compare Pet. App. 13a (holding that, under Arizona law, "[o]ne spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse"), with *Youngbluth*, 6 A.3d at 686 (suggesting that a similar argument "ignore[s] the critical point that finality is about ending litigation," and stating that the

veteran husband in that case "was well within his rights to apply for disability benefits"). But the opinion in *Youngbluth* also suggests that the USFSPA would have preempted the application of any such state-law rule in the specific context of a post-divorce waiver of military retirement pay. Thus, the Supreme Court of Vermont stated that, under *Mansell*, non-veteran former spouses "can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because [the military service-member] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.* at 684 (brackets in original) (quoting *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting)). And the Court's reliance on federal preemption principles is underscored by its statement that, "[r]ather than joining those courts that have found creative solutions around *Mansell*, we recognize that * * * a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts." *Id.* at 684-685 (citation and internal quotation marks omitted).

3. In *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000), the veteran had agreed in the divorce settlement to pay his ex-wife alimony in the amount of "his monthly U.S. Army retirement check." *Id.* at 106 (citation omitted). Ten years later, the veteran waived a portion of his retirement pay in favor of disability benefits. *Id.* at 107. The family court "ordered the husband to pay the wife 'all of his military retirement pay received as a result of his United States Army military service from whatever source, be it defined as military retirement pay or VA disability.'" *Id.* at 109.

The Supreme Court of Alabama held that the family court's order was inconsistent with the USFSPA. *Billeck*, 777 So. 2d at 108-109. The court stated:

> The *Mansell* decision and [Section] 1408 clearly manifest the intent of the federal law that a retiree's veteran's disability benefits be protected from division or assignment. Alabama courts and other state courts have circumvented the mandates of the *Mansell* decision and [Section] 1408 by allowing trial courts to *consider* veteran's disability benefits in awarding alimony.

Id. at 108. The trial court's order in *Billeck*, which expressly directed the veteran to pay over his disability benefits (rather than simply to indemnify his ex-wife for the economic loss caused by his partial waiver of military retirement pay), would be improper even under the Supreme Court of Arizona's view of USFSPA preemption. See Pet. App. 7a ("We agree that the family court cannot divide [military retirement pay] that has been waived to obtain disability benefits either at the time of the decree or thereafter."). But the Supreme Court of Alabama's determination that a veteran's receipt of disability benefits cannot even be *considered* in determining an appropriate alimony award reflects a particularly expansive view of USFSPA preemption.

4. In *Clauson* v. *Clauson*, 831 P.2d 1257 (Alaska 1992), divorcing spouses entered into a stipulated property settlement under which the wife was to receive 13/40 of her husband's military pension. *Id.* at 1259. The veteran subsequently "elected to waive all of his military retirement pension in order to receive disability benefits." *Ibid.* Based on that change in circumstances, his ex-wife sought a modification of the

divorce decree, and the trial court ordered her ex-husband to pay her the same amount ($168 per month) that she had been receiving before the waiver occurred. See *id.* at 1259-1260.

The Supreme Court of Alaska held that, although the USFSPA precludes state courts from dividing veterans' disability benefits between divorced spouses, see *Clauson*, 831 P.2d at 1262, it does not preclude state courts from taking a veteran's waiver of retirement pay into account in determining what division of property or level of spousal support is appropriate, see *id.* at 1262-1264. The court further held, however, that it would be "unacceptable" for "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," an approach that the court viewed as substantially equivalent to dividing the disability benefits themselves. *Id.* at 1264. That reasoning seems inconsistent with the indemnification remedy approved by the Supreme Court of Arizona in this case, the purpose and effect of which was to place respondent in the same economic position she would have occupied if no waiver of military retirement pay had occurred.

More recently, however, the Supreme Court of Alaska upheld a trial-court order, entered as part of a divorce decree, that required a veteran to indemnify his former spouse "for any subsequent unilateral actions to decrease the total monthly pension payout amounts," including a waiver of retirement pay. *Glover* v. *Ranney*, 314 P.3d 535, 543 (2013); see note 4, *supra*. The court thus indicated that a veteran who waives military retirement pay may be required to compensate his former spouse for the precise amount

of her resulting economic loss, so long as such an obligation was made part of the original divorce decree. See notes 7-9, *infra*.

5. In *Kramer* v. *Kramer*, 567 N.W.2d 100 (Neb. 1997), the divorce decree awarded the wife a percentage of the veteran-husband's military pension. *Id.* at 105. Several years later, the husband waived a portion of his military retirement pay in order to receive disability benefits, *ibid.*, and his ex-wife sought increased alimony to compensate for the reduction of her share of the military retirement pay, *id.* at 106.

The Supreme Court of Nebraska held that the husband's "waiver of retirement pension benefits" effected a "substantial and material change in the relative economic circumstances of the parties which would justify an increase in the amount of alimony which the husband is obligated to pay the wife in the absence of evidence that her income from other sources has increased." *Kramer*, 567 N.W.2d at 113.[6] Relying on the Supreme Court of Alaska's decision in *Clauson*, however, the court stated that its "holding does not permit the district court to treat service-connected disability benefits as divisible marital property in form or substance." *Ibid.* That caveat appears to endorse the *Clauson* court's view that, although a trial court may consider the economic effects of a veteran's waiver in deciding whether to modify a divorce decree, it may not "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." *Id.* at 111 (quoting *Clauson*, 831 P.2d at 1264).

---

[6] Accord *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991) (trial court may "t[ake] note of the [veteran spouse's] disability benefits" in making an award of alimony).

6. State supreme courts have thus adopted a variety of responses to the question whether a disposition-of-property order issued at the time of divorce may subsequently be modified to account for the economic impact of a veteran's post-divorce waiver of military retirement pay and election of disability benefits. The Supreme Court of Alabama has held that such a waiver cannot even be considered in determining whether modification of the decree is appropriate. Some courts have overturned or cautioned against modification orders that would restore to the non-veteran spouse the precise level of monthly payments that she had received before the waiver occurred.[7] And several other courts, including the Supreme Court of Arizona in this case, have approved indemnification remedies that are specifically designed to place the non-veteran spouse in the economic position she would have occupied but for the veteran's waiver of military retirement pay.[8]

---

[7] Some state courts that have disapproved the use of after-the-fact indemnification-type remedies have reserved the question whether the USFSPA preemption analysis might be different if the trial court had included an indemnification provision as part of the original divorce decree. See *Youngbluth*, 6 A.3d at 687, 689; see also *Billeck*, 777 So. 2d at 109; *Mallard*, 95 So. 3d at 1272 (quoting *Youngbluth*).

[8] In Arizona, the issue presented has been resolved by Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) for divorce decrees entered after that statute's enactment date in 2010. That provision prohibits, as a matter of state law, a division of property agreement that would "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits." Ariz. Rev. Stat. Ann. § 25-318.01(2) (Supp. 2015). Accordingly, the specific reasoning of the Supreme Court of Arizona is of diminishing prospective importance. The question

Although those divergent approaches may result in part from variations among the property-law and family-law regimes of different States, they appear largely to reflect conflicting views of the USFSPA's preemptive scope. This Court's review is warranted to clarify the extent to which disposition-of-property and spousal-support requirements may be modified to address the economic consequences of post-divorce waivers of military retirement pay. To be sure, state courts have employed a variety of mechanisms to address the economic impact on non-veteran spouses of veterans' post-divorce waivers of retirement pay, and the Court's decision in this case might not definitively resolve the legality of all such mechanisms. But the basic problem in this case recurs with sufficient frequency, and the method by which the courts below addressed it is a sufficiently common one, that this Court's resolution of the question presented here would provide helpful guidance concerning the scope of USFSPA preemption.[9]

---

presented, however, remains one of recurring importance nationwide.

[9] In *Padot* v. *Padot*, 891 So. 2d 1079 (Fla. Dist. Ct. App. 2004), cert. denied, 549 U.S. 1110 (2007), the Court invited the Solicitor General to file a brief expressing the views of the United States, and the government recommended that the petition be denied. In *Padot*, the trial court had issued a Supplemental Order, in connection with the initial disposition of marital property, directing that "neither party shall take any action to reduce the other party's interest in the * * * retire[ment] pay." *Id.* at 1081. When the veteran spouse subsequently waived a portion of his military retirement pay in order to receive disability benefits, the trial court enforced the Supplemental Order by directing the veteran to pay his former wife the monthly amount she would have received if no waiver had occurred. See *ibid.* The state intermediate appellate court held that the USFSPA did not preclude that relief. See

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

OCTOBER 2016

---

id. at 1081-1084. The government's amicus brief in this Court argued that this holding was correct and that no conflict among state courts of last resort existed on the question. See U.S. Br. at 7-16, *Padot* v. *Padot*, 549 U.S. 1110 (2007) (No. 05-1076).

The government's view that a writ of certiorari should be granted in this case is not inconsistent with the analysis of the pertinent case law in our *Padot* brief. The decisions of the Supreme Courts of Vermont and Mississippi in *Youngbluth* and *Mallard* post-date the filing of the government's brief in *Padot*. In addition, state supreme courts that have disapproved the use of after-the-fact indemnification-type remedies have reserved the question whether inclusion of an indemnification provision as part of the original divorce decree might alter the preemption analysis. See note 7, *supra*. We are aware of no state-court decision that has construed the USFSPA to preclude enforcement of a *Padot*-like provision entered at the time of a divorce decree. See Pet. 31 (distinguishing cases involving such a provision from the question presented here). By contrast, state supreme courts have reached inconsistent conclusions on the question whether indemnification may be ordered in response to a veteran's post-divorce waiver of retirement pay if the original decree contained no such provision.