

In The  
**Supreme Court of the United States**

—◆—  
ROBERT MERRILL,

*Petitioner,*

v.

DIANE MERRILL,

*Respondent.*

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

—◆—  
**BRIEF IN OPPOSITION**  
—◆—

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## **RESTATEMENT OF QUESTION PRESENTED**

Should this Court grant certiorari where:

The Supreme Court of Arizona ruled that the due process guarantee in article 2, section 4 of the Arizona constitution prohibits retroactive application of A.R.S. § 25-318.01 to impair rights that vested in a dissolution decree that was entered before the statute's effective date?

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## OPINIONS BELOW

The decision of the Arizona Court of Appeals in *Merrill v. Merrill*, 230 Ariz. 369, 284 P.3d 880 (Ct. App. 2012), was not listed in the Petition. The decision is referred to herein as “*Merrill I.*”



## STATUTES INVOLVED

### **A.R.S. § 25-318.01 (2010). Military retirement benefits; disability related waiver**

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

1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 38 United States Code chapter 11.
2. Indemnify the veteran’s spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retirement or retainer pay related to receipt of the disability benefits.
3. Award any other income or property of the veteran to the veteran’s spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retirement or retainer pay related to receipt of the disability benefits.

**A.R.S. § 25-318.01 (2014). Military retirement benefits; disability related waiver**

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

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

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

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

Historical Note: "This act applies retroactively to from and after July 28, 2010."



**INTRODUCTION**

The Petition should be denied because the Arizona Supreme Court relied on independent and adequate state law grounds when it decided that a state law cannot be applied retroactively to impair vested

property rights awarded in a dissolution decree that was entered before the statute's effective date. The independent and adequate state-law grounds expressly relied on by the Arizona Supreme Court include the due process protections in article 2, section 4 of the Arizona constitution.

The Petition should be denied because it asks this Court to address an issue that was not raised before the Arizona Supreme Court, nor raised by Robert Merrill in his still-pending state court appeal. Jurisdiction is lacking under 28 U.S.C. § 1257(a).

Through the Uniformed Services Former Spouse Protection Act, Congress has vested in state legislatures and state courts the division and related enforcement of military retired pay. This Court should deny the Petition's invitation to modify clear congressional instruction on military retired pay division.



### **STATEMENT OF THE CASE**

Diane Merrill filed a post-decree enforcement action to seek redress for impairment of her awarded military retired pay caused by Robert Merrill's election of Combat Related Special Compensation under 10 U.S.C. § 1414. While the enforcement action was pending, the Arizona legislature enacted A.R.S. § 25-318.01 (2010). The trial court concluded that the statute served to bar her reimbursement claim. Diane Merrill appealed, and the Arizona Court of Appeals reversed the trial court as set forth in the *Merrill I*



opinion. *Merrill v. Merrill*, 230 Ariz. 369, 284 P.3d 880 (Ct. App. 2012)

On remand, the trial court granted relief to Diane Merrill and entered judgment against Robert Merrill, who then filed his own appeal. In 2014, while Robert Merrill's appeal was pending, the Arizona legislature amended A.R.S. § 25-318.01 (2014), to include a reference to Combat Related Special Compensation, and expressly made the statute retroactive to July 28, 2010. The Arizona Court of Appeals, relying on the addition of Combat Related Special Compensation to the statute, ruled that the amended statute barred Diane Merrill's reimbursement claim. Diane Merrill filed a Petition for Review in the Arizona Supreme Court, which was granted as to the following issues:

- (1) Whether the Court of Appeals erred in concluding that A.R.S. § 25-318.01 (2014) applies because Wife sought to modify the decree; and
- (2) If so, does the statute retroactively impair Wife's vested rights.

The Arizona Supreme Court concluded that the Arizona Court of Appeals had erred in its statutory interpretation and had erroneously applied a 2010 statute to impair property rights that had vested seven years prior to the statute's effective date. The Arizona Supreme Court based its ruling on state law

including article 2, section 4 of the Arizona constitution.



## **REASONS TO DENY THE PETITION**

### **I. THE ARIZONA SUPREME COURT DECISION INTERPRETS A STATE STATUTE AND IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.**

The Arizona Supreme Court reversed the Arizona Court of Appeals' interpretation of A.R.S. § 25-318.01 (2014), ruling that a statute effective in 2010 cannot be applied to impair vested rights awarded in a 1993 dissolution decree. The case was remanded to the Arizona Court of Appeals for further proceedings on Robert Merrill's appeal from trial court judgments entered against him.

A state supreme court's interpretation of state law is binding on this Court. *O'Brien v. Skinner*, 414 U.S. 1032 (1974). Review in this Court is precluded when independent and adequate state law grounds support the decision. *California v. Freeman*, 488 U.S. 1311 (1989). Given the existence of independent and adequate state law grounds for the decision, Petitioner's request for a stay should be denied. *Id.* This Court must examine the precise grounds on which the opinion is based without considering the broader opinion. *Black v. Cutter Labs*, 351 U.S. 292 (1956).

The Arizona Supreme Court addressed the question whether the Arizona Court of Appeals had erred

in applying a state law effective in 2010, to impair property rights that vested in 1993. The Arizona Supreme Court held that the vested property rights could not be so impaired, and remanded the case. The grounds on which the opinion rests include the Arizona constitution, article 2, section 4: “No person shall be deprived of life, liberty, or property without due process of law.” Arizona constitution, article 2, section 4.

A statute may not be applied retroactively if that application impairs a substantive or vested right, while retroactive application is recognized for procedural changes. *Aranda v. Industrial Commission of Arizona*, 11 P.3d 1006, 198 Ariz. 467 (2000); *S&R Properties v. Maricopa County*, 875 P.2d 150, 178 Ariz. 491 (Ct. App. 1993). Here, the Arizona legislature expressly limited the reach of A.R.S. § 25-318.01 (2014), to July 28, 2010. (An issue for another case is whether the statute can be applied retroactively to rights that vested between 2010 and 2014). The property rights at issue in this case vested upon entry of the dissolution decree in 1993 and cannot be affected by a 2010 state law.

The Arizona Supreme Court decision was based on adequate and independent state law grounds. There was no consideration of federal law required to interpret and decide the retroactive reach of the state law. The Petition attempts to raise a federal question by ignoring the state-law issues directly addressed by the Arizona Supreme Court. Only state law issues were presented in the Arizona Supreme Court, and

the decision rests on adequate and independent state law grounds.

## **II. THE PETITION'S REQUEST TO EXPAND *MANSELL* WAS NOT RAISED IN THE ARIZONA SUPREME COURT; JURISDICTION UNDER 28 U.S.C. § 1257 IS LACKING.**

The Petition presents the question whether “the Arizona Supreme Court err[ed] in circumventing *Mansell* under the guise that post-divorce waivers of retired pay are different than pre-divorce waivers?” This question was not presented to the Arizona Supreme Court, nor raised in Robert Merrill’s still-pending appeal.

The jurisdiction of this Court arises from the power to review “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.” 28 U.S.C. § 1257(a). An issue that is not raised in state court cannot be asserted for the first time in a petition for writ of certiorari to this Court. *Howell v. Mississippi*, 543 U.S. 440, 443-446 (2005).

The Arizona Supreme Court was not asked to decide, and it did not decide, whether *Mansell*’s prohibition against dividing federal disability payments at divorce should be expanded to prohibit post-divorce property reimbursement claims. The differences between pre- and post-decree military retired pay waivers are

real, and not a “guise” as the Petition argues. Post-decree waivers can interfere with the direct collection of vested property rights, while pre-decree waivers result in disability benefits that are the separate property of the disabled party. *Mansell v. Mansell*, 490 U.S. 210 (1989).

Robert Merrill challenged the judgments entered against him based on whether the trial court had conducted an appropriate examination of eligible income or assets. In his appeal, he acknowledges that a state court can order reimbursement for waived military retirement payments from non-exempt income and assets, citing *Danielson v. Evans*, 201 Ariz. 401, 36 P.3d 749 (App. 2001). His argument is that the judgment entered against him impairs exempt assets.

Accordingly, the pending state court appeal has not raised the issue that *Mansell* should be expanded to prohibit reimbursement claims created by post-decree waivers of military retired pay. To the contrary, Robert Merrill’s appellate brief acknowledges that there are differences between pre- and post-divorce waivers, and that a court can order reimbursement from non-exempt income. The issues raised in his appeal concern the adequacy of the state-court examination of exempt assets. Having failed to assert the question in state court, he is precluded from raising the issue before this Court.

### **III. CONGRESS HAS GRANTED STATES THE AUTHORITY TO DIVIDE AND ENFORCE MILITARY RETIRED PAY AND ONLY CONGRESS CAN AMEND THAT AUTHORITY.**

With the passage of the Uniformed Services Former Spouse Protection Act, Congress provided authority to the individual states on whether and how to divide disposable retired pay at dissolution of marriage.

Authority for Court To Treat Retired Pay as Property of the Member and Spouse. –

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(c)(1).

The Uniformed Services Former Spouse Protection Act similarly grants authority for enforcement remedies to the states:

Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph

(4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6).

Arizona is among those states that treat disposable retired pay as property of the member and his or her spouse. *DeGryse v. DeGryse*, 135 Ariz. 335, 338, 661 P.2d 185, 188 (1983). Arizona also recognizes that awards of military retired pay that vest before July 28, 2010, may not be impaired by post-decree waivers of military retired pay in favor of Veterans' disability payments under Title 38, United States Code, or in favor of Combat Related Special Compensation elections under Title 10, United States Code. A.R.S. § 25-318.01 (2014).

The award of, and enforcement of, disposable retired pay divisions should remain with the states, as Congress expressly provided for in the Uniformed Services Former Spouse Protection Act. Any changes to this authority must come from an act of Congress and should not be imposed judicially.

Other states that have confronted post-decree military waiver issues regularly resolve them on state-law procedural and substantive law. In *Clauson*

*v. Clauson*, 831 P.2d 1257 (Alaska 1992), although the Supreme Court of Alaska reversed the specific reimbursement method that had been ordered, it ruled that “the Supreme Court’s interpretation of the USFSPA [in *Mansell*] does not require our courts to entirely disregard this source of post-divorce income in effecting an equitable distribution of the parties’ assets.” *Clauson*, 831 P.2d at 1258. The post-decree waiver in *Clauson* by the retiree affected the parties’ relative financial positions, and the court ruled that the former spouse was entitled to a redistribution of the marital estate. *Id.*

In *Kramer v. Kramer*, 252 Neb. 526 (1997), the Nebraska Supreme Court held that while a Nebraska court may not divide disability benefits at divorce, post-decree “it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits.” *Kramer*, 252 Neb. at 539.

In *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010), the Supreme Court of Vermont expressed its “narrow” ruling that post decree, a court may not increase, in an enforcement action, a decree’s specific percentage award of military retired pay in response to a disability waiver reduction. *Youngbluth*, 6 A.3d at 690. The court made a point to “express no view on whether a former spouse in another case could



receive an increased share of a military retired servicemember's disposable retirement benefits either through an indemnity provision in the original property division order or through meeting the standard in Rule 60(b) for relief from judgment." *Youngbluth*, 6 A.3d at 690-691.

The Petition asserts that these three state supreme court decisions interpret *Mansell* to preclude indemnification for post-decree waivers. To the contrary, all three decisions recognize methods that can uphold reimbursement claims, and are highlighted here as errors in law in the Petition.

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### CONCLUSION

The Petition for Writ of Certiorari should be denied.

The request for stay should be denied.

Respectfully submitted,

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