

No. 15-1139

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IN THE  
**Supreme Court of the United States**

ROBERT MERRILL,  
*Petitioner,*

v.

DIANE MERRILL,  
*Respondent.*

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

**PETITIONER'S REPLY BRIEF**

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- I. **This Court has Jurisdiction to hear this Case as the issue is one of federal preemption.**
  - A. **The Arizona Supreme Court's *Merrill* decision is based on federal law.**

In her Brief in Opposition (the “BIO”), Respondent argues that this Court lacks jurisdiction because the Arizona Supreme Court based the *Merrill* decision on adequate and independent state law grounds. BIO, p. 5. To support her argument, Respondent cites to the Arizona Supreme Court’s analysis of vested rights according to Arizona law. Respondent, however, ignores the Arizona Supreme Court’s analysis of federal preemption under 10 U.S.C. § 1408. Despite Respondent’s insistence that the Arizona Supreme Court based its decision on adequate and independent state law grounds, a full analysis of *Merrill* shows that it was also based on federal preemption, which this Court has jurisdiction to hear. Respondent’s argument ignores the purpose of federal preemption, which does not allow state grounds to supersede federal law.

This Court will not review state court judgments that rest on adequate and independent state grounds. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court’s power over state courts’ judgments is limited to correcting them to the extent that they incorrectly adjudge federal rights. *See id.* at 125 – 6. If the grounds for the decision in question are ambiguous, however, this Court may review the decision if: (1) the decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law; and (2) the adequacy and

independence of any possible state law ground is unclear from the face of the decision. *See Michigan v. Long*, 463 U.S. 1032, 1038 – 42 (1983).

It is important to point out that the *Merrill* case has a sister case: *In re the Marriage of Howell*, 238 Ariz. 407 (2015) (*Howell* is currently pending before this Court as No. 15-1031). These cases involved similar facts and the same law. In fact, the cases were argued at the Arizona Supreme Court two weeks apart. The Arizona Supreme Court issued its decision in *Howell* prior to its decision in *Merrill*. In *Howell*, the Arizona Supreme Court addressed various federal law issues such as the application of *Mansell v. Mansell*, 490 U.S. 581 (1989) and federal preemption. This is important because the Arizona Supreme Court adopted the well-developed analysis of federal law from *Howell* in *Merrill* to dismiss Petitioner’s federal preemption claim. Specifically, in *Merrill*, the Arizona Supreme Court stated:

*We recently held that neither federal law nor § 25–318.01 precludes the family court from ordering a retired veteran to indemnify an ex-spouse for a reduction in the latter’s share of MRP caused by a post-decree waiver of MRP made to obtain Department of Veterans Affairs (“VA”) disability benefits pursuant to 38 U.S.C. chapter 11. In re Marriage of Howell, 238 Ariz. 407, 412, 361 P.3d 936, 941 (2015).*

(Emphasis added).

Thus, while the *Merrill* decision does not include the lengthy analysis of the federal preemption claim as was done in *Howell*, its adoption of *Howell* illustrates that part of the *Merrill* decision was based on federal preemption law.

Further, the state statute at issue in *Merrill*—A.R.S. § 25-318.01 (2015)—includes references to federal statutes, such as 10 U.S.C. § 1413a and 38 United States Code chapter 11. The Arizona Supreme Court analyzed A.R.S. § 25-318.01 (2015)’s application in conjunction with the federal statutes to reach its conclusion that federal preemption did not apply. Doing so illustrates that the Arizona Supreme Court’s legal basis in both *Howell* and *Merrill* was, at the very least, state law interwoven with federal law.

This Court in *Long* stated that,

Accordingly, when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain

statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

*Long*, 463 U.S. at 1041. Because the Arizona Supreme Court specifically relied on its federal preemption analysis from *Howell* in *Merrill*, this Court can hear this case.

**B. Petitioner properly presented his claim regarding the post-decree application of *Mansell* at the Arizona Supreme Court.**

Petitioner would like to first point out that he never argued for an expansion of *Mansell*. Rather, Petitioner argued for the correct application of *Mansell* and its progeny regarding the preclusion of a court's ability to divide military disability benefits.

Respondent's argument regarding this Court's lack of jurisdiction according to 28 U.S.C. § 1257(a) is incorrect because Petitioner properly raised the issues currently before this Court at the Arizona Supreme Court. *See* Petitioner's Response to Respondent's Petition for Review to the Arizona Supreme Court, pp. 13 – 14. The parties and Arizona Supreme Court also extensively discussed the proper application of *Mansell* at the oral argument held regarding Petitioner's Petition for Review. Thus, Respondent's argument ignores the briefing and oral argument held at the Arizona Supreme Court and, therefore, is without merit.

**II. This Court should grant review to provide the nation with clarity on the application of *Mansell* for post-divorce waivers of MRP.**

Respondent's brief misses the point of the issue presented to this Court. Specifically, Respondent's assertion that Congress empowered the states to determine how to divide *military retired pay* is unavailing because Petitioner does not dispute that issue. Rather, Petitioner seeks this Court's review of Arizona's—and other states'—decision to divide *military disability benefits* after a post-decree waiver of military retired pay in favor of military disability benefits. Respondent's argument ignores the true issue before this court and the complexity of the relevant statutes and case law.

Respondent correctly notes that the Uniformed Services Former Spouse Protection Act authorizes the individual states to decide how to divide *military retirement pay*. See 10 U.S.C. § 1408(c)(1), (e)(6). This authority, however, does not extend into military disability benefits. This Court in *Mansell* specifically stated that the Act does not grant the states the authority to “treat as property divisible upon divorce military retirement pay that has been waived to receive veterans’ disability benefits.” *Mansell v. Mansell*, 490 U.S. at 595. Contrary to Respondent's assertions, the timing of the waiver does not affect *Mansell's* holding that limits states' power to divide military disability benefits. Rather, it illustrates this Court's interpretation of the power granted to the states by the Act. Congress echoed this general prohibition on



allowing the division of military disability benefits in the language of 10 U.S.C. § 1413a. This section created Combat Related Special Compensation and unambiguously states that this disability benefit is “*not retired pay*”. (Emphasis added).

Even with the absence of language allowing for the division of military disability benefits and the unambiguous prohibition on dividing military disability found in *Mansell* and 10 U.S.C. § 1413a, states have found a way to divide military disability. These active attempts to circumvent *Mansell* and 10 U.S.C. § 1413a require this Court to review the issue and present the states with clarity on how to properly deal with the post-decree waiver of military retirement pay in favor of military disability benefits.

## CONCLUSION

This Court has jurisdiction to hear this case. The Arizona Supreme Court’s decision was not based solely on an adequate and independent state ground as the issue is one of federal preemption. The decision was interwoven with federal law, thereby presenting a federal question for this Court’s review according to 28 U.S.C. § 1331. Additionally, Petitioner properly raised the issues currently before this Court at the Arizona Supreme Court, granting this Court jurisdiction according to 28 U.S.C. § 1257. Finally, this Court should grant review because there is a legitimate need for this Court to provide the states with clarity on how to proceed when a

veteran waives military retirement pay in favor of  
military disability benefits, post-divorce.

Respectfully submitted,

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