No. 18-519

In the Supreme Court of the United States

JOSEPH A. JENNINGS, III,

Petitioner,

v.

SUSAN W. JENNINGS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Franklin County

BRIEF IN OPPOSITION

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THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

The appeal of this case is not, as alleged by the Petitioner, based upon the issue whether the state court has disregarded federal law pertaining to the treatment of Petitioner's veteran's benefits, but instead this appeal is simply a manifestation of the Petitioner's failure to distinguish between the concepts of property division and alimony in a simple divorce case. The decision of the state court in this case was based upon adequate and independent state law grounds while the Court indicated it was fully mindful of the potential federal questions concerning veteran's benefits.

In order to attempt to bring his claim before the U.S. Supreme Court, Petitioner would have this Court believe that federal law preempts *all* application of state law with respect to *all* matters concerning *any* aspect of veteran's benefits. This is simply not an accurate interpretation of the law. The Petitioner ignores the fact that in this case, the state court properly applied state law while following all federal law provisions. A state court is not prevented from applying state law where it does not contravene federal law. In this case, there is no conflict between state law and federal law – the Petitioner's issue was simply that the state court found that the Petitioner was obligated to pay alimony. However, since the highest court in the state denied review, the only way to challenge this order was to claim a federal question. Since the Petitioner is a recipient of veteran's benefits, he now claims that the state court was precluded from ordering alimony. The Petitioner ignores the fact that there

were more than adequate funds from which to pay the alimony without inclusion of any of the veteran's benefits in question. Therefore, the issue alleged by the Petitioner is never even reached in the matter presented by this case. There is no federal preemption of a state court's ability to award alimony, as alimony is clearly within the providence of the state courts.

The ruling of the state court in this case did not conflict with the decision of a federal court of appeals or with another state court of last resort on an important issue of federal law, nor does it conflict with (but rather it conforms with) the prior rulings of the U.S. Supreme Court. Finally, this case does not address a question of federal law that is so important that the Supreme Court needs to address it, even absent a conflict. There is simply no reason for the U.S. Supreme Court to grant certiorari.

STATEMENT OF THE CASE

The parties were married on December 26, 1982. No children were born as issue of the marriage. On November 19, 2014, after a marriage of almost 32 years, Respondent filed for divorce. Prior to trial, the parties entered into a written agreement allocating all the property and debts of the parties. This agreement specifically allocated all the benefits Petitioner was entitled to receive as a veteran (whether by reason of his disability or otherwise) to the Petitioner. After several days of trial, the trial court issued its decision on the four remaining issues of the divorce: spousal support, trial expenses, court costs, and attorney fees. In awarding alimony in favor of the Respondent, the trial court specifically found, and the state Court of Appeals confirmed, that the trial court acted properly

when it included all income of Applicant, from all sources, including Petitioner's non-taxable disability benefits, in its consideration and determination of what constituted a proper alimony award. Nevertheless, it was noted that that the Petitioner had adequate funds that were wholly unrelated to his veterans' disability benefits from which he could pay the alimony awarded.

The Ohio Appellate Court specifically noted that while federal law does not allow the state court to award of a portion of Petitioner's veteran's disability benefit as a property division, the trial court did not attempt such a division in this case. In addition, the Ohio Court of Appeals found that the mere consideration of the Petitioner's veteran's benefits in determining an award of alimony (spousal support) pursuant to Ohio statute, O.R.C. § 3105.18(C)(1)(a), did not impinge upon federal law.

Finally, it should be of note that the extensive recitation by the Petitioner in his Statement of the Case of the various colloquies from the trial court transcript, merely clarifies and confirms that this appeal is about Petitioner's dissatisfaction with the trial court's decision and his attempt to correct the alleged "error in judgment" of the lower court when it awarded alimony to the Respondent – not in the misapplication of federal law pertaining to veteran's benefits.

REASONS FOR DENYING THE PETITION

Petitioner states in its Petition for a Writ of Certiorari that a "service connected disability awarded under 10 U.S.C. § 1408(A)(4)(B)" may not "lawfully be awarded to a divorcing spouse for spousal support." First while this statement is overbroad, even if it were an accurate statement of the law, it is irrelevant to the case at bar. The reality is that no portion of the Petitioner's serviceman's disability was *awarded* by the state court for any reason. There was no division of the Petitioner's disability benefits as a property award. There was no interest in the Petitioner's disability benefits awarded to the Respondent. The trial court only made an alimony award and in doing so, it specifically found that there were adequate funds, without inclusion of any of the veterans' disability benefits, from which the award of alimony could be paid. There was no attempted attachment of the Petitioner's disability benefits in order to pay the alimony award. Therefore, it is clear that no portion of the Petitioner's federal disability benefits were awarded or impacted by the State Court for any reason.

The Petitioner cites several cases which he claims support his position that a state court is prohibited from considering a veteran' disability benefits in making any spousal support award to the spouse. However, the cases cited by the Petitioner do not support that claim as these cases all deal with an attempt to divide veterans' disability benefits as a *property division*. In the case before the Court, the parties themselves entered into stipulations regarding the division of the property of the marriage, including the Petitioner's veteran's disability benefits. More

importantly, all of the Petitioner's veteran's disability benefits were fully allocated to the Petitioner. Therefore, the cases cited by Petitioner have no relevance to this case.

In addition to the inapplicable cases cited by the Petitioner, the Petitioner also attempts to suggest that the Federal Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, prevents all consideration of veteran's disability benefits by a state court for any reason. This is simply not accurate. If this were the case, then there would be no reason for the USFSPA, at 10 U.S.C. § 1408(A)(2)(B) to specifically provide differentiation between court orders that deal with (i) child support and (ii) alimony as opposed to court orders that provide for (iii) division of property (which the cases cited by Petitioner all pertain to).

On the other hand, in a case that is relevant to the case at bar, the U.S. Supreme Court in *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L.Ed.2d 599 (1987), dealt with a disabled serviceman who was charged with contempt by state court for his failure to pay the child support that had been ordered. In that case, unlike the case at bar, the veterans' disability benefits were essentially the serviceman's only source of income, hence the child support would, by necessity, have to be paid from his veteran's disability benefits. The U.S. Supreme Court held that it was not a violation of federal law that the serviceman was compelled to pay the child support, and then specifically noted that the disability benefits payable to the serviceman were not just for the benefit of the serviceman but were for his dependents as well.

Petitioner also claims in his application for Writ of Certiorari that titles 10 U.S.C. § 1408(a)(4)(B) and 38 U.S.C. § 3101(a) preempt the authority of state courts to divide veteran's disability benefits based upon the U.S. Supreme Court decision in *Mansell v. Mansell*, 490 U.S. 581 (1989). However, as noted earlier, the U.S. Supreme Court has previously answered this claim. The Court indicated that it is appropriate to include veteran's disability benefit receipts as income or resources for the purpose of establishing a support obligation. See *Rose*, supra. In renewing the legislative history applicable to what is now 38 U.S.C. § 5301(a) (formerly 38 U.S.C. § 3101(a)), the Court in *Rose* held that veteran's disability benefits were never intended to be exclusively for the subsistence of the beneficiary. Rather, Congress intended such benefits "to support not only the veteran, but the veteran's family as well." Recognizing an exception to the application of [§ 5301(a)'s] prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits." *Rose*, 481 U.S. at 634, 107 S. Ct. at 2038, 95 L.Ed.2d at 613. The Court thus held that "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Enforcement Act of Title 42" preempt the authority of state courts to enforce a child support order against a veteran, even where the veteran's income is composed of veteran's disability benefits that would necessarily be used to pay child support. There is no reason to differentiate between payment of child support and alimony as both are for the support of the Veteran's family.

Petitioner also asserts that the recent U.S. Supreme Court case of *Howell v. Howell*, 137 S. Ct. 1400 (2017), supports his claim that federal law preempts all consideration by state court of anything touching on veteran's disability benefits. *Howell* made no such declaration, but instead merely stated that a state court could not divide, as property division, the disability-related waived portion of military retirement pay. The Court in *Howell* found that this case was essentially the same as the previous decision in *Mansell*, with the difference being that in *Mansell*, the waiver (of retirement interests) took place before the divorce proceeding; while in *Howell*, the waiver took place years after the divorce. Nevertheless, the decision in *Howell* is not relevant to the case at bar as it addressed the law with respect to the division of property and not alimony as in the case here.

However, while the decision itself is not relevant, Justice Breyer, writing in the Howell decision, expressly addressed the issue of pre-emption with respect to spousal support, finding pre-emption was not applicable in such cases, when he stated that:

> "We recognize, as we recognized in Mansell, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U.S., at 594. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value ***when it calculates or recalculates the need for spousal support.*** See Rose v. Rose, 481

> U.S. 619, 630-634, and n. 6 (1987); 10 U.S.C. §1408(e)(6)." (Emphasis added).

In making this statement, Justice Breyer is acknowledging that the pre-emption of state courts with respect to a property division that attempt to reduce the effect of a waiver of military retirement pay does not extend to pre-empt the state courts from all consideration of veteran's disability income – particularly with respect to the calculation or recalculation of spousal support. Considering that is all the trial court in the case at bar did, i.e. calculate and award spousal support, Justice Breyer's recognition that the state court is not pre-empted from including disability benefits in the calculation or recalculation of spousal support fully supports the trial court's determination in this case. The basis of the appeal in this case was that the state trial court was pre-empted from including the military disability benefit of the Defendant-Appellant in its spousal support determination. Petitioner's position seems to be that the consideration by the state court of all *income of the parties, from all sources,* in compliance with the language of O.R.C. § 3105.18(C)(1)(a), is pre-empted by federal law, at least with respect to veteran's disability benefits – even though there is no federal statute or case law that requires such a pre-emption. It is clear that the federal pre-emption does not extend that far.

Finally, it is significant that state law historically controls domestic relations issues. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979). It should thus be noted that not only the Ohio courts but also the high courts of numerous states have previously

found that federal pre-emption does not preclude veteran's disability benefits from being included (within the definition of "all income") in the calculation of child support or spousal support.

Lastly, the burden on the Petitioner is great as there is a presumption against preemption. The alleged preemption must be clear and explicit. Here, the USFSPA does not expressly preempt the application of all state law with respect to veteran's disability benefits, and *Mansell* did not hold that federal law preempts all state law unless a federal statute confers power on state divorce courts. Instead, *Mansell* stands for the narrower rule that the USFSPA does not grant states the power to treat the military retirement pay that a veteran waives to receive disability benefits as property divisible upon divorce. Thus, *Mansell* leaves room for the Court to apply other aspects of domestic relations law, including the rule that regulation of such relations is primarily left to the states.

CONCLUSION

The cases cited by Petitioner, including the recent Minnesota case of *Berberich v. Mattson*, Case No. A18-1535, and the U.S. Supreme Court cases of *Mansell* and *Howell,* all deal with the award of military retirement (or the waiver of retirement in favor of disability benefits) as part of a property division. There was no such property division made in this case.

Congress has passed no law stating that veterans' disability benefits may not be considered as income when assessing the stream of income available in the determination of appropriate alimony. Neither the

USFSPA, the federal courts nor the U.S. Supreme Court have held that veteran's disability benefits cannot be considered as income in determining support cases. To the contrary, multiple state courts as well as the U.S. Supreme Court have recognized that Congress intended veterans' disability benefits to be used, in part, for the support of veterans' dependents.

The Ohio statute, O.R.C. § 3105.18, provides the legal framework for the consideration and determination of appropriate spousal support. All income, from all sources, is to be included in such support determinations. The trial court did not attempt to divide the Petitioner's Veteran's benefits. It did not attempt to attach or withhold the spousal support award from the Petitioner's veteran's benefits. There is no violation of federal law. The U.S. Supreme Court should decline jurisdiction and the decision of the trial court, as affirmed by the state Appellate Court, should be left undisturbed.

Respectfully submitted,

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