No. 23-999

In the Supreme Court of the United States

MICHAEL B. YOURKO,
Petitioner,

v.

LEE ANN B. YOURKO,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. This Court held in Mansell v. Mansell, 490 U.S. 581, 586 n.5 (1989), that the doctrine of *res judicata* "is a matter of state law over which we have no jurisdiction." There, as here, state domestic relations law did not permit a collateral attack on a final, unappealed divorce decree. The question presented is whether 38 U.S.C. § 5301 extends to the point of reversing this Court's previous ruling.

2. The second question presented to this Court is not properly before this Court because it is based on false "facts" and a misstatement of the law of the Commonwealth of Virginia. Here, the Supreme Court of Virginia held that, citing to *Owen v. Owen*, 14 Va. App. 623, 627 (1992) (quoting *Holmes v. Holmes*, 7 Va. App. 472, 485, 375 S.E.2d 387,395 (1988), "the source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets." As provided below, Mr. Yourko has a substantial income other than his disability payments. His income actually exceeds $123,000 per year, $75,000 of which is from non-military benefits, and he is capable of paying the contracted amount of $949.50 per month from funds other than his disability award. As such, this case does not implicate the question presented by the Petitioner.

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STATEMENT OF THE CASE

Respondent disagrees with how Petitioner has chosen to describe the factual background of the matter. Taking all reasonable inferences of fact (and not legal conclusions) in a light most favorable to Petitioner (*see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), the following comments and clarifications are presented.

Petitioner's characterization of the questions presented does not accurately address the issues posed, argued, and decided in the proceedings below, but instead, based on a false rendition of the facts, asks this Court to overturn its precedent in place since at least 1989.

Additionally, by misrepresenting the facts of this case, the Petitioner attempts to have a question posed to this Court that was never part of the case below, is therefore not part of the record, does not apply to the present case, and is not addressed at all in the decision of the Supreme Court of Virginia.

The Petitioner's citation to "military powers" and 38 U.S.C. § 5301 are correct in that no state court can use "any legal or equitable process whatever" to dispossess a veteran of these benefits. We also agree that *Howell v. Howell*, 581 U.S. 214, 222 (2017), identified that Congress has given a grant for the states to divide only disposable retired pay, while they can recognize receipt of disability payments, as they can *all* separate property income streams, in calculating spousal support and child support.

Petitioner's claims that veterans' disability benefits are appropriated by Congress for the purpose of maintenance and support of disabled veterans under its Article I enumerated powers, without any grant to the states to "consider" these monies as an available asset in any state court proceeding. However, that is an overstatement amounting to a falsehood of both fact and law.

Congress does appropriate the disability funds, but does so for the support of the veteran *and his family*. *See Rose v. Rose*, 481 U.S. 619, 630 (1987). It is for this reason that Congress has authorized the partition of disability funds for the purpose of paying child or spousal support, and why all income from all sources is considered by state courts when making awards of child and spousal support. *See In re Marriage of Stanton*, 190 Cal. App. 4th 547, 118 Ca. Rptr. 3d 249 (Ct. App. 2010) (applying *Rose*).

Petitioner goes on at length concerning the supremacy clause and cases stating that federal law trumps state law in various contexts. There is no argument in this realm, but there is no such issue presented in this case. The state court has not and will not divide benefits that are not divisible and it did not and will not divert funds based on any community property theory. It simply enforced a contract that one party would pay another a specified sum from whatever assets he chose, as contracted for in a stipulated, unappealed order.

Petitioner argues (at page 9) that allowing a state court to divide disability benefits would be a disincentive to the service or affect the services' ability to promote the service or retain personnel. That

concept was at the core of both *McCarty v. McCarty*, 453 U.S. 210, 212–13 (1981) and *Mansell v. Mansell*, 490 U.S. 581, 584 (1989), but the issue is not implicated here.

The state court did not divide any disability benefits of Mr. Yourko or order him to invade those benefits to pay Ms. Yourko any sums. Mr. Yourko entered into a contract in which he agreed to pay Ms. Yourko a sum certain equal to her percentage share of his military benefits. This was a stipulated agreement included in a stipulated Military Pension Division Order. The stipulated contract and stipulated order were not appealed.

What the Yourkos did is exactly what this Court instructed divorcing parties to do. Specifically, in *Howell* this Court held:

> We recognize, as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. *See* 490 U.S. 594, 109 S. Ct. 2023. 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.

Howell, 581 U.S. at 222 (citations omitted).

The Yourkos did exactly what this Court suggested by "taking into account" the contingency that their estimation of Husband's retired pay may be incorrect due to Husband's disability, and agreeing that if that occurred, Mr. Yourko would pay an agreed sum to Ms. Yourko anyway.

If Mr. Yourko had bought a car, and took out a loan to pay for it, then taken disability, he would not be heard to say that this conversion of retired pay into disability pay allows him to retroactively void his agreement to pay for the car. And if he asserted that of all the people in the world who he might have contracted to make future payments, the only contractual promise voided by his actions are the ones he made to his ex-wife, he asserts a facial violation of equal protection of the law.

Specifically, this Court has held that "[t]he Equal Protection Clause of [the 14th] amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike." *Eisenstadt v. Baird*, 405 U.S. 438, 446–47 (1972) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). This Court held in *Eisenstadt* that courts may not treat single persons differently than married persons. This is exactly what the Petition is asking this Court to do; he asserts that since Ms. Yourko was once married to Mr. Yourko, his agreement to her under contract should not be held to

be a valid contract whereas a contract to make payments to any other person *not* once married to him would be enforceable.

It is telling to note that nowhere does the Petition address this Court's holding in *Mansell*, 490 U.S. at 586 n.5, that the issue of *res judicata* is strictly a state law issue that is outside the jurisdiction of this Court. As in *Howell*, that footnote in *Mansell* "determines the outcome here." *Howell*, 591 U.S. at 214.

McCarty and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. *See* 2 Turner, Equitable Distribution of Property (4th ed. 2023), § 6:6, pp. 54–55; Turner, State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update, 16 Divorcing Litig. 76, 80 (2004).

Footnote 5 of the *Mansell* decision, holding that the issue of *res judicata* is outside the jurisdiction of federal courts, is a holding that there is no federal question on the issue, and a finding of a lack of substantial federal question is an adjudication on the merits carrying the same precedential value as a full opinion. *See Sheldon v. Sheldon*, 456 U.S. 941 (1982); Turner, § 6:6, p. 49 (citing *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (emphasis omitted)).

Petitioner is aware that there is no federal question here, which is why he attempts (at pages 1, 10, 22, 23, 24, and 36) to misstate the Supreme Court of Virginia decision as holding that "state doctrines of judicial convenience like res judicata" could act to "circumvent the Supremacy Clause." Petitioner even

asserts that the Supreme Court of Virginia "explicitly ruled that the agreement Petitioner had entered into was enforceable and that *res judicata* prevents him from challenging it." No such conclusion was reached or stated by the Supreme Court of Virginia, which specifically and expressly held in footnote 4 of its opinion that "we do not consider whether the doctrine of res judicata has any bearing on the present case."[1]

Instead, the Supreme Court of Virginia determined that neither *Mansell* nor *Howell* were applicable to this case, because there is a difference between a judicial imposition of a remedy of indemnification and enforcement of a final, unappealed, contract.[2] Because Mr. Yourko's obligations arise from voluntary contract rather than any judicially imposed remedy, state law contract principals apply to its validity and enforcement.

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[1] The apparent lack of Petitioner's awareness of the content of the Supreme Court of Virginia's holding suggests that Petitioner is merely attempting to shoehorn his case in with a group of other cases pending before this Court or recently denied certiorari on the same issue, whose petitioners are all represented by the same counsel of record. *See, e.g. Foster v. Foster*, 509 Mich. 109; 983 N.W. 2d 373 (2022), *cert. denied*, 217 L. Ed. 2d 15 (2023); *Boutte v. Boutte*, 403 So. 3d 467, 472 (La. App. 2020), *state cert. denied* July 8, 2020, *cert. denied*, 142 S. Ct. 220 (2021); *Martin v. Martin*, 498 P. 3d 1289 (Nev. 2021), (No. 23-605 July 17, 2023). Petitioner's misrepresentation to this Court of the basic holdings of the decision from which he appeals is troubling at best, both substantively and ethically.

[2] See, e.g., 2 Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK, A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 691 (3d ed. 2019) ("[i]t's one thing to argue about a judge's power to require . . . a duty to indemnify, but another matter entirely to require a litigant to perform what he has promised in a contract.").

REASONS FOR DENYING CERTIORARI

I. THIS CASE DOES NOT PRESENT THE ISSUES RAISED BY PETITIONER

Petitioner argues that current federal law and the cases that have been decided concerning those laws hold that the Supreme Court of Virginia illegitimately divided disability benefits. He goes on at length purporting to give this Court a history lesson on the decisions in *Rose*, *McCarty*, and *Mansell*, but does not address footnote 5 in *Mansell* at all. That footnote decides this case.

Specifically, it says:

> Whether the doctrine of *res judicata*, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.

Mansell, 490 U.S. at 586 n.5.

The procedural law in Virginia is the same as that in California; an unappealed decision becomes the "law of the case" and is enforceable as a matter of *res judicata*, or "claim preclusion". *Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006).

Under the doctrine of claim preclusion, a final judgement forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Taylor v.*

Sturgell, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)).

II. NO COURT HAS COMPELLED MR. YOURKO TO USE HIS DISABILITY BENEFITS TO SATISFY THE AGREEMENT

Though we do not think it makes a difference where Mr. Yourko obtains the money he has agreed to pay Ms. Yourko, the disability benefits are not Mr. Yourko's only source of income. The Supreme Court of Virginia commented in footnote 7 of its decision that Mr. Yourko's gross monthly income is $10,266. Excluding his military benefits of $4,009, Mr. Yourko has $6,257 from which to pay Ms. Yourko his contractual obligation of $949.50, meaning that he can clearly pay Ms. Yourko without touching any of his military benefits whatsoever, much less his disability pay.

The contract itself does not dictate the source of Mr. Yourko's payments. As the record clearly indicates that Mr. Yourko's income far exceeds the contractually obligated amount owed to Ms. Yourko, the contract cannot be interpreted as requiring Mr. Yourko to use any of his military disability pay to pay Ms. Yourko. As such, Mr. Yourko "is free to satisfy his obligations to his former wife by using other available assets." *Yourko v. Yourko*, 302 Va. 149, 161, 884 S.E.2d 799, 805 (2023) (citing *Owen v. Owen*, 14 Va. App. 623, 627, 419 S.E.2d 268, 270 (1992) and quoting *Holmes v. Holmes*, 7 Va. App. 472, 485, 375 S.E.2d 387, 395 (1988)).

38 U.S.C. § 5301 is not implicated; nothing prevents the disability funds "from actually reaching" Mr. Yourko; the questing is whether their receipt means he can selectively disregard his contracts to make payments to others because he might possibly choose to use some of those dollars to do so.

Both *Shelton* and *Mansell II* (*In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (Ct. App. 1989), *cert. denied*, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990)), established that the holding in *Mansell I* that *res judicata* of unappealed divorce decrees remains good law. Applied here, it means that Mr. Yourko is free to satisfy his agreed upon obligations with any funds he has available.

III. THIS PETITION IS PREMATURE AS TO THIS ISSUE

Even if the issue of collateral attacks on final, unappealed divorce decrees being barred under state law res judicata was not certain (as it is), and even if there was some legitimacy to Mr. Yourko's claim of being forced to use disability funds to satisfy his contractual obligations (and there is not), this case would not be appropriate for granting certiorari.

To date there are four state supreme court cases relating to this subject, all of which have held that a stipulated contract to make payments to a former spouse are enforceable. *See Yourko*, 884 S.E.2d at 799 (2023); *Martin v. Martin*, 520 P.3d 813, 819 (Nev. 2022); *Foster v. Foster*, 983 N.W.2d 373 (Mich. 2022); and *Jones v. Jones*, 505 P.3d 224 (Alaska 2022).

That leaves 46 states to reach the issue. It is possible that some state might reach a different conclusion, setting up conflicting opinions as to which this Court might wish to weigh in and resolve. For the moment, however, there is a very thin body of decisions to reference in deciding what issues to reach and how they should be approached.

If this Court elects to revisit the issues presented by these cases, it should do so only after there is enough of a body of state court decisions on the matter that the applicable issues will have been fully fleshed out in the various factual backgrounds in which they might arise.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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Dated: May 23, 2024