

No. 25-1349

IN THE
Supreme Court of the United States

ROXANE M. MARSCHNER,

Petitioner,

v.

RICHARD A. MARSCHNER,

Respondent.

On Petition for a Writ of Certiorari
to the North Dakota Supreme Court

BRIEF IN OPPOSITION

Leah Sonsteli Warner
VOGEL LAW FIRM
218 Northern Pacific Ave.
Fargo, ND 58102
(701) 237-6938
lwarner@vogellaw.com

Johanna P. Clyborne
Counsel of Record
BREKKE, CLYBORNE &
RIBICH, LLC
287 Marschall Road
Suite 201
Shakopee, MN 55379
(952)402-9410
jclyborne@bcrlawyers.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Legal Background	2
B. Factual & Procedural Background.....	6
REASONS FOR DENYING THE WRIT	11
I. This case is a poor vehicle for answering the question presented.....	11
II. There is no split worthy of this Court's attention.....	15
III. The decision below was correct.	17
IV. The question presented is not important enough to warrant certiorari.....	23
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

<i>Foster v. Foster</i> , 949 N.W.2d 102 (Mich. 2020), cert. denied, 144 S. Ct. 79 (2023).....	16, 17
<i>Foster v. Foster</i> , 983 N.W.2d 373 (Mich. 2022).....	22
<i>Howell v. Howell</i> , 581 U.S. 214 (2017)...	2, 5, 9, 14-15, 18-19
<i>In re Marriage of Tronsrue</i> , 272 N.E.3d 84 (Ill. 2025), cert. denied, 146 S. Ct. 1473 (2026).....	11, 15, 22
<i>In re Marriage of Weiser</i> , 14 Wash. App. 2d 888 (Wash. Ct. App. 2020).....	22
<i>Jones v. Jones</i> , 505 P.3d 224 (Alaska 2022).....	15, 22
<i>Mansell v. Mansell</i> , 490 U.S. 581 (1989).....	4-5, 18-19, 21-22
<i>Martin v. Martin</i> , 520 P.3d 813 (Nev. 2022), cert. denied, 145 S. Ct. 135 (2024).....	15-17, 22-23
<i>McCarty v. McCarty</i> , 453 U.S. 210 (1981).....	2-4
<i>Parish v. Parish</i> , 991 N.W.2d 1 (Neb. 2023).....	22
<i>Yourko v. Yourko</i> , 884 S.E.2d 799 (Va. 2023), cert. denied, 145 S. Ct. 137 (2024).....	15, 18, 22-23

STATUTES

10 U.S.C. § 1201.....	2
10 U.S.C. §§ 1201–1204.....	2

10 U.S.C. § 1401.....	2
10 U.S.C. § 1408.....	4, 16, 19-20
§ 1408(a)(2).....	20
§ 1408(a)(4).....	18
§ 1408(a)(4)(B).....	4, 18
§ 1408(a)(4)(C).....	4, 18
§ 1408(c).....	4, 20
§ 1408(c)(1).....	20
10 U.S.C. § 1413a.....	3, 16
§ 1413a(g).....	16
38 U.S.C. § 1110.....	3
38 U.S.C. § 1131.....	3
38 U.S.C. § 1155.....	3
38 U.S.C. § 5301.....	3, 20
§ 5301(a)(1).....	3, 20
§ 5301(a)(3)(A).....	20
38 U.S.C. § 5304-5305.....	3
N.D. Cent. Code § 14-05-24.....	10, 22

§ 14-05-24(3).....	22
--------------------	----

RULES

N.D. R. Civ. P. 60(b)(5).....	9
-------------------------------	---

Sup. Ct. R. 10(b).....	15
------------------------	----

OTHER AUTHORITIES

Petition for a Writ of Certiorari at i–ii, <i>Tronsrue v.</i> <i>Tronsrue</i> , No. 25-500 (Oct. 20, 2025).....	24
--	----

INTRODUCTION

The petition purports to present the question whether the Uniformed Services Former Spouses Protection Act (USFSPA) “require[s] state courts to refuse enforcement of indemnification provisions in divorce settlement agreements.” Pet. i. But this case doesn’t tee up any part of that question. Most notably, the court order at issue in this case does not enforce a provision in a “divorce settlement agreement[.]” Instead, it entirely undoes the settlement agreement, relieving petitioner from the judgment and imposing a new court order. Whatever the answer to the question presented, then, it won’t resolve *this* case, where no court was attempting to enforce the terms the parties purportedly contracted for.

Even spotting petitioner that the question presented is properly teed up in this case, it isn’t certworthy. Petitioner claims that there is an unanswered question in the case law about provisions that are “contracted-for,” rather than “court-imposed.” Pet. 27. But this Court has *already* considered a “contracted-for” provision that sees a veteran giving up disability pay in a divorce: *Mansell v. Mansell*, 490 U.S. 581 (1989), held that state courts could not enforce a settlement agreement—that is, a “contracted-for” provision—that divided a veteran’s disability pay.

The other criteria for certiorari aren’t met, either. There’s no split warranting this Court’s attention. The question presented is of limited practical importance. And this Court has repeatedly and recently denied petitions raising the question presented. This petition for certiorari, too, should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. As part of this Nation's compact with those who have borne the costs of military service, Congress has long extended veterans a variety of disability and retirement benefits. *See McCarty v. McCarty*, 453 U.S. 210, 228 (1981). Four types of benefits are relevant to this case:

- Longevity retirement pay: The federal government "has long provided retirement pay to those veterans who have retired from the Armed Forces after serving, e.g., 20 years or more." *Howell v. Howell*, 581 U.S. 214, 216 (2017).
- Chapter 61 Military Medical Retirement: Under Chapter 61 of Title 10, Service members found unfit for duty due to a physical disability incurred in the line of duty are forced to retire. To qualify, a member needs a service-connected disability rating of at least 30%, or 20-plus years of service. When a service member qualifies for a Chapter 61 Military Medical Retirement, their monthly retired pay is determined by taking the higher of two methods: either a disability formula or a longevity formula (10 U.S.C. §§ 1201, 1401). The disability percentage, referred to as Method A or the Disability Formula, retired pay is computed by multiplying the Department of Defense disability percentage by the pay base. The years of active service, referred to as Method B or the Longevity Formula. The amount paid under the methods above will be computed by the Defense Finance and Accounting Service using the method most beneficial to the servicemember.
- VA disability pay: Veterans who experience a service-related disability can apply for disability

pay from the Veterans Administration. 38 U.S.C. §§ 1110, 1131, 1155. In general (and as relevant to this case), under 38 U.S.C. §§ 5304–05, retired servicemembers generally may not receive both their retired pay and VA disability compensation and must waive a portion of their military retired pay (whether longevity retirement pay, Chapter 61 disability retired pay, or another type) to receive disability pay. Because retirement pay is taxable, while disability pay is not, veterans typically choose to waive retirement pay to receive VA disability pay. 38 U.S.C. § 5301(a)(1). The two common kinds of disability benefits are Concurrent Disability Retired Pay (CRDP) under 10 U.S.C. § 1414 and Combat-Related Specialty Compensation (CRSC) under 10 U.S.C. § 1413a.

- **Combat-Related Specialty Compensation (CRSC):** Retired servicemembers who establish that their disability is attributable to a combat-related event may receive additional compensation up to the amount of waived retired pay. 10 U.S.C. § 1413a.
- **Concurrent Retirement and Disability Pay (CRDP):** It partially restores the retired pay (whether longevity retirement pay or Chapter 61 disability retired pay) that a veteran must forego in order to receive VA disability pay. *Id.*; *see* Pet. App. 37a, 38a.

2. In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court addressed the disposition of veterans' benefits in divorce proceedings. It held that longevity retirement pay was not divisible property in divorce because Congress intended that pay as a "personal entitlement payable to the retired member himself as long as he lives." *Id.* at 232. Under the Supremacy Clause, Congress's decision preempted any contrary state court decisions. *Id.* Allowing state courts free rein to divide up retirement pay created

“[t]he potential for disruption of military personnel management” and undermined the Government’s “substantial interest in attracting and retaining personnel for the military forces.” *Id.* at 234.

Congress passed the Uniformed Services Former Spouses’ Protection Act (USFSPA) to partly affirm and partly overturn that opinion. Most relevant to this case is a provision entitled “Payment of retired or retainer pay in compliance with court orders.” 10 U.S.C. § 1408. That provision partly overturned *McCarty*. It mandated that, going forward, “disposable retired pay” was divisible in divorce proceedings. 10 U.S.C. § 1408(c). But Congress carefully circumscribed what “disposable retirement pay” was divisible. It excluded from “disposable retirement pay” both Chapter 61 disability retired pay and VA disability pay. *See* 10 U.S.C. §§ 1408(a)(4)(B)-(C).

3. As relevant here, this Court has twice interpreted the USFSPA.

In *Mansell v. Mansell*, 490 U.S. 581 (1989), two divorcing spouses entered into. “a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total retirement pay, including that portion of his retirement pay waived so that Major Mansell could receive disability benefits”—that is, VA disability pay. *Id.* at 585-86. Major Mansell later moved to modify the divorce decree, arguing that federal law precluded the “provision that required him to share his total retirement pay with Mrs. Mansell.” *Id.* at 586.

This Court agreed with Major Mansell. “[P]re-existing federal law, as construed by this Court” in *McCarty* placed veterans’ benefits—and military retirement pay in particular—out of reach of state community property law. *Mansell*, 490 U.S. at 588. The USFSPA “affirmatively grants state courts the power to divide military retirement pay, yet its language is both precise and limited” and

“specifically . . . exclude[s], *inter alia*, military retirement pay waived in order to receive veterans’ disability payments.” *Id.* at 589. “[U]nder the Act’s plain and precise language,” courts can treat some military retirement pay as community property, divisible in divorce proceedings, but not VA disability pay.

Undeterred, state courts devised a workaround after *Mansell*. Rather than directly dividing up VA disability pay, as the divorce decree in *Mansell* had done, they would require the veteran to indemnify an ex-spouse. In other words, the state court would divide the longevity retirement pay as permitted by the statute. But the state court would also provide that if the veteran did not receive longevity retirement pay, and instead received Chapter 61 disability retirement pay, VA disability pay, or the like, the veteran would pay his or her former spouse an amount equal to the lost longevity pay.

In *Howell v. Howell*, 581 U.S. 214 (2017), this Court rejected that approach, too. The State could not evade federal preemption simply by “describing the family court order as an order requiring [the veteran] to ‘reimburse’ or ‘indemnify’ [his ex-spouse], rather than an order that divides property.” *Id.* at 222. That difference was “semantic and nothing more”—the indemnification agreements sought to “restore the amount previously awarded as community property.” *Id.*

This Court recognized “the hardship that congressional pre-emptions can sometimes work on divorcing spouses.” *Id.* at 222. But it believed the solution was to allow a family court, when first valuing a family’s assets, to take account of the contingency that some military retirement pay might be waived. *Id.*

B. Factual & Procedural Background

1. Respondent Richard A. Marschner served for more than 35 years in the North Dakota Army National Guard. Pet. App. 2a; DA Form 199 at 5. During that time, he served his country both domestically (for instance, assisting with flood response) and abroad (for instance, he was deployed to combat zones in Kosovo and Iraq). Informal Physical Evaluation Board Proceedings, DA Form 199, at 1 (Mar. 25, 2021) (R. Exh. 58); IPEB Rebuttal Mem. at 1 (Mar. 11, 2021) (R. Exh. 57).

Decades of military service took a toll on Richard. He developed debilitating back and knee issues from “extremely long hours on his feet,” “trench warfare, long marches, low crawling to assault objectives,” “cramming in a HUMMV,” “carrying load-bearing equipment, and ruck marching.” IPEB Rebuttal Mem. at 1 (R. Exh. 57); Impartial Medical Review Mem. at 1–2 (Dec. 1, 2020) (R. Exh. 55). And he suffered PTSD with traumatic brain injury and tinnitus from his time in combat zones. CRSC Approval (R. Exh. 59).

2. Richard married petitioner Roxane M. Marschner in 1994. Pet. App. 2a. Roxane and Richard began divorce proceedings in 2015. *Id.*

They reached a settlement agreement in 2016 dividing their marital estate, under which, as relevant here, Roxane was to receive a portion of Richard’s disposable retired or retainer pay. Pet. App. 2a, 29a–30a. On February 9, 2016, a judgment was entered based on the settlement agreement. Pet. App. 29a.

Approximately two months later, Roxane’s attorney submitted a proposed Order Dividing Military Retirement Pay. Pet. App. 30a. Richard was not a party to that order. *Id.* As relevant here, that order included the following provisions:

- “Payments to Former Spouse shall be made as called for in this Order beginning on the first month following Member’s first eligibility for longevity retirement.” Pet. App. 30a.
- “Former Spouse shall receive a percentage of Member’s military retirement per month as Former Spouse’s sole and separate property, payable from Member’s disposable retired or retainer pay” Pet. App. 31a.
- “For the purpose of interpreting this Court’s intention in making the division set out in this Order, ‘military retirement’ includes retired pay paid or to which Richard would be entitled for longevity . . . and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code.” Pet. App. 31a–32a.
- “It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability.” Pet. App. 31a–32a.

3. In 2021, Richard was forced by the military to medically retire. Pet. App. 36a, 38a; Notification of Medical Disqualification Mem. (Apr. 5, 2020) (R. Exh. 54). He began receiving Chapter 61 disability retired pay and, because his disability stemmed from his work in combat zones in Kosovo and Iraq, CRSC payments. Pet. App. 35a; CRSC Decision Letter at 1 (Oct. 15, 2021) (R. Exh. 59). Because Richard was receiving Chapter 61 disability retired pay, he was no longer eligible to receive longevity retirement pay. Richard also waived a portion of his Chapter 61 disability retired pay to receive VA disability pay. Pet. App. 3a.

Roxane filed a motion with the trial court seeking a share of Richard's "gross" Chapter 61 disability retired pay. Pet. App. 14a, 36a. By that, she meant Richard's Chapter 61 disability retired pay before he waived part of it to receive VA disability pay. *Id.* Functionally, then, Roxane was seeking a share of Richard's Chapter 61 disability retired pay and a share of his VA disability pay to include CRSC.

Roxane's motion did not seek to enforce the terms of the divorce decree as written. *Id.* Instead, she asked to either amend the judgment or redistribute the marital estate. *Id.*

4. The district court granted Roxane's motion. It concluded that the "indemnity language to protect Roxane" in the divorce decree "contains terminology that makes it contradictory or difficult to interpret on certain issues." Pet. App. 15a; *see also* Pet. App. 39a. Although the district court discerned an intent "to protect Roxane receiving her share of the non-traditional or non-regular military retired pay in the event that Richard was retired under Chapter 61," the text of the agreement did not so specify. Pet. App. 15a.

For instance, the divorce decree specified that Roxane would begin receiving payments "on the first month following Member's first eligibility for longevity retirement." Pet. App. 70a. But Richard was no longer going to be eligible for longevity retirement. *Id.* It specified that "Roxane's payments shall come from Richard's disposable retired or retainer pay"— that is, from his longevity retirement pay. Pet. App. 71a. But there was no "disposable retired or retainer pay" (that is, longevity retirement pay) for Roxane's payments to come from. *Id.* And Roxane was only entitled to Richard's Chapter 61 disability retired pay if he "took any action" that interfered with the longevity retirement pay. Pet. App. 33a. But Richard did not take any action to end his longevity retirement pay. Pet. App. 38a.

Rather, “his separation from the Army National Guard was not voluntary.” *Id.*

Because the trial court found that the divorce decree as drafted may not “protect Roxane . . . in the event that Richard was retired under Chapter 61,” the district court declined to enforce it. The trial court concluded that “[a]pplying the judgment prospectively is no longer equitable.” Pet. App. 46a. Per the trial court, two options were available: awarding Roxane relief from the judgment under North Dakota Rule of Civil Procedure 60(b)(5) or redistributing the marital estate under North Dakota Century Code § 14-05-24. Pet. App. 46a, 55a.

The court found the former the “simpler remedy.” Pet. App. 56a. It proceeded to relieve Roxane from the divorce decree and award her spousal support. The spousal support matched, dollar-for-dollar, the amount Roxane would have received had Richard’s gross Chapter 61 disability retired pay been divided in the divorce decree (that is, a share of both his Chapter 61 disability retired pay and the VA disability pay for which he waived part of the Chapter 61 disability retired pay). Pet. App. 16a-17a. Richard was also required to pay off the arrears dating back to 2021, when he first received Chapter 61 retirement pay, adjusted for cost of living. Pet App. 17a-18a.¹

Richard objected that, under *Howell v. Howell*, 581 U.S. 214 (2017), the court could not issue an order requiring him to indemnify or reimburse Roxane, because so doing amounted to dividing property (his Chapter 61 disability retired pay and his VA disability pay) that was not divisible

¹ To pay off the arrears, the court ordered Richard’s CRSC garnished. Pet. App. 19a-24a. However, the CRSC amount was not divided as part of the divorce decree; rather, money from the CRSC was garnished to pay out the share of Richard’s Chapter 61 disability retired pay and VA disability pay to which the court found Roxane entitled. Pet. App. 17a.

under federal law. Pet. App. 48a-50a. The district court rejected that argument, reasoning that “the parties agreed to distribute the marital estate based on a belief Roxane would eventually receive a marital share of Richard’s military retirement.” Pet. App. 55a.

4. Richard appealed to the North Dakota Supreme Court. (North Dakota has no intermediate appellate court.) The state high court reversed. Writing for a unanimous court on the merits, Justice Tufte held that “federal law prohibits North Dakota district courts from dividing military disability retired pay.” Pet. App. 2a. The court concluded that the USFSPA’s exclusion of Chapter 61 disability retired pay and VA disability pay from “disposable retired pay” is an absolute bar. Pet. App. 7a–8a. The court explained that the trial court’s attempt to recharacterize its order as one of spousal support was “merely a semantic reframing of the division of Richard’s disability pay,” because “[b]ut for Richard’s election to waive retirement pay, the court would not have ordered the ‘spousal support.’” Pet. App. 8a. The court further held that “[e]ven if the parties’ agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable.” *Id.*

Chief Justice Fair McEvers concurred. She agreed with the majority’s analysis of the preemption question. Pet. App. 9a. And she agreed that the trial court’s “method of achieving equity” was “legally incorrect.” Pet. App. 12a. But she would have remanded to allow the trial court to consider Roxane’s second argument—that she was entitled to redistribution of the marital estate under N.D.C.C. § 14-05-24(3). Pet. App. 13a.

REASONS FOR DENYING THE WRIT

This Court has denied certiorari repeatedly in cases out of petitioner's purported split. Indeed, two years ago, this Court denied certiorari in a case presenting a virtually identical question. *See In Re Tronsrue, infra*, Part II.

It should do the same here. This case does not implicate the question presented. Nor does this case split with any other. Supreme Court precedent squarely supports the lower court's decision. And the practical consequences of the question presented are limited.

I. This case is a poor vehicle for answering the question presented.

The petition purports to present the question whether "USFSPA require[s] state courts to refuse enforcement of indemnification provisions in divorce settlement agreements." Pet. i. But this case doesn't tee up any part of that question. There's no enforcement of a "settlement agreement," and there's no "indemnification provision. And even if this Court *could* answer the question presented in this case, it shouldn't: Various factual idiosyncrasies make this a poor vehicle for doing so.

1. To start, the state courts in this case did not understand themselves to be enforcing a "divorce settlement agreement[]," as petitioner would have it. *See* Pet. i.

a. First, the courts below did not understand the relevant provisions in the 2016 divorce decree to be provisions "in a divorce settlement agreement[]." *See* Pet. i. The relevant provisions were not contained in the parties' settlement agreement but rather were added in a separate court order.

Per the trial court, "[i]n February 2016, the parties reached a Settlement Agreement," under which "Roxane

would receive a portion of Richard’s Army National Guard pension and Federal Employee’s Retirement System benefits when he retired.” Pet. App. 29a. “Approximately two months later, Roxane’s attorney submitted a proposed Order Dividing Military Retirement Pay,” which “dealt with the division of Richard’s intended retirement pay” and included the operative language about “retirement” including pay that Richard may have waived to qualify for disability pay. Pet. App. 30a-33a.²

In other words, the courts below operated on the understanding that the *settlement agreement* contained no provision specifying that Roxane would get paid in the event that Richard waived his disability pay. Instead, those provisions were only contained in a *separate* court order. So the parties did not “agree[] as part of their divorce settlement that the veteran would indemnify his ex-wife.” Pet. i.

b. Second, and even more significantly, the trial court’s 2025 order—the one challenged here—was not an order to enforce the 2016 divorce decree. Even assuming that 2016 divorce decree was a “settlement agreement,” then, the question presented still isn’t teed up—this simply isn’t a case where a state court was seeking to “enforce[] . . . provisions in divorce settlement agreements.” *See* Pet. i.

Recall that Roxane never asked the trial court to enforce the 2016 divorce decree. *See supra*, Pet. i. . Instead, she asked the court to either relieve her from that judgment or redistribute the property in the marital estate. *Id.*

That was for good reason. Enforcing the 2016 divorce decree would not help Roxane. Remember, the trial court

² *See also* Pet. App. 3a (“The district court entered a post-judgment order specifying additional details about the division of Richard’s retirement benefits,” including operative language.).

found that the divorce decree was “contradictory” and “difficult to interpret.” Pet. App. 15a. If the trial court had enforced the 2016 divorce decree according to its terms, Roxane would not have received any additional money. Per the 2016 divorce decree, Roxane wasn’t eligible for payments until Richard’s “first eligibility for longevity retirement”—a day that would never come. *See supra*, Pet. App. 30a. She was only to be paid out of Richard’s “disposable retired or retainer pay”—which amounted to \$0. *Id.* And she could only access Richard’s Chapter 61 disability retired pay if he “took any action” that interfered with his longevity retirement pay. Richard did no such thing; instead, he was ordered to take medical retirement by the Army National Guard. *Id.*

So the district court could not have awarded Roxane a share of Richard’s Chapter 61 disability retired pay under the terms of the 2016 divorce decree. Instead, it relieved Roxane from that judgment. It then issued a new court order, over Richard’s objection, that attempted to divide up the property equitably. There’s no way to characterize that new order as a “settlement agreement.”

2. Even assuming the provisions of the divorce decree amount to a settlement agreement, they certainly don’t contain an “indemnification provision[],” as the question presented requires. Pet. i. Search the full text of the divorce decree; the word “indemnify” never once appears in connection with retirement pay. *See* Pet. App. 90a-99a.

Instead, the divorce decree simply defines “military retirement” to include Chapter 61 disability retired pay and VA disability pay in addition to longevity retirement pay. Pet. App. 94a. It then awards Roxane a share of that “military retirement.” *Id.* As explained *infra*, Part III, that means this case is on all fours with *Mansell*: The divorce decree directly divides the military retirement; it doesn’t

bother with a workaround requiring the veteran to indemnify his ex-spouse.

3. Finally, the unusual facts of this case make it a poor vehicle for resolving the question presented.

For one thing, the divorce decree's own terms specified that Roxane would begin receiving payments "on the first day of the first month following Member's first eligibility for longevity retirement." Pet. App. 95a. Richard's longevity-retirement eligibility date—April 2026, when he would turn 59 years and 3 months—had not yet arrived when the district court issued its order, and it certainly had not arrived as of June 2021, the date from which the district court ordered arrears. *See* Pet. App. 56a. In other words, even under Roxane's theory of the decree, her entitlement to payments had not yet matured—and any award of retroactive relief beginning in 2021 ran ahead of the decree's own triggering mechanism.

Moreover, when Richard reaches his longevity-retirement eligibility age, the nature of his benefits could change. One expert testified that at that point Richard could make various elections that "would cause a recalculation of his pay." Pet. App. 41a–42a. To be sure, the trial court found that such a recalculation was "not likely" to "switch anything." *Id.* But the uncertainty still underscores that the division of assets is a moving target—the distribution may need to be revisited regardless of how this Court rules.

Finally, the pre-*Howell* posture of this case further counsels against review. The parties' settlement agreement was executed in February 2016—more than a year before this Court decided *Howell v. Howell*, 581 U.S. 214 (2017). Pet. App. 2a. The parties thus were not bargaining in the shadow of *Howell*'s holding that federal law preempts state-court orders requiring indemnification for waived retired pay. The more typical case going forward will involve a settlement agreement negotiated after *Howell* put

both parties on notice of the federal constraints. This Court would benefit from a vehicle in which the indemnification clause was drafted with *Howell*'s prohibition squarely in view.

II. There is no split worthy of this Court's attention.

Petitioner claims a whopping 6-5 split. At the outset, five of those cases must be set aside, as they come from intermediate appellate courts. *See* Pet. 18; Sup. Ct. R. 10(b) (certiorari warranted where there is a split among "state court[s] of last resort," not state intermediate appellate courts).

The remaining cases don't form a split either.

1. For the reasons explained above, none of the state high court cases petitioner cites as in conflict with this one actually create a split. In each of those four cases, the state court was attempting to enforce a settlement agreement the parties had agreed to. *See Yourko v. Yourko*, 884 S.E.2d 799, 801 (Va. 2023); *In re Marriage of Tronsrue*, 272 N.E.3d 84, 86 (Ill. 2025); *Jones v. Jones*, 505 P.3d 224, 226-27 (Alaska 2022); *Martin v. Martin*, 520 P.3d 813, 815 (Nev. 2022). In this case, by contrast, the state court amended the divorce decree, resulting in a new court order.

Additionally, in three of the four cases petitioners cite as breaking ranks with this case, the agreement in question featured an indemnification provision.³ *See Yourko*, 884 S.E.2d at 801; *Jones*, 505 P.3d at 226-27;⁴ *Martin*, 520 P.3d

³ In the fourth case, *Tronsrue*, the settlement agreement directly divided up the veteran's disability payments as a property distribution. 272 N.E.3d at 86-87.

⁴ *Jones* featured *both* a direct division of property *and* an indemnification provision. *See id.* at 227 (dividing "military retirement"; defining "military retirement" to include "all amounts of retired pay HUSBAND actually or constructively waives or forfeits

at 815. In this case, by contrast, there was no indemnification agreement. Instead, the divorce decree divided up “military retirement” and defined “military retirement” to include Chapter 61 disability retired pay and VA disability pay. *See* Pet. App. 106a.

2. There isn’t a split over the question presented even apart from this case. Setting aside the intermediate appellate courts, petitioner’s basic claim is that the Michigan Supreme Court has broken ranks with several other high courts on the question presented. *See* Pet. 18. But the Michigan Supreme Court case in question, *Foster v. Foster*, 949 N.W.2d 102 (Mich. 2020), deals with CRSC, not Chapter 61 disability retirement pay or VA disability pay.

Foster held that state courts were precluded from enforcing a provision of a divorce consent judgment “requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC.” *Id.* at 111. Its reasoning is specific to CRSC: The Michigan Supreme Court relies on a statutory provision stating that CRSC payments “are not retired pay.” *Id.* at 112 (citing 10 U.S.C. § 1413a(g)). “Because CRSC is not ‘retired pay’ under Title 10, it would not be subject to division as a marital asset under 16,(c),” the Michigan Supreme Court explained.

By contrast, the cases that petitioner cites on the other side of the split—cases out of Alaska, Illinois, Nevada, and Virginia—do not have anything to do with CRSC. Unsurprisingly, none of those cases cite the preemption

... including but not limited ... waiver made in order to qualify for Veterans Administration benefits”; also providing that “[i]f HUSBAND takes any action that prevents, decreases, or limits [retirement pay], he shall make payments to WIFE directly in an amount sufficient to neutralize, as to WIFE, the effects of the action taken by HUSBAND”).

analysis in Michigan's *Foster* case.⁵ Since it's not clear how a case about CRSC benefits would come out in Alaska, Illinois, Nevada, or Virginia, and it's equally unclear how a case featuring a different benefit would come out in Michigan, there is no split warranting this Court's attention.

III. The decision below was correct.

This Court's precedents already squarely resolve this case. Were there any doubt, the text of the statute confirms that the North Dakota Supreme Court reached the right result. Petitioners' arguments to the contrary are driven by policy concerns about unfair surprise, but those policy concerns can be resolved by various state-law doctrines and in any case provide no basis for disregarding this Court's cases or the plain text of the statute.

1. Even on petitioner's telling—in which the courts below were attempting to enforce a divorce settlement agreement—this Court's decision in *Mansell v. Mansell*, 490 US 581 (1989), is on all fours with this case. As in petitioner's version of this case, the parties in *Mansell* “entered into a property settlement.” *Id.* at 585-86. As in this case, that settlement that the veteran would pay his spouse a percentage “of his total military retirement pay, including that portion of retirement pay waived so that [the veteran] could receive disability benefits.” *Id.* at 586. And as in this case, the veteran argued that the USFSPA precluded treating as divisible pay that was expressly

⁵ *Martin* cites *Foster*, but only for the concurring judge's note about res judicata. See 520 P.3d at 819 (quoting *Foster*, 949 N.W.2d at 124 (Viviano, J., concurring)).

excluded from the definition of “disposable retirement pay” in 10 U.S.C. § 1408(a)(4). *Id.*⁶

This Court agreed. The “language of the statute” is “both precise and limited,” granting state courts “the power to divide . . . disposable retired pay,” but only insofar as the statute defines that term. *Mansell*, 490 U.S. at 589. Because “[t]he Act’s definitional section specifically defines the term ‘disposable retired or retainer pay’ to exclude, *inter alia*, military retirement pay waived in order to receive veterans’ disability payments,” state courts do not have the authority to divide that property. *Id.* (discussing 10 U.S.C. § 1408(a)(4)(B)). (The Act’s definitional section also excludes “the amount of retired pay of the member under [Chapter 61].” 10 U.S.C. § 1408(a)(4)(C).)

2. The petition does not grapple at all with *Mansell*. Courts that have taken petitioners’ side in the split have distinguished *Mansell* on the basis that that case is about “treating military retirement pay that had been waived to receive disability benefits as” divisible, not about indemnification. *Yourko*, 884 S.E.2d at 804. To start, as explained *supra*, Part I, the 2016 divorce decree in this case is the same: it doesn’t require Richard to indemnify Roxane; instead, it treats Chapter 61 disability retirement pay and VA CRSC benefits pay as divisible.

In any event, *Howell* makes clear that distinction cannot hold water. *Howell* dealt with a court-ordered indemnification, and the State attempted to “avoid *Mansell*” by distinguishing a court order of indemnification as different than “an order that divides property.” *Howell*, 581 U.S. at 222. This Court rejected that difference as “semantic

⁶ In *Mansell*, the settlement agreement covered only VA disability pay, while the divorce decree in this case also covers Chapter 61 disability retired pay. Compare 490 U.S. at 586, 588-89 & n.9 with 10 U.S.C. § 1408(a)(4). But nothing in *Mansell* turns on that distinction.

and nothing more”: Because “the amount of indemnification mirrors the waived retirement pay, dollar for dollar,” the indemnification order “displace[d] the federal rule” and was thus preempted. *Id.* The same is true here: *Mansell* cannot be distinguished on the basis that it is “not about indemnification” because that difference is merely “semantic.” See *Howell*, 581 U.S. at 222.

Petitioner attempts to distinguish *Howell* on the ground that there is a “distinction between contracted-for and court-imposed indemnification.” Pet. 27. Set aside, for the moment, that in this case, any indemnification *was* court-imposed—the trial court did not purport to enforce the parties contracted-for 2016 divorce decree, but rather refashioned its own, more equitable judgment. Even if petitioners were right on that front, as just explained, *Mansell* was about a property settlement—a “contracted-for” division, not a “court-imposed” one.

In short, *Mansell* addresses orders to enforce settlement agreements, and *Howell* addresses orders of indemnification. Between the two cases, the question presented has been squarely answered: State court orders cannot award Chapter 61 disability retired pay or VA disability pay to a former spouse, even under guise of an indemnification provision and even pursuant to a settlement.

3. If this Court’s cases leave any doubt, the text of the statute itself should resolve it. The text of the relevant statute, 10 U.S.C. § 1408, does not distinguish between “contracted-for” and “court-imposed” provisions.

Indeed, all indications are that Congress did not think those two categories were relevantly different. Start with title of that provision, “Payment of retired or retainer pay in compliance with court orders.” In turn, the statute specifies that the “term ‘court order’ means a final decree of divorce, dissolution, annulment, or legal separation

issued by a court, or a court ordered, *ratified, or approved property settlement* incident to such a decree.” 10 U.S.C. § 1408(a)(2) (emphasis added). The definitions in the statute, in other words, apply whether a court is enforcing a “contracted-for” or a “court-imposed” provision.

Next look to Section 1408(c), the portion of the statute authorizing state courts to treat military retired pay as divisible property. It bars retroactive enforcement, specifying that a court “may not treat retired pay as property in any proceeding . . . if a final decree of divorce . . . (*including a court ordered, ratified, or approved property settlement* incident to such decree) affecting” the parties was issued before June 25, 1981. (emphasis added). Here, again, the statute treats “contracted-for” and “court-imposed” provisions as equivalent.

As to Richard’s VA disability pay, an additional textual provision makes clear that there is no difference between “contracted-for” and “court-imposed” provisions. The chapter governing VA disability pay says that that VA disability pay is “not assignable except to the extent specifically authorized by law.” 38 U.S.C. § 5301(a)(1). Lest there be any doubt, the provision goes on to specify that “where a beneficiary entitled to compensation . . . enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit . . . such agreement shall be deemed to be an assignment and is prohibited.” *Id.* § 5301(a)(3)(A).

That’s exactly what happened here, on petitioner’s telling. A “beneficiary entitled to compensation” (Richard) “enter[ed] into an agreement with another person” (Roxane) under which Roxane “acquire[d] for consideration the right to receive such benefit” (that is, she paid some money up front for the right to receive a share of

Richard's VA disability pay). That agreement is thus "prohibited," even if it were "contracted-for." *See* 20-(1).

4. Petitioner urges this Court to hold that "[u]nder ordinary res judicata principles," the divorce decree "should have stayed in place." Pet. 27. That contention is puzzling for at least three reasons. First, it was Roxane, not Richard, who asked for relief from the divorce decree. Pet. App. 14a. Second, "res judicata principles" are determined by *state* law, not by this Court. *See Mansell*, 490 U.S. at 586 n.5. And third, the North Dakota Supreme Court issued no holding on res judicata. Petitioner suggested the North Dakota Supreme Court found the divorce decree "void ab initio" and "preempted by federal law and void." Pet. 27-28. But the "void ab initio" quote comes from the North Dakota Supreme Court's summary of cases from other jurisdictions. Pet. App. 7a (discussing Minnesota, Kansas, and Nebraska cases). And the "preempted and void" quote describes the 2025 district court order—*not* the 2016 divorce decree to which petitioner would have res judicata attach. Pet. App. 8a.

5. Without precedent or text on her side, petitioner resorts to policy considerations, urging that "[t]he rule of the North Dakota Supreme Court creates grossly inequitable results" by "undermin[ing] reliance interests" and refusing to hold a veteran to "his own promise." Pet. 28a. But such policy concerns aren't a basis for ignoring the statute's plain text or overturning decades of precedent.

In any event, concerns about unfair surprise are best addressed by state-law doctrines. A variety of state-law doctrines, such as res judicata and laches, might prevent a veteran from collaterally attacking a settlement

agreement.⁷ Indeed, the Michigan Supreme Court case petitioner discusses did just that. *See Foster v. Foster*, 983 N.W.2d 373, 376 (Mich. 2022). In Michigan, going forward, settlement agreements cannot include provisions requiring a veteran to indemnify his or her ex-spouse for CRSC. *Id.* But the veteran in that case could not reopen a long-closed settlement agreement to undo the indemnification provision—the “doctrine of res judicata applie[d] even if the prior judgment rested on an invalid legal principle.” *Id.* at 379.

Alternatively, a variety of state law doctrines allow parties to reopen and renegotiate a prior settlement agreement (think unconscionability or mutual mistake).⁸ Some states have divorce decree-specific statutes allowing reopening. In North Dakota, for instance, Chief Judge McEvers agreed with the majority that the trial court’s indemnification of Roxane was unlawful but would have allowed the trial court to revisit the division of the estate under N.D.C.C. § 14-05-24(3), which allows a court to redistribute property and debts in a post-judgment proceeding. *See* Pet. App. 13a.

State law is thus replete with mechanisms for avoiding an ill-gotten bargain. But under the Supremacy Clause, the one thing that state courts cannot do to avoid a bad bargain is enforce a provision contrary to federal law.

⁷ *See, e.g., Mansell*, 490 U.S. at 586 n.5 (res judicata “is a matter of state law over which we have no jurisdiction”); *Jones*, 505 P.3d at 233 (discussing laches and res judicata); *Weiser*, 14 Wash. App. 2d (Wash. Ct. App. 2020) at 888 (res judicata); *Tronsrue*, 272 N.E.3d at 94-96 (same); *Parish v. Parish*, 991 N.W.2d 1 (Neb. 2023) at 7-8 (same); *Martin*, 520 P.3d at 818-19 (same).

⁸ *See Martin*, 520 P.3d at 819 (discussing unconscionability); *Jones*, 505 P.3d at 233 (same); *Yourko*, 884 S.E.2d at 802 (mutual mistake); *Foster*, 983 N.W.2d at 377 (same).

IV. The question presented is not important enough to warrant certiorari.

The question presented is of limited practical import. Going forward, divorcing couples in North Dakota know the backdrop legal rule: They cannot contract around federal law. Settlement negotiations will reflect that reality. Spouses will bargain over other aspects of the marital estate, recognizing that a veteran’s disability pay cannot be divided. As for couples whose divorces are finalized, as explained *supra*, there are a variety of state-law mechanisms to seek relief if a bargain is truly inequitable—mechanisms that don’t require flouting Supreme Court precedent.

In any event, the question presented applies to only a small subset of divorces—those where (1) one of the parties is a veteran; (2) a settlement agreement is reached that (3) purports to divide up military retirement pay and (4) requires the veteran to indemnify his or her spouse; (5) the veteran is subsequently deemed unable to work and awarded Chapter 61 retirement pay; and (6) no state-law alternative exists to either bind the veteran to indemnification or, alternatively, redistribute the assets.

Uniformity as to the question presented is also less critical in this context. The question presented asks whether a *voluntary* indemnification clause may be enforced. By its nature, that question is one that turns on the infinite variety of state contract, family-law, and property regimes; the varied preferences of each individual divorcing couple; and the different bargaining dynamics that emerge as a result.

That’s presumably why this Court has denied certiorari as to at least four cases in the purported split. *See* 146 S. Ct. 1473 (2026) (denying certiorari in *Tronsrue*); 145 S. Ct. 137 (2024) (denying certiorari in *Yourko*); 145 S. Ct. 135 (2024) (denying certiorari in *Martin*); 144 S. Ct. 79

(2023) (denying certiorari in *Foster*). Indeed, the question presented in the *Tronsrue* petition for certiorari was almost identical to the one presented in this case: “May a state court enforce a contractual agreement entered into between a disabled veteran and his former spouse, which agreement obligates the veteran to use restricted federal benefits to indemnify his former spouse?” Pet at i-ii, *Tronsrue v. Tronsrue*, No. 25-500 (Oct. 20, 2025).

This Court should follow suit in this case and deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Leah Sonstelie Warner
VOGEL LAW FIRM
218 Northern Pacific Ave.
Fargo, ND 58102
(701) 237-6938
lwarner@vogellaw.com

Johanna P. Clyborne
Counsel of Record
BREKKE, CLYBORNE &
RIBICH, LLC
287 Marschall Road Suite 201
Shakopee, MN 55379
(952)402-9410
jclyborne@bcrlawyers.com

Counsel for Respondent

August 25, 2026