

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case is an ideal vehicle to resolve a recurring question of federal law that has divided state supreme courts: whether the Uniformed Services Former Spouses' Protection Act ("USFSPA") requires state courts to refuse enforcement of indemnification provisions in divorce settlement agreements. The North Dakota Supreme Court could scarcely have been clearer that it viewed that question as dispositive. It stated that "the dispositive question in this appeal is a legal one: does a federal statute preempt the district court's enforcement of the indemnification provision in the parties' divorce judgment?" Pet. App. 5a. And it answered that question as follows: "Any order of the court requiring indemnification of a veteran's former spouse for military retirement pay waived for disability pay is preempted by federal law and void." Pet. App. 8a.

Richard's brief in opposition litigates a case that is completely different from the case that the North Dakota Supreme Court decided. He insists that there is no settlement agreement; that, even if there is, the trial court did not enforce it; and that, even if it did, there is no indemnification agreement.

These arguments are no basis to deny review. They are new state-law arguments that squarely contradict Richard's own positions below and hence are waived. Further, they are wholly meritless.

The Court should not be distracted by these Hail Mary arguments. There is a clear conflict of authority on the question decided by the North Dakota Supreme Court. The Court should resolve that conflict.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Ideal Vehicle to Resolve the Question Presented.

The North Dakota Supreme Court made clear that the “dispositive question” was whether “a federal statute preempt[s] the district court’s enforcement of the indemnification provision in the parties’ divorce judgment.” Pet. App. 5a. It concluded: “Even if the parties’ agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable.” Pet. App. 7a. Yet Richard argues that this case is an improper vehicle because “[t]here’s no enforcement of a ‘settlement agreement,’ and there’s no ‘indemnification provision.’” Opp. 11. Richard’s late-breaking state-law theories contradict his own arguments below, contradict the state-law conclusions of the lower courts, and are indefensible on their merits.

No settlement. According to Richard, the state courts were not enforcing a “settlement agreement,” because the document denominated “Settlement Agreement” was submitted in February 2016 and the follow-up agreement dividing Richard’s retirement pay was submitted two months later. Opp. 11–12. This argument contradicts Richard’s own argument below that the indemnification provision appears in the parties’ joint agreement. See Appellant’s Br. at 23, *Marschner v. Marschner*, No. 20250066 (N.D. Aug. 11, 2025) (“Appellant’s Br.”) (“While in *Howell* there was no private indemnification agreement entered into by the parties, *as in the instant case*” (emphasis added)); *id.* at 10 (referring to “the district court’s erroneous

enforcement of the parties' indemnification agreement").

Richard was right the first time. Here is what happened: after Richard and Roxane's initial settlement agreement (submitted in February 2016) left some issues to further elaboration, "[i]t appears the attorneys were working to draft an order that would ensure Roxane received her share of Richard's military retirement pay." Pet. App. 30a. Two months later, having worked out those details, Roxane's attorney submitted a follow-up order, with no objection from Richard's attorney—in other words, they submitted the parties' settlement agreement. *Id.* Thus, the trial court explicitly, and accurately, characterized the follow-up order as part of the settlement agreement. The court concluded that the "parties' Agreement included indemnity language to protect Roxane receiving her share" of Richard's Chapter 61 retirement pay. Pet. App. 15a. And it reiterated that "Roxane has not, and will not, receive any of the portion of Richard's military retirement pay that was agreed to in the stipulated property settlement." Pet. App. 46a. The North Dakota Supreme Court said the same thing: the "[parties] reached a settlement agreement" under which "Roxane was to receive a portion of Richard's Army National Guard pension and Federal Employees' Retirement System benefits when he retired," with the follow-up order merely "specifying additional details about the division of Richard's retirement benefits." Pet. App. 2a–3a.

No enforcement. Next up to bat is Richard's argument that the trial court was not "[e]nforcing" the

settlement but instead “relieved Roxane from that judgment” and “issued a new court order.” Opp. 12–13. This argument hinges on a confusing theory that the divorce decree, properly construed, should not have required him to pay benefits to Roxane. Opp. 13.

That is wrong. The trial court’s “new court order” (Opp. 13) was an order *enforcing the agreement*. Again, that is what Richard told the North Dakota Supreme Court—“[t]he district court’s decision to enforce the parties’ indemnification clause is clearly erroneous.” Appellant’s Br. at 23. The North Dakota Supreme Court appropriately took him at his word. Here is the first sentence of its opinion: “Richard Marschner appeals from an amended judgment enforcing an indemnification provision in the divorce decree that dissolved his marriage to appellee Roxane Marschner.” Pet. App. 2a. And it characterized the trial court’s decision this way: “The [trial] court determined that the 2016 divorce judgment and post-judgment orders required Richard to indemnify Roxane and awarded her spousal support in an amount equivalent to her share of the pre-waiver retirement pay.” Pet. App. 4a.

The North Dakota Supreme Court—and Richard, in his brief below—understood the trial court’s decision correctly. Although, as Richard notes (Opp. 12–13), the trial court stated that certain portions of the judgment were “contradictory or difficult to interpret,” Pet. App. 15a, the court unambiguously held that the settlement required Richard to indemnify Roxane and hence enforced that provision of the settlement. To wit: The court concluded that the “parties’ Agreement included indemnity language to protect Roxane receiving her

share” of Richard’s Chapter 61 retirement pay. Pet. App. 15a. Yet, it reasoned, Roxane “has not received” her “marital share,” even though the “Judgment clearly states” that she is entitled to those payments. Pet. App. 16a. Thus, the parties’ agreement required Richard to make Roxane whole: “The Judgment requires Richard to indemnify Roxane for her share of the military retirement if the payments are not directly made by the military.” *Id.*

Given that Richard had not done so, the court recognized it had authority to enforce the agreement: it noted that “[t]he Judgment also provides that the Court retain jurisdiction to enter further orders as necessary to enforce the award of the marital share of Richard’s military retirement which includes Chapter 61 retirement,” and “further extends the Court’s ability to correct issues caused if Richard fails to indemnify Roxane.” *Id.* Thus, the court concluded, “[a]n award for spousal support should be entered requiring Richard to pay to Roxane spousal support in the amount equivalent to the pension-share amount to which she is entitled.” *Id.*; *see also* Pet. App. 46a (similar). The court issued a revised spousal support order because that was the means for enforcing the agreement recited in the agreement itself: “[T]he simpler remedy is the one repeatedly outlined in the post-judgment orders—the award of spousal support.” Pet. App. 56a; *see also* Pet. App. 3a (North Dakota Supreme Court describing that the order “retained the court’s jurisdiction ... if Richard failed to comply with the payment provisions by any means, including the application for a disability award”).

Indeed, even Richard acknowledges that the trial court understood itself to be enforcing an indemnity agreement; he simply disagrees with the lower courts' interpretation. Opp. 8 (acknowledging that "the district court discerned an intent" for Richard to indemnify Roxane but disagreeing with that interpretation). But this Court may not question state courts' interpretation of state law. *United States v. Taylor*, 596 U.S. 845, 859 (2022) ("state courts" are "the final arbiters of state law in our federal system"); *Johnson v. United States*, 559 U.S. 133, 138 (2010) (this Court is "bound by" state supreme court's interpretation of state law).

To be clear, Richard's new interpretation of the divorce decree is, in any event, wrong on the merits. The parties' settlement defines "military retirement" to include not only "retired pay" based on "longevity," but also "*all payments paid or payable under ... Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied*" and entitles Roxane to a share of the military retirement pay under that definition. Pet. App. 94a (emphasis added). It is hard to see how the parties could have been clearer that Roxane gets a share of Richard's Chapter 61 retirement pay. But the more important point is that Richard's argument is both waived and directly contrary to the lower courts' interpretation of state law.

No indemnification agreement. Richard argues that the settlement does not contain an indemnification provision, apparently because it does not use the word "indemnification." Opp. 13. Yet again, Richard is contradicting his own brief below, which recounts that

the divorce decree “included an indemnification clause.” Appellant’s Br. at 12; *accord id.* at 10, 22, 23, 26 (similar). And yet again, Richard had it right the first time. The agreement explicitly says that if Roxane receives less than her specified allotment of Richard’s “military retirement,” then “[Richard] shall initiate an allotment to [Roxane] in the amount of any such difference.” Pet. App. 16a, 56a, 96a. That is an indemnification provision. Confirming the point, the first sentence of the North Dakota Supreme Court’s decision refers to that provision as an “indemnification provision,” Pet. App. 2a, and the court refers to “indemnification” or “indemnify” more than a dozen times. Pet. App. 2a, 3a, 4a, 5a, 6a, 7a, 8a. The trial court similarly found that the settlement included “indemnity language to protect Roxane receiving her share” of Richard’s retirement pay. Pet. App. 15a.

Unusual facts. Richard’s recitation of the purportedly “unusual facts” of this case (Opp. 14–15) does not advance the ball.

The first purported “unusual fact” is that until April 2026, “[Roxane’s] entitlement to payments had not yet matured.” Opp. 14. To the contrary, the trial court concluded that Roxane’s entitlement to payments matured in 2021 and awarded nearly four years of arrears. Pet. App. 17a. To the extent Richard is now expressing disagreement with some aspect of the trial court’s calculation, that is a pure state-law argument that was neither raised nor decided in the North Dakota Supreme Court.

The second purported “unusual fact” is that Richard’s benefits would be recalculated, although this

is “not likely” to “switch anything.” Opp. 14. The precise amount Richard gets every month is completely irrelevant to this case. Under the decree’s terms, Roxane is entitled to a share of that money. Under the North Dakota Supreme Court’s decision, she gets nothing. Pet. App. 8a.

The third purported “unusual fact” is that the parties divorced before *Howell v. Howell*, 581 U.S. 214 (2017), and hence were not “bargaining in the shadow of *Howell*’s holding.” Opp. 14–15. So what? The North Dakota Supreme Court found that “federal law prohibits North Dakota district courts from dividing military disability retired pay.” Pet. App. 2a. Whether such agreements were negotiated with or without the benefit of *Howell* has nothing to do with whether such provisions are enforceable or preempted.

The North Dakota Supreme Court’s decision squarely tees up the question presented. Richard should not be able to avoid Supreme Court review by generating new, waived, meritless state-law theories.

II. State Courts Have Split Squarely on the Question Presented.

As the petition explained, the North Dakota Supreme Court’s decision conflicts with decisions of the highest courts of four states and intermediate appellate courts of two more. Pet. 13–18; *see Jones v. Jones*, 505 P.3d 224 (Alaska 2022); *Tronsrue v. Tronsrue (In re Marriage of Tronsrue)*, 272 N.E.3d 84 (Ill. 2025); *Martin v. Martin*, 520 P.3d 813 (Nev. 2022); *Yourko v. Yourko*, 884 S.E.2d 799 (Va. 2023); *Hammond v. Hammond*, 680

S.W.3d 269 (Tenn. Ct. App. 2023); *Weiser v. Weiser (In re Marriage of Weiser)*, 475 P.3d 237 (Wash. Ct. App. 2020).

Richard responds that in that conflicting line of cases, “the state court was attempting to enforce a settlement agreement the parties had agreed to” and “the agreement in question featured an indemnification provision,” while in this case, there was no enforcement order and no indemnification agreement. Opp. 15–16. As explained above, those are new, waived, meritless arguments that run directly contrary to how the lower courts decided this case. *Supra* at 2–7.

As for cases on North Dakota’s side of the split, three intermediate appellate courts have reached the same conclusion as the court below. *Williams v. Burks*, 353 So. 3d 549 (Ala. Civ. App. 2021); *Babin v. Babin (In re Marriage of Babin)*, 437 P.3d 985 (Kan. Ct. App. 2019); *Berberich v. Mattson (In re Marriage of Berberich)*, 903 N.W.2d 233 (Minn. Ct. App. 2017). The Michigan Supreme Court, meanwhile, held that the USFSPA does not permit indemnification provisions in settlements, but existing decrees should not be disturbed under *res judicata* principles. *Foster v. Foster*, 983 N.W.2d 373 (Mich. 2022); *Foster v. Foster*, 949 N.W.2d 102 (Mich. 2020); *see* Pet. 18–21.

Richard asserts that the petition’s “basic claim is that the Michigan Supreme Court has broken ranks with several other high courts on the question presented.” Opp. 16. To the contrary, the basic claim is that the *North Dakota Supreme Court*’s decision conflicts with the decisions of other high courts. The Michigan Supreme Court is simply an additional case that is (at

least on a forward-looking basis) on the North Dakota Supreme Court's side of the split.

Richard attempts to distinguish *Foster* on the ground that it dealt with Combat-Related Special Compensation (CRSC). Opp. 16. The Michigan Supreme Court, however, reasoned that the receipt of CRSC (as opposed to other types of disability benefits) made no difference to the preemption analysis. 949 N.W.2d at 112. *Foster* is therefore appropriately included in the split.

III. The Question Presented Is Important.

The question presented is of critical importance to this country's veterans and their ex-spouses. As the petition describes, a significant—and growing—number of veterans draw benefits. Pet. 23. Richard asserts that the question presented is not important because veterans and their ex-spouses can just bargain over other assets. Opp. 23. But a military pension often represents a substantial portion of the couple's assets. Pet. 23. Divorcing spouses need to know what provisions in settlement agreements are legal.

The previous denials of other petitions, *see* Opp. 23–24, are irrelevant. Until this case, the ex-spouse prevailed in every state supreme court case—in *Foster*, the ultimate result was that the ex-spouse prevailed on res judicata grounds, even though she initially lost in her first trip to the Michigan Supreme Court. So, in prior cases, the brief in opposition could credibly claim that there was no genuine split among state supreme courts. That is no longer the case.

IV. The Decision Below Is Incorrect.

The decision below is wrong. While Richard asserts that the USFSPA does not distinguish between settlements and court-imposed indemnification, Opp. 19–21, he does not engage at all with the point that—like most statutory rights—the provisions of the USFSPA can be waived. Pet. 24–25. Richard points to 38 U.S.C. § 5301(a)(3)(A), but that statute prohibits agreements by which a third party acquires the right to receive benefits, which never happened here. Instead, the benefits went to Richard, who in turn agreed to pay a portion of them to Roxane. “[F]ederal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit” once “paid directly to the veteran first.” *Yourko*, 884 S.E.2d at 804.

Richard improbably suggests that because *Mansell v. Mansell*, 490 U.S. 581 (1989), involved a settlement, it resolves this case. Opp. 17–19. But *Mansell* merely held that waived retirement pay is not divisible under federal law. 490 U.S. at 594–95. The Court did not consider the relevance of the settlement, and in fact remanded for further consideration of that issue. *Id.* at 586 n.5. On remand, the California Court of Appeal enforced the settlement, reaching the same result that Roxane advocates here. *Mansell v. Mansell (In re Marriage of Mansell)*, 217 Cal. App. 3d 219, 230 (1989) (“Even if Husband were correct in contending the division of his gross retired pay would otherwise have been an act in excess of jurisdiction, he consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining.”). The

California Supreme Court denied discretionary review. *Id.* at 236.

As for *res judicata*, Richard misunderstands Roxane’s argument. The 2016 decree was a judgment. Under ordinary *res judicata* principles, that final judgment could not be relitigated after the fact.¹ This means that, in the proceedings below, it should have been enforced. Yet the North Dakota Supreme Court nonetheless refused to enforce it on federal preemption grounds. The North Dakota Supreme Court erred in interpreting the USFSPA to require retroactively invalidating existing judgments. *See* Pet. 27–28. Richard responds that the North Dakota Supreme Court declared the 2025 order, rather than the 2016 judgment, void. Opp. 21. But the 2025 order enforced the 2016 judgment, so by declaring the 2025 order to be “preempted and void,” the North Dakota Supreme Court effectively invalidated the 2016 judgment by rendering it unenforceable. Nothing in the USFSPA suggests such a broad preemptive scope.

Richard suggests that there might be other state-law mechanisms to achieve fairness. Opp. 22. That is irrelevant. In this case the parties deemed it fair to give Roxane a share of Richard’s retirement pay in exchange for consideration. Richard freely chose to waive his statutory rights, and nothing in the USFSPA permits him to revisit that decision.

¹ Roxane raised this issue below, to no avail. *See* Appellee’s Br. at 22–24, *Marschner v. Marschner*, No. 20250066 (N.D. Sept. 22, 2025).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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