No. 25-1349

IN THE
Supreme Court of the United States

ROXANE M. MARSCHNER,
Petitioner,

v.

RICHARD A. MARSCHNER,
Respondent.

On Writ of Certiorari to the
North Dakota Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In the Uniformed Services Former Spouses' Protection Act ("USFSPA"), Congress provided that a State may treat veterans' longevity-based retirement pay as divisible property in divorce. 10 U.S.C. § 1408(c). But Congress further provided that retirement pay that was waived to receive disability pay, as well as certain retirement pay received due to disability-related retirements, is not divisible. 10 U.S.C. § 1408(a)(4)(A)(ii), (iii).

In *Howell v. Howell*, 581 U.S. 214 (2017), a divorced veteran waived a portion of his longevity-based retirement pay in order to receive disability pay, causing his ex-wife's share of his retirement pay to decrease. The divorce court ordered him to indemnify his ex-wife for that reduction. This Court held that the USFSPA preempted that indemnification order. *See id.* at 222.

In this case, unlike in *Howell*, the parties agreed as part of their divorce settlement that the veteran would indemnify his ex-wife if her share of his retirement pay were reduced because he later waived his retirement pay to receive disability benefits or because he received disability-based retirement pay. Even though the veteran agreed to the indemnification provision at the time of the divorce, the North Dakota Supreme Court held that, under *Howell*, enforcement of the indemnification provision was preempted.

The question presented is:

Does the USFSPA require state courts to refuse enforcement of indemnification provisions in divorce settlement agreements?

PARTIES TO THE PROCEEDING

Roxane M. Marschner is petitioner here and was plaintiff-appellee below.

Richard A. Marschner is respondent here and was defendant-appellant below.

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INTRODUCTION

This case concerns the scope of federal preemption under the Uniformed Services Former Spouses' Protection Act ("USFSPA"). Veterans who retire after serving a sufficiently long period in the military (typically twenty years) are eligible to receive retirement pay. The USFSPA authorizes state courts to treat a veteran's retirement pay as divisible property in divorce.

Veterans sometimes waive a portion of their retirement pay in order to obtain disability benefits. In *Mansell v. Mansell*, 490 U.S. 581 (1989), this Court held that the USFSPA does not authorize divorce courts to divide a veteran's waived retirement pay. Thus, if a veteran waives a portion of his retirement pay, the ex-spouse is entitled only to a share of whatever amount the veteran receives post-waiver—not a share of the full, pre-waiver amount. In *Howell v. Howell*, 581 U.S. 214 (2017), this Court found that *Mansell*'s rule applies even when the veteran's waiver of retirement pay occurs after the divorce. The Court held that if a veteran waives retirement pay after the divorce, causing the ex-spouse's monthly payments to go down, the divorce court may not require the veteran to indemnify the ex-spouse for that loss—which would have the same practical effect as dividing the veteran's waived retirement pay.

Howell and *Mansell* were cases in which state courts treated the veteran's waived retirement pay as divisible under state community-property law over the veteran's objection. In this case, by contrast, the veteran, respondent Richard Marschner, entered into a property

settlement in which he voluntarily agreed to indemnify his ex-wife, petitioner Roxane Marschner, if he ever waived a portion of his retirement pay. The question in this case is whether the USFSPA bars divorce courts from enforcing such property settlements.

The answer is no. Federal law protects disabled veterans by preventing divorce courts from *involuntarily* treating waived retirement pay as divisible. It does not bar courts from enforcing *voluntary* property settlements.

The applicable federal statutes provide that the portion of a veteran's retirement pay that he elects to waive in favor of disability pay is the veteran's personal entitlement. Thus, a divorce court may not undermine that personal entitlement by itself treating the waived retirement pay as divisible and awarding a share to his ex-spouse. But enforcing a voluntary settlement agreement—and hence allowing the veteran to make his own decisions on how to dispose of his own property—is perfectly compatible with treating that property as the veteran's personal entitlement.

Enforcing voluntary settlements benefits both veterans and their ex-spouses. When veterans agree to indemnify their ex-spouses in the event of a waiver of retirement pay, they get something in exchange. In this case, Richard agreed to such an indemnification provision, and he thus received $140,500 up front. Such property settlements are often, as here, mutually beneficial for divorcing spouses who face divergent financial circumstances. Prohibiting enforcement of such settlements would prevent divorcing spouses from entering into agreements that help both sides.

At a minimum, federal law does not require state courts to *retroactively* invalidate divorce settlements. In this case, back in 2016, the parties entered into a settlement agreement with an indemnification provision, and the divorce court entered that settlement agreement as the final divorce judgment. Years later, after Richard violated the judgment, the divorce court issued an order enforcing that judgment. Yet the North Dakota Supreme Court held that the enforcement order was preempted, a ruling that had the practical effect of invalidating a judgment that had become final a decade earlier. As a result, Roxane—who gave Richard $140,500 up front in exchange for a stream of income—is left with nothing. Nothing in federal law demands that unfair result.

OPINIONS BELOW

The decision of the North Dakota Supreme Court (Pet. App. 1a) is reported at 33 N.W.3d 9. The opinions and orders of the North Dakota District Court (Pet. App. 14a, 28a, 59a, 90a, 100a) are not reported.

JURISDICTION

The judgment of the North Dakota Supreme Court was entered on March 4, 2026. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Uniformed Services Former Spouses' Protection Act are in the appendix to the Petition for Certiorari.

STATEMENT

I. Statutory Framework

The federal government provides veterans with several types of benefits, three of which are relevant here. *First*, veterans who serve for a minimum period of time—typically twenty years—may retire with pay based on their length of service (herein called "longevity-based retirement pay"). *Howell*, 581 U.S. at 216; *see, e.g.*, 10 U.S.C. § 7311(a) (Army); *id.* § 8323(a)(1) (Navy and Marine Corps); *id.* § 9311(a) (Air Force); *id.* § 12731(a) (reserve-component members).

Second, under Chapter 61 of Title 10, veterans who retire because of a service-connected disability may receive retirement pay computed under a statutory formula keyed to either the veteran's disability rating or his years of service, whichever yields the greater amount (herein, to avoid confusion with other kinds of disability or retirement pay, called "Chapter 61 retirement pay"). *See* 10 U.S.C. §§ 1201, 1401.

Third, veterans with service-connected disabilities—whether retired or not—are entitled to receive disability compensation from the Department of Veterans Affairs (herein called "VA disability pay"). *See* 38 U.S.C. §§ 1110, 1131, 1155.

In certain cases, Congress has barred veterans from receiving both disability pay and retirement pay (of either type) simultaneously. In those cases, a veteran may receive VA disability pay only by waiving an equal amount of retirement pay. 38 U.S.C. § 5305. Veterans commonly execute such waivers because VA disability

pay is tax-exempt and retirement pay generally is not. *See id.* § 5301(a)(1); *Howell*, 581 U.S. at 216.

This Court first addressed the disposition of military retirement pay in divorce in *McCarty v. McCarty*, 453 U.S. 210 (1981). In that case, a state court had treated a veteran's military retirement pay as community property when the veteran's military service occurred during the marriage. *See id.* at 216–18. It reasoned that retirement pay was deferred compensation for work performed during the marriage; because "each spouse is deemed to make an equal contribution to the marital enterprise," each spouse was therefore "entitled to share equally in its assets," including a share of that deferred compensation. *Id.* at 216–17.

The Court held that federal law barred state courts from dividing a veteran's retirement pay as community property. *Id.* at 232–36. Congress, the Court reasoned, had established retirement pay as "a personal entitlement payable to the retired member himself as long as he lives." *Id.* at 224 (quoting S. Rep. No. 90-1480, at 6 (1968) (emphasis omitted)). This Court concluded that dividing the pay under state law conflicted with the federal scheme: "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member." *Id.* at 233. The Court acknowledged that "the plight of an ex-spouse of a retired service member is often a serious one," but it concluded that whether to give former spouses more protection was a decision "for Congress alone." *Id.* at 235–36.

Congress took up the invitation to act the next year, passing the Uniformed Services Former Spouses'

Protection Act ("USFSPA" or the "Act"), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA restored to the States authority that *McCarty* held they lacked. Its central provision states that, subject to specified limitations, "a court may treat disposable retired pay … either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). Whereas under *McCarty* state courts had to treat military retirement pay as the member's alone, under the Act, they may treat "disposable retired pay" as marital property and divide it according to state law.

But the Act's restoration of state-court authority has an important limitation. It confers authority to divide only "disposable retired pay," which is defined as "the total monthly retired pay to which a member is entitled" less four excluded types of payment. § 1408(a)(4)(A). Two of those exclusions matter here. The first is any portion of retirement pay the member has waived in order to receive VA disability pay. § 1408(a)(4)(A)(ii). The second, for a member receiving Chapter 61 retirement pay, is the portion of retirement pay computed on the basis of the member's disability rating. § 1408(a)(4)(A)(iii).[1] In practice, then, a state court dividing a veteran's retirement pay under § 1408(c)(1)

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[1] *Mansell*, *Howell*, and many lower court decisions cite the waiver exclusion at its former location, § 1408(a)(4)(B), and the Chapter 61 exclusion at § 1408(a)(4)(C). Congress redesignated those provisions in 2016 using romanettes instead. *See Howell*, 581 U.S. at 217; National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641(a), 130 Stat. 2000, 2164 (2016).

may divide only longevity-based retirement pay, not waived retirement pay or Chapter 61 retirement pay.

The Act also supplies a mechanism for a former spouse to receive her share of payments. A former spouse who serves a qualifying "court order" on the Secretary of the relevant military service—in practice, the Defense Finance and Accounting Service ("DFAS")—receives her allotment directly from the government. § 1408(d)(1). But DFAS will pay only "from the disposable retired pay of a member." § 1408(d)(1); *see* § 1408(a)(2)(C). If a veteran's benefits fall outside the definition of "disposable retired pay"—because of a waiver to receive VA disability pay or the receipt of Chapter 61 retirement pay—there is nothing for DFAS to allot the former spouse.

This Court has twice construed the USFSPA. In *Mansell v. Mansell*, 490 U.S. 581 (1989), the Court held that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594–95. Major Gerald Mansell, a retired Air Force officer, had waived part of his retirement pay to receive VA disability benefits. His divorce decree required him to pay his ex-wife half of "his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 585–86. Gerald later asked the state courts to remove that provision from the decree, but they refused. This Court reversed. Because *McCarty* had "completely pre-empted" state community property law as applied to military retirement pay, Congress could displace *McCarty* only through "an

affirmative grant of authority." *Id.* at 588. And the grant in § 1408(c)(1) was "both precise and limited": "state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property." *Id.* at 588–89.

In *Howell*, this Court held that a state court may not order a veteran to indemnify a former spouse for the reduction in her share of his retirement pay caused by his post-divorce waiver of that pay to receive disability pay. 581 U.S. at 222. The divorce decree in *Howell* had awarded John Howell's former wife half of his "military retirement when it begins." *Id.* at 218–19 (quotation marks omitted). Several years after the divorce, he waived a portion of his retirement pay to receive disability pay, reducing his ex-wife's monthly payments. *Id.* at 219. The Arizona courts ordered him to "reimburse" her for the shortfall, reasoning that she had a "vested" interest in the pre-waiver amount she had been receiving. *Id.* This Court reversed. It held that the reimbursement order was in substance an award of "the portion of military retirement pay that John waived in order to obtain disability benefits"—"the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse." *Id.* at 221.

II. Proceedings Below

1. Petitioner Roxane Marschner and Respondent Richard Marschner, a North Dakota Army National Guard member, married in 1994. Pet. App. 2a. In 2005, having completed twenty years of service, Richard received his "Twenty-Year Letter" from the

Department of Defense[2] confirming that he would be eligible for longevity-based retirement pay when he turned sixty. Pet. App. 28a–29a.[3] Also in 2005, Richard was found eligible for VA disability pay based on a service-connected disability; he received that VA disability pay while continuing to serve by waiving a corresponding amount of his drill pay from the National Guard. Pet. App. 28a.

Roxane filed for divorce in January 2015. Pet. App. 29a. Both parties were represented by experienced family-law attorneys, and in February 2016 they reached a comprehensive settlement agreement. The district court incorporated that agreement into a judgment entered February 9, 2016. Pet. App. 29a, 100a–29a. As relevant here, the judgment awarded Roxane, "as [her] sole and separate property," a share of Richard's "military retirement" computed by a marital-fraction formula and "payable from Richard's disposable retired or retainer pay." Pet. App. 105a–06a. It defined "military retirement" to include not only "retired pay … for longevity of … service," but also "all payments paid or payable under the provisions of … Chapter 61 of Title 10," and "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

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[2] The lower courts' opinions and the record refer to the "Department of Defense," rather than the "Department of War," and so this brief follows that convention.

[3] Richard's longevity-based retirement age was subsequently calculated to be lower—age 59 and 3 months, which he attained in April 2026—based on his combat service. *See* Pet. App. 35a, 41a–42a.

waiver made in order to qualify for Veterans Administration benefits including disability." Pet. App. 106a.

The judgment thus embodied a settlement that departed in two respects from the allocation the USFSPA's definition of "disposable retired pay" would otherwise produce: the share it awarded Roxane included the disability-based component of any Chapter 61 retirement pay, and it also encompassed any retirement pay Richard might waive to receive VA disability pay. *Compare* Pet. App. 106a, *with* 10 U.S.C. § 1408(a)(4)(A)(ii)–(iii).

Richard did not make these concessions for free. Under the settlement, he received $50,500 from Roxane's retirement account immediately, and Roxane agreed to pay him an additional $90,000 within ninety days of the entry of judgment "to make the property distribution equitable." Pet. App. 29a, 37a–38a, 105a, 113a.

The settlement provided that it was "contractual in nature," Pet. App. 125a, and that although the property division was "not subject to modification," the parties "underst[ood] that the court may redistribute property in a post-judgment proceeding if a party fails to comply with the terms of a court order or judgment distributing property or debts," Pet. App. 115a. The court also "retain[ed] jurisdiction over the retirement assets in the event additional orders are needed to transfer ownership." Pet. App. 109a–10a.

Two months later, in April 2016, Roxane's attorney submitted a proposed Order Dividing Military Retired

Pay that the parties' attorneys had been "working to draft" together in order to "ensure Roxane received her share of Richard's military retirement pay." Pet. App. 30a. Richard's attorney did not object when the Order was submitted, and the court entered it. Pet. App. 30a. An amended version of the Order—with minor changes not relevant here, again entered without objection from Richard or his counsel—followed on July 5, 2016. Pet. App. 16a, 34a, 90a–99a.

The Order Dividing Military Retired Pay set out a formula that fixes Roxane's share at 27.907% of Richard's "military retirement." Pet. App. 16a, 56a, 93a–94a. It repeated the judgment's definition of that term verbatim—specifying, in other words, that his "military retirement" included waived retirement pay and Chapter 61 retirement pay. Pet. App. 94a. The Order added a series of provisions designed to ensure that Roxane would receive her allotted share. First, the "appropriate military pay center" was directed to pay Roxane directly "to the extent permitted by law." Pet. App. 96a. But if the pay center paid less than the specified amount, Richard was required to "initiate an allotment to [Roxane] in the amount of any such difference, to be paid from any federal entitlements due [him]." Pet. App. 96a. If no allotment could be made, Richard was to "pay the amounts called for … directly to [Roxane] by the fifth day of each month." Pet. App. 96a–97a. And if Richard took "any action that prevents, decreases, or limits the collection by [Roxane] of the sums to be paid hereunder (by application for or award of disability compensation, … waiver for any reason, … or in any other way)," he was to "make payments to

[Roxane] directly in an amount sufficient to neutralize, as to [Roxane], the effects of the action taken," holding any such sums "in constructive trust until actual payment." Pet. App. 97a. The court retained jurisdiction to enforce the award, including through "an award of alimony (in the sum of benefits payable plus future cost of living adjustments)" should Richard fail to comply "by any means, including the application for a disability award," or should "military or government regulations or other restrictions interfere with payments." Pet. App. 98a.

2. In April 2020, an Army medical review board concluded that Richard no longer met Army medical standards; a physical evaluation board then found him unfit and recommended that he be permanently medically retired. Pet. App. 35a. He was medically retired from the National Guard and began receiving Chapter 61 retirement pay in June 2021. Pet. App. 15a, 42a.

As of late 2024, Richard was eligible to receive $4,406 per month of Chapter 61 retirement pay. He waived most of that Chapter 61 retirement pay ($3,846.25 per month) to receive tax-free VA disability pay in the same amount. Pet. App. 17a.[4]

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[4] In some cases, veterans who are at least 50% disabled are eligible for Concurrent Retirement and Disability Pay ("CRDP"), meaning that they can receive VA disability pay without waiving retirement pay. 10 U.S.C. § 1414(a). Richard is 60% disabled. Pet. App. 35a. But prior to April 2026, Richard was not eligible for CRDP because he was not yet eligible for longevity-based retirement pay. *See* 10 U.S.C. § 1414(b)(1) (recipients of Chapter 61 retirement pay must

None of Richard's benefits qualify as "disposable retired pay" that DFAS will divide: Chapter 61 retirement pay and waived retirement pay are excluded from the definition of "disposable retired pay," *see* 10 U.S.C. § 1408(a)(4)(A)(ii), (iii). Thus, when Roxane applied to DFAS for her share, DFAS denied the application on August 6, 2021, explaining: "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA." Pet. App. 36a.

As described above, the parties' agreement provided that if DFAS did not send benefits to Roxane, Richard was required to pay Roxane her share of his "military retirement" directly—a term the parties had defined to include waived retirement pay and Chapter 61

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waive that pay to receive VA disability pay if their Chapter 61 retirement pay exceeds the longevity-based retirement pay to which they would otherwise be entitled); Pet. App. 42a (Richard became eligible for longevity-based retirement pay in April 2026).

Richard was separately entitled to a monetary benefit, known as Combat-Related Special Compensation ("CRSC"), awarded to veterans injured in combat. Pet. App. 35a, 40a. As the district court explained, upon becoming eligible for CRDP in 2026, Richard was virtually certain to waive CRDP so that he could continue receiving CRSC, which is not divisible retirement pay and which is more financially advantageous for him. Pet. App. 41a–42a; *see* 10 U.S.C. § 1414(d) (requiring veterans to elect between CRDP and CRSC). Moreover, because Richard is receiving Chapter 61 retirement pay (which DFAS does not distribute to ex-spouses), Roxane will not receive any money from DFAS regardless of whether Richard elects to receive CRDP or CRSC. Pet. App. 42a ("[R]egardless of whether Richard receives [CRSC] or [CRDP], DFAS will deem his benefits as non-disposable and will not honor any state court order to divide them.").

retirement pay. But Richard never paid. Pet. App. 15a, 36a, 46a.

In August 2023, Roxane returned to the district court "[t]o obtain enforcement" of the parties' agreement as embodied in the 2016 orders. Pet. App. 14a. To that end, she moved to amend the judgment under North Dakota Rule of Civil Procedure 60 or, alternatively, to redistribute the marital estate under N.D.C.C. § 14-05-24. Pet. App. 36a. Richard opposed, contending, as relevant here, that federal law prohibited enforcing the agreement. Pet. App. 37a–38a, 47a–48a.

After a three-day evidentiary hearing, the district court ruled for Roxane. Pet. App. 14a–58a; *see* Pet. App. 37a. It found that the parties' agreement "included indemnity language to protect Roxane receiving her share" in the event Richard "was retired under Chapter 61"; that the judgment "clearly states" that the "military retirement" to be shared "includes Chapter 61 retirement"; and that it "requires Richard to indemnify Roxane for her share of the military retirement if the payments are not directly made by the military." Pet. App. 15a–16a. The court further found that Roxane's receipt of a share of Richard's military pay "was an important consideration for the parties in distributing the marital estate." Pet. App. 39a. But, the court found, "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. It reiterated that "[t]he post judgment orders indicated Richard would make an allotment or pay Roxane directly if she did not receive her share of his benefits" from DFAS; and that "[t]his has not happened." Pet.

App. 55a. Richard, the court found, "has not initiated an allotment to Roxane" and "has not paid Roxane directly." Pet. App. 46a.

Noting the division among state courts over whether *Howell* bars enforcement of agreed indemnification provisions, Pet. App. 50a–51a, the court concluded that *Howell* did not prevent it from enforcing the parties' agreement. Pet. App. 47a–51a; *see* Pet. App. 5a. It therefore ordered the remedy "repeatedly outlined in the post-judgment orders—the award of spousal support." Pet. App. 56a. Specifically, it directed Richard to pay Roxane her 27.907% share of his retired pay (net of the survivor-benefit premium)—$1,149 per month as of 2024, subject to cost-of-living adjustments—and $51,232 in arrears accrued since June 2021. Pet. App. 16a–19a, 25a–26a.

3. Richard appealed, arguing that "the district court's erroneous enforcement of the parties' indemnification agreement" was preempted under *Howell.* Appellant's Br. 10, *Marschner v. Marschner*, No. 20250066 (N.D. Aug. 11, 2025); *see id.* at 23. The North Dakota Supreme Court identified "the dispositive question in this appeal" as "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. The answer, the court held, was yes. It therefore reversed. Pet. App. 1a–8a.

The North Dakota Supreme Court recognized that "several state courts after *Howell* distinguished between voluntary indemnification agreements and court-imposed indemnification, applying *Howell* only to the latter." Pet. App. 5a–6a. But it sided with the

"[c]ourts in other jurisdictions" that "have interpreted *Howell* to hold that indemnification provisions requiring a veteran to compensate a former spouse for retirement pay lost due to a waiver in favor of disability benefits are void ab initio and do not bind the veteran." Pet. App. 7a. In the court's view, "[e]ven if the parties' agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable," because *Howell* "holds that property division orders that affect a veteran's disability pay, regardless of form, are preempted." Pet. App. 7a–8a. The court concluded: "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.

Chief Justice Fair McEvers joined the court's opinion but wrote separately because "the result is inequitable to Roxane Marschner." Pet. App. 9a. The parties' property division, she observed, "was based on an agreement that appeared equitable at the time," and Roxane sought relief "only after [she] was denied the military benefits she expected under the stipulation." Pet. App. 9a. Because "equity has not yet been achieved," the Chief Justice would have remanded for consideration of alternative relief. Pet. App. 13a.

SUMMARY OF ARGUMENT

I. The USFSPA does not bar state courts from adopting and enforcing voluntary divorce settlements.

I.A. In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempted state community-property law insofar as it treated military retirement

pay as divisible marital property. *McCarty* concerned a court's involuntary division of a veteran's pay over his objection. Nothing in its reasoning suggests that a veteran may not agree to share his retirement pay. To the contrary, *McCarty* rested on the premise that retirement pay is the veteran's "personal entitlement," over which he has a federal right of control. Permitting veterans to dispose of that entitlement through voluntary settlements honors that principle.

Congress enacted the USFSPA in response to *McCarty*. The USFSPA does not take authority from the States; it restores authority *McCarty* held they lacked. With respect to waived retirement pay, then, the USFSPA simply declines to restore state authority and leaves *McCarty*'s preemption regime in place. But that regime never reached voluntary settlements. Thus, because enforcement of settlements was not preempted before the USFSPA, it is not preempted now.

I.B. Even if the USFSPA has independent preemptive force, its operative provision does not reach voluntary settlements. Section 1408(c)(1) governs what a "court" may do: it may "treat" only disposable retired pay "as property of the member and his spouse in accordance with the law of the jurisdiction of such court." But a court that adopts and enforces the parties' own agreement does not "treat" anything as marital property under state law. The parties—not the court—have decided how to dispose of the asset.

This Court's preemption cases have long distinguished state-imposed obligations from self-imposed undertakings. *See American Airlines, Inc. v. Wolens*, 513

U.S. 219 (1995); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). The USFSPA fits that mold.

I.C. The Act's surrounding provisions confirm the point. Every substantive limit in § 1408(c) is addressed to courts—and what they "may" or "may not" do.

Richard's textual counterarguments fail. The definition of "court order" to include approved settlements exists so that spouses who settle may use the Act's direct-payment mechanism; it does not forbid courts from enforcing those settlements. And the 1990 amendment protecting pre-*McCarty* decrees addresses the reopening of decades-old judgments, not what divorcing spouses may agree to today.

I.D. The decision below rested on *Howell*. But *Howell* had nothing to do with voluntary settlements. The Arizona Supreme Court had held, as a matter of state law, that the original *Howell* decree did not require indemnification and that the later indemnification order modified rather than enforced it. The later order was upheld only because Arizona law gave the former spouse a "vested" substantive right to half of the waived pay. This Court reversed because "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give." 581 U.S. at 221. Thus, *Howell* limits a court's authority to impose a division under state law. It says nothing about enforcing a veteran's own bargain.

I.E. Enforcing agreed indemnification provisions advances rather than obstructs Congress's purposes. The Act exists to protect former spouses; the decision below leaves them holding an asset of indeterminate value that the veteran may unilaterally reduce to zero, with no

means of protecting themselves. The Act also protects veterans' access to disability pay. Roxane's rule preserves that protection in full—no court may force a veteran to share disability-related pay—while leaving veterans free to trade that right for something they value more.

II. The case can also be resolved on waiver grounds. Richard waived whatever protection the USFSPA afforded him twice over. He waived by contract when he agreed to share waived and Chapter 61 retirement pay and to indemnify Roxane for any shortfall. And he waived in litigation when, through counsel, he participated in drafting the orders dividing his retirement pay and consented to their entry without objection. "[A]bsent some affirmative indication of Congress' intent to preclude waiver," statutory protections are presumptively waivable by agreement. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Nothing in the USFSPA or the statutes construed in *McCarty* rebuts that presumption.

III. The anti-assignment provision of 38 U.S.C. § 5301(a), which Richard raised in opposing certiorari, provides no alternative basis for affirmance. Illegality is an affirmative defense, and Richard waived it by consenting to entry of the very judgment he now calls illegal. Moreover, on the merits, no "assign[ment]" of Richard's disability benefits occurred. An assignment transfers the assignor's legal right to the benefit. Richard made no such transfer: every dollar of his disability pay goes to him. The judgment imposes a personal obligation on Richard, satisfiable from any of his assets.

Rose v. Rose, 481 U.S. 619 (1987), confirms this analysis. *Rose*, construing the adjacent anti-attachment clause, held that § 5301(a) protects the benefit stream itself but does not bar a court from requiring the veteran to satisfy a court-ordered obligation once the funds reach him. The same reasoning governs the anti-assignment clause. And the specific-governs-the-general canon counsels against reading a general anti-assignment statute to override the USFSPA's specific and detailed regime for military retirement pay in divorce.

IV. At a minimum, federal law does not require North Dakota to treat its own final judgment as void. Even if the divorce court should have refused to enter the parties' settlement in 2016, that judgment went unappealed and became final. Under settled principles of res judicata, a final judgment is conclusive even if it rests on legal error. A judgment is void only for jurisdictional defects or a denial of due process, and the USFSPA—which by its terms applies to courts "of competent jurisdiction"—contains none of the clear language needed to make its limits jurisdictional.

ARGUMENT

I. The USFSPA Does Not Bar State Courts From Adopting and Enforcing Divorce Settlements.

In 2016, Roxane and Richard agreed to a divorce settlement in which Richard promised to indemnify Roxane to ensure she received her full share of his retirement pay. Pet. App. 15a. As consideration for that promise, Richard received $140,500 from the parties' assets up front. Pet. App. 29a, 39a. The divorce court adopted that settlement as a final judgment with the consent of both

parties. Pet. App. 29a, 34a. The question in this case is whether the divorce court was authorized to enforce that judgment when Richard violated it.

The answer is yes. The divorce judgment complied with federal law. Although federal law would have barred the divorce court from *involuntarily* dividing Richard's waived retirement pay and Chapter 61 retirement pay,[5] federal law did not bar the court from entering a settlement in which the parties *voluntarily* agreed that Roxane would receive a share of that pay. Because the judgment was consistent with federal law, federal law posed no barrier to its enforcement.

A. Federal Law Did Not Preempt the Enforcement of Settlements Prior to the USFSPA's Enactment, and the USFSPA Left That Non-Preemption Regime in Place.

In *McCarty*, this Court held that federal statutes governing military retirement pay preempted state community-property law insofar as it treated that pay as divisible marital property. 453 U.S. at 232–36. Congress enacted the USFSPA in response to *McCarty*. The USFSPA did not enlarge the scope of federal

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[5] Richard has waived most of his retirement pay, but he is still receiving some disability-based Chapter 61 retirement pay. *See supra* pp. 12–14. Waived retirement pay and the disability-based component of Chapter 61 retirement pay are treated the same way under the USFSPA: both are excluded from the definition of "disposable retired pay." 10 U.S.C. § 1408(a)(4)(A)(ii), (iii). For ease of exposition, we focus throughout the rest of this brief on Richard's waived retirement pay, which was also the focus of *Mansell* and *Howell*. The analysis with respect to his Chapter 61 retirement pay is identical.

preemption. Instead, it abrogated *McCarty* with respect to longevity-based retirement pay while leaving *McCarty*'s regime intact with respect to waived retirement pay.

McCarty's reasoning makes clear that the federal statutes it interpreted do not preempt enforcement of voluntary settlements. Because enforcement of settlements was not preempted under that pre-existing regime, and because the USFSPA does not enlarge that regime's preemptive effect, enforcement of settlements is still not preempted under the USFSPA.

1. Under *McCarty*, enforcement of voluntary settlements is not preempted.

In *McCarty*, this Court held that federal law "completely pre-empted the application of state community property law to military retirement pay." *Mansell*, 490 U.S. at 588 (describing *McCarty*'s holding). After *McCarty*, then, a divorce court could not divide any portion of a veteran's retirement pay over his objection—longevity-based, waived, or Chapter 61.

McCarty concerned a court's involuntary division of a veteran's retirement pay, not the enforcement of a property settlement. Colonel McCarty asked the California court to confirm his retirement benefits as his separate property; the court instead held them "subject to division as quasi-community property" and awarded his former wife a share. 453 U.S. at 217–18.

McCarty's reasoning makes clear that federal law would pose no barrier to a divorce court adopting and enforcing a settlement in which a veteran voluntarily agrees to share his retirement pay. *McCarty*'s

preemption analysis hinged on the following statutory language: "A member of the Army retired under this chapter is entitled to retired pay …." 453 U.S. at 224 (quoting 10 U.S.C. § 3929). The Court inferred from this text and the legislative history that retirement pay was a "personal entitlement." *Id.* (quotation marks omitted). The Court drew the same inference from a statute providing that a service member "is free to designate someone other than his spouse or ex-spouse as the beneficiary" of unpaid arrearages. *Id.* at 224–25 (citing 10 U.S.C. § 2771).

That reasoning does not support invalidating voluntary settlements. Allowing a veteran to make a voluntary decision to give a share of his retirement pay to his ex-spouse is entirely compatible with the principle that retirement pay is a personal entitlement. Indeed, refusing enforcement of settlements would *undermine* that principle by effectively preventing veterans from entering such settlements and hence restricting them from disposing of their own property as they see fit.

The remainder of *McCarty*'s reasoning similarly confirms that the enforcement of voluntary settlements is not preempted. The Court emphasized that "the community property division of retired pay" would "[d]iminish[] the amount available to the retiree," which would make it "less likely that the retired service member will choose to reduce his or her retired pay still further by purchasing an annuity for the surviving spouse, if any, or children." *Id.* at 233. In other words, in the Court's view, involuntarily stripping veterans of their retirement pay would deter them from voluntarily giving money to their ex-spouses. This reasoning plainly does

not suggest that a voluntary divorce settlement is unenforceable.

The Court also emphasized that service members "are not free to choose their place of residence," and "[t]he value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce." *Id.* at 234. Again, this reasoning makes sense only for involuntary orders stripping a veteran of retirement pay, not the enforcement of voluntary indemnification agreements.

2. The USFSPA partially preserved, but did not enlarge, *McCarty*'s preemption regime.

Congress enacted the USFSPA the next year "[i]n direct response to *McCarty*." *Mansell*, 490 U.S. at 584. The USFSPA does not take power away from the States. Instead, it gives power back to them. As this Court explained in *Mansell*, because "pre-existing federal law, as construed by this Court, completely preempted the application of state community property law to military retirement pay," "Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." 490 U.S. at 588. The USFSPA is that affirmative grant of power: it provides that divorce courts may, if they so wish, divide "disposable retired pay," 10 U.S.C. § 1408(c)(1). Because the definition of "disposable retired pay" excludes waived retirement pay, the Court inferred that the USFSPA "grant[s] the authority [to state courts] to treat disposable retired pay as

community property" but does "not … grant[] the authority to treat total retired pay as community property." 490 U.S. at 588–89.

Thus, with respect to waived retirement pay, the USFSPA does not *on its own* preempt state law. Instead, it simply declines to restore the authority to divide such pay and hence leaves in place the preemption regime that *McCarty* recognized. As this Court later put it, "in respect to the waived portion of retirement pay, *McCarty*, with its rule of federal pre-emption, still applies." *Howell*, 581 U.S. at 218.

That understanding resolves this case. *McCarty*'s preemption regime never reached voluntary divorce settlements. The USFSPA restores authority rather than carrying independent preemptive force, and thus could not have withdrawn an authority that state courts possessed all along. Because the enforcement of divorce settlements was not preempted before the USFSPA's enactment, it is still not preempted today.

B. Even If the USFSPA Has Preemptive Force of Its Own, Its Operative Provision Does Not Restrict Courts From Adopting and Enforcing Divorce Settlements.

The USFSPA's operative provision reads: "Subject to the limitations of this section, a court may treat disposable retired pay payable to a member … either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). The Act's definition of "disposable retired pay" then excludes certain amounts—including waived retirement pay—

from what a court may divide. 10 U.S.C. § 1408(a)(4)(A)(ii). Thus, the USFSPA authorizes divorce courts to treat longevity-based retirement pay, but not waived retirement pay, as divisible property. *Mansell*, 490 U.S. at 589.

Even if the USFSPA's *withholding of authority* to divide waived retirement pay is understood as *independently preempting* court orders that divide such pay, the USFSPA still would not preempt the enforcement of voluntary settlements. When divorcing spouses agree to a settlement, they submit it to the court, which then adopts it as a judgment. In North Dakota and elsewhere, a divorce court's review of a settlement agreement is very limited. Because "[p]ublic policy favors the prompt and peaceful resolution of marital disputes," "[t]o the extent that competent parties have voluntarily stipulated to a particular disposition of their marital property, a court ordinarily should not decree a distribution of property that is inconsistent with the parties' contract." *Kramer v. Kramer*, 711 N.W.2d 164, 168 (N.D. 2006) (internal quotation marks and brackets omitted). Divorce courts reject a property settlement agreement only for "mistake, duress, menace, fraud, or undue influence" or when it is "unconscionable." *Id.*; *accord* 1 John Tingley & Nicholas B. Svalina, *Marital Property Law* § 26:3, Westlaw (2d ed. database updated July 2026).

As such, when a divorce court adopts and subsequently enforces such a settlement, it is not itself treating the property as divisible under state law—in the USFSPA's words, it is not "treat[ing]" that property as "property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C.

§ 1408(c)(1). Instead, it is allowing the parties to make their own voluntary decisions about how to dispose of their property.

Further, to the extent the unconscionability inquiry involves a limited assessment of fairness, that inquiry is entirely consistent with treating waived retirement pay as the veteran's personal property, rather than as "property of the member and his spouse." 10 U.S.C. § 1408(c)(1). Suppose, for example, a divorcing couple agrees to a property settlement under which the ex-spouse would receive half of the total retirement pay—defined to include waived retirement pay—each month, but the veteran receives $100,000 up front in exchange. That settlement is fair *precisely because* the background legal rule provides that waived retirement pay is indivisible. That is why it makes economic sense for the ex-spouse to pay $100,000 up front in exchange for a share of the veteran's waived retirement pay. If the divorce court concludes such a settlement is fair, it is not "treat[ing]" that property as "property of the member and his spouse," 10 U.S.C. § 1408(c)(1). To the contrary, it is starting from the premise that the waived retirement pay is *not* "property of the member and his spouse," *id.*, and that it is therefore fair for the ex-spouse to pay up front in exchange for a share of that asset.

This distinction between state-imposed obligations and voluntary agreements is a familiar one in this Court's preemption cases. For instance, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court held that the Airline Deregulation Act of 1978, which prohibits States from "enact[ing] or enforc[ing] any law, … relating to rates, routes, or services of any air

carrier," did not preempt "court enforcement of contract terms set by the parties themselves." *Id.* at 222–23 (ellipsis in original) (internal quotation marks omitted). The Court drew a distinction between "state-imposed obligations," which were preempted, and the enforcement of "self-imposed undertakings," which was not. *Id.* at 228. Likewise, in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act, which preempts state "requirement[s] for labeling or packaging" that differ from federal requirements, did not preempt a claim for breach of warranty that "asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook." *Id.* at 444; *accord Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 526 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement … imposed under State law' within the meaning of [the Federal Cigarette Labeling and Advertising Act's preemption provision]."). The USFSPA works the same way: States may not force veterans to divide waived retirement pay, but veterans may agree to do so—those agreements may be enforced.

Mansell is not to the contrary. In the brief in opposition, Richard pointed out that *Mansell* arose from a divorce settlement, and this Court nonetheless ruled in favor of the veteran's preemption claim. Br. in Opp. 17–19. But *Mansell*'s holding is framed in terms of state courts' "power to treat as property divisible upon divorce" waived retirement pay, 490 U.S. at 594–95—that is, in terms of what courts may do, not what veterans may agree to. In *Mansell*, the California Court of

Appeal upheld the enforcement of a judgment dividing the veteran's waived retirement pay. Although the judgment happened to be the product of a divorce settlement, the Court of Appeal's reasoning did not distinguish between settlements and contested divorces: the Court of Appeal held that the USFSPA abrogated *McCarty* across the board. *Id.* at 586–87. In this Court, Gaye Mansell argued that "the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened," but the Court explained that the Court of Appeal had "decided that it was appropriate, under California law, to reopen the settlement and reach the federal question," and so this Court did too. *Id.* at 586 n.5. It continued: "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." *Id.* 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.").

Mansell is therefore consistent with Roxane's argument that voluntary divorce settlements are enforceable. At most, the question whether Major Mansell's consent to the settlement independently barred his challenge "merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon," and so

Mansell cannot "be considered as having … decided" it. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quotation marks omitted).

C. Surrounding Provisions Confirm That the USFSPA Does Not Restrict Courts From Adopting and Enforcing Divorce Settlements.

Provisions of the USFSPA surrounding its central exclusions establish that it does not restrict the enforcement of voluntary settlements. Every other substantive limit in the Act is addressed to courts. For example: "This section does not authorize any court to order a member to apply for retirement or retire at a particular time[.]" § 1408(c)(3). Or: "A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member …." § 1408(c)(4). Or, again: "A court may not treat retired pay as property" where a pre-1981 decree did not do so. § 1408(c)(1). The Act is a statute about judicial power: what courts may and may not do when they divide property under state law.

By contrast, nothing in the Act speaks to what a veteran may agree to do with his retirement pay. In fact, the USFSPA does contain an anti-assignment provision—just not one that governs what veterans may do. Section 1408(c)(2) provides that the Act "does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse." Congress thus made the *former spouse's* interest in retirement pay inalienable—while imposing no parallel restriction on the veteran. "[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted).

Richard's textual arguments do not show otherwise. First, in opposing certiorari, he observed that the Act defines "court order" to include "a court ordered, ratified, or approved property settlement incident to" a divorce decree, § 1408(a)(2), and inferred that the Act's limits must therefore govern settlements just as they govern adjudicated divisions. Br. in Opp. 19–20. But that argument misunderstands the role the definition plays in the Act. The term "court order" underpins the Act's direct-payment mechanism: "After effective service on the Secretary concerned of a *court order*," the Secretary must pay the former spouse the amount of disposable retired pay the order specifies. § 1408(d)(1) (emphasis added). The definition includes approved settlements so that former spouses whose divorces were resolved by agreement, rather than by contested judgment, may use the direct-payment mechanism too. The fact that the definition of "court order" includes court-approved settlements does not imply that courts are banned from enforcing court-approved settlements.

Richard's second textual argument fares no better. He relies on the second sentence of § 1408(c)(1). That sentence bars a court from treating retirement pay as marital property if a final divorce decree—"(including a court ordered, ratified, or approved property settlement incident to such decree)"—was issued before June 25, 1981, and did not divide, or reserve jurisdiction to divide, that pay. Br. in Opp. 20. *McCarty* came down on June

26, 1981—and Congress added that sentence in 1990 to protect the finality of pre-*McCarty* divorces. After the Act restored state courts' authority to divide retirement pay, some courts had reopened long-final decrees to award former spouses a share of retirement pay those decrees never divided. Congress put a stop to that practice because it was "inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate." H.R. Rep. No. 101-665, at 279 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 2931, 3005; *see* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555(a), 104 Stat. 1485, 1569 (1990). The provision thus says nothing about what divorcing spouses may agree to going forward, and it has no application to a decree entered in 2016.

D. The North Dakota Supreme Court Misunderstood *Howell*.

The North Dakota Supreme Court's decision rested almost entirely on *Howell v. Howell*, 581 U.S. 214 (2017). But *Howell* had nothing to do with the enforcement of voluntary settlements.

In *Howell*, John and Sandra Howell divorced while John was still an active-duty service member. "Anticipating John's eventual retirement," the divorce decree awarded Sandra "'as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins.'" *Id.* at 218–19 (alteration in original) (citation omitted). Several years after the divorce, John waived a portion of his longevity-based retirement pay in order to receive disability pay. As a result, Sandra's monthly payments—equal to half of John's longevity-based retirement payments—went down. *See id.* at

219. In 2014, following John's waiver, the divorce court "ordered John to ensure that Sandra 'receive her full 50% of the military retirement without regard for the disability.'" *Id.* (citation omitted). The practical effect of that 2014 Order was that John was required to pay Sandra an amount equal to half of his waived retirement pay.

The case reached the Arizona Supreme Court. *See Howell v. Howell (In re Marriage of Howell)*, 361 P.3d 936 (Ariz. 2015). As a threshold matter, the Arizona Supreme Court held that the original decree had not required John to indemnify Sandra. The court explained that John was complying with the original decree: "The decree awarded Sandra fifty percent of John's [retirement pay], regardless of the amount, and DFAS paid her that percentage each month. It was not necessary to 'enforce' the decree as DFAS was honoring its terms." *Id.* at 940. Thus, "[b]ecause the decree did not require John to indemnify Sandra for her loss of [retirement pay], the 2014 Order necessarily modified the original property disposition terms." *Id.*

The Arizona Supreme Court nonetheless upheld the indemnification order, not because John agreed to indemnify Sandra in the original decree, but because Arizona law gave Sandra a "vested right" to half of John's waived retirement pay. *Id.* at 941. Even though the court was involuntarily forcing John to pay an amount equal to half of his waived retirement pay to Sandra each month, the Arizona Supreme Court held that the USFSPA did not preempt the order. It reasoned that the order "did not divide the [retirement pay] subject to the VA waiver, order John to rescind the waiver, or

direct him to pay any amount to Sandra from his disability pay." *Id.* at 939. Thus, in the court's view, the indemnification order was not *literally* an order dividing John's waived retirement pay, and "[n]othing in the USFSPA directly prohibits" orders that have the same practical effect. *Id.*

This Court reversed. It concluded that federal law preempted Arizona law to the extent it conferred on Sandra a vested right to half of John's waived retirement pay. This Court explained: "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Howell*, 581 U.S. at 221. Although the divorce court's order was styled as an indemnification order rather than an order dividing John's waived retirement pay, the Court deemed this difference "semantic and nothing more" because "the amount of indemnification mirrors the waived retirement pay, dollar for dollar." *Id.* at 222. Thus, "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress [and] … are thus pre-empted." *Id.*

Nothing in *Howell*'s reasoning suggests that a state court may not enforce a voluntary indemnification agreement. The indemnification order was preempted because the Arizona court was exercising authority that the USFSPA does not confer: It was applying state substantive law to involuntarily divide John's waived retirement pay, and hence was "treat[ing]" that pay "as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). That is not so where a court enforces a

voluntary agreement. This Court's statement that "[a]ll such orders are thus pre-empted," *Howell*, 581 U.S. at 222, refers, in context, to orders in which a state court involuntarily forces a veteran to pay his ex-spouse an amount equal to half of his waived retirement pay. The Court was not expressing any view on enforcement of voluntary agreements.

Further, *Howell* itself observed 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." *Id.* That is what parties do when they negotiate a voluntary settlement: they take account of that fact and bargain against that reality. *Howell* does not preclude divorcing parties from doing so.

This analysis would not come as a surprise to the *Howell* Court. Throughout the case, *Howell* was litigated on the premise that John had never voluntarily agreed to indemnify Sandra. The petition for certiorari touted the case as a strong vehicle because "[t]he Arizona Supreme Court went out of its way to hold that, as a matter of state law, the divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision," and that the enforceability of such a pre-existing provision presented an "analytically distinct legal question." Pet. for Cert. at 31–32, *Howell v. Howell*, No. 15-1031 (U.S. Feb. 16, 2016), 2016 WL 641415. The reply brief on the merits explained that "the Arizona Supreme Court was *not* enforcing the parties' bargain or vindicating Petitioner's 'freedom of contract,' because the original decree did *not* divide Petitioner's waived [retirement pay] or provide Respondent with a

right to indemnification," and that "an express-indemnification provision in a settlement agreement might well be enforceable." Reply Brief of Petitioner at 1–3, *Howell v. Howell*, No. 15-1031 (U.S. Mar. 13, 2017), 2017 WL 975389. And at oral argument, in response to questions on this precise issue, the veteran's counsel told the Court: "Our position today has nothing to do with the enforcement of settlements …. [I]f Petitioner had agreed to [an] express indemnification provision and thereby … waived his rights under the USFSPA, we think that litigation waiver would be okay [and] would be enforceable, just like any other waiver in litigation." Tr. of Oral Arg. at 5, *Howell v. Howell*, No. 15-1031 (U.S. Mar. 20, 2017), 2017 WL 1048380; *see also id.* at 47–48.

E. Enforcing Agreed Indemnification Provisions Would Advance Congress's Goals.

In the family law context, the Court "will not find preemption absent evidence that it is positively required by direct enactment," *Mansell*, 490 U.S. at 587 (internal quotation marks omitted), and state family law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

The court below concluded that enforcement of the parties' settlement would "stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Pet. App. 6a–7a (quotation marks omitted). That conclusion is wrong.

As discussed, the Act's text does not address settlements at all. To the extent the USFSPA's

purposes are relevant, then, the question is whether enforcing such agreements does major damage to clear and substantial federal interests. It does not. To the contrary, enforcing a veteran's agreement advances each purpose the Act serves.

1. Consider first the interest in protecting former spouses. The statute is the Uniformed Services Former Spouses' *Protection* Act. Congress enacted it in response to "the distressed economic plight of military wives after a divorce," *Mansell*, 490 U.S. at 593, for whom a share of the military pension is frequently the most valuable asset of the marriage, *id.* at 602 (O'Connor, J., dissenting). As *Howell* explains, a former spouse's share of retired pay is "at most, contingent, depending for its amount on a subsequent condition: [the veteran's] possible waiver of that pay." 581 U.S. at 222. Under the decision below, the parties may not contract around that contingency. The former spouse must accept an asset of indeterminate value, with no means of protecting herself, and the veteran's later elections may reduce it to zero—as happened here.

2. Consider next the interest in protecting disabled veterans. When a divorce court divides waived retirement pay, it effectively obligates the veteran to pay his ex-spouse an amount equivalent to a share of the veteran's disability pay. The USFSPA protects veterans' access to disability pay by barring such orders. That protection is fully preserved under Roxane's rule: no court may force a veteran to share disability pay.

Roxane's rule benefits veterans by permitting them to enter into mutually beneficial, enforceable settlements in which a veteran can exchange his right to

waived retirement pay for a right he deems more valuable. Suppose, for example, a divorcing veteran needs money up front, while the ex-spouse would prefer a steady income stream. Roxane's proposed rule would allow both parties to achieve those goals. In this case, for example, Richard received $140,500 in up-front consideration for his promise to share his "military retirement"—including waived and Chapter 61 retirement pay—with Roxane. Pet. App. 29a, 38a–39a. Under the decision below, veterans will no longer be able to enter into such settlements, because no former spouse will pay for a promise that cannot be enforced. A state court's enforcement of an agreement that benefits both sides is no obstacle to Congress's objectives.

II. Respondent Waived Any Protection the Act Afforded Him.

The Court could also view this case through the lens of waiver. When he entered into the settlement and consented to the entry of the divorce judgment, Richard waived his federal rights under the USFSPA.

In fact, Richard twice waived any protection the USFSPA could be read to afford him. First, he waived by contract. The settlement defined "military retirement" to include waived and Chapter 61 retirement pay and obligated Richard to indemnify Roxane for any reduction in her share caused by his receipt of disability benefits. Pet. App. 94a, 96a–97a, 105a–07a. If the Act gave Richard a right to retain those amounts for himself, that agreement explicitly relinquished it.

Second, he waived in litigation. The orders dividing Richard's military retired pay were submitted after the

attorneys "work[ed] to draft an order that would ensure Roxane received her share," and they were entered "without objection and in apparent agreement of the parties." Pet. App. 30a, 54a; *see also* Pet. App. 16a, 34a. A party who acquiesces in the entry of a judgment relinquishes objections he could have raised to its terms. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153–54 (2009).

These waivers were valid. "[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). That presumption applies to constitutional protections, *D.H. Overmyer Co. of Ohio v. Frick Co.*, 405 U.S. 174, 185–87 (1972); to statutory rights of action, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); and to statutory entitlements waived as part of a settlement, *Evans v. Jeff D.*, 475 U.S. 717, 730–32 (1986). The presumption yields only where Congress has manifested a contrary intent in "the particular statute," or where enforcing the waiver would contravene a public policy the statute embodies. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704–06 (1945); *see Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

Here, neither exception applies. Neither the USFSPA nor the statutes addressed in *McCarty* contain any indication that Congress intended to preclude waiver. While the USFSPA does contain a clause restraining the alienation of benefits, § 1408(c)(2), that clause covers only former spouses—not veterans.

Nor would enforcing Richard's waiver offend any public policy the Act embodies. As explained above, permitting veterans to bargain over disability-related pay serves both of the Act's purposes: it protects former spouses, for whom an enforceable promise is an asset rather than a contingency, and it protects veterans, who remain free to keep that pay but may also use it to obtain more favorable terms—as Richard did here. *See supra* Part I.E.

The USFSPA does not reflect a judgment, like the one underlying the wage-and-hour protections in *Brooklyn Savings Bank*, that the protected class lacks the bargaining power to protect itself, so that private waivers would defeat the statute's remedial purpose. *Cf.* 324 U.S. at 706–07. Divorcing couples are not like employees signing an employment agreement with a company; they typically are represented by separate counsel, bargain at arm's length, and act under the supervision of a court empowered to reject unconscionable terms. In this case, Richard was represented by experienced counsel, Pet. App. 29a; participated in negotiating the orders dividing his retirement pay, Pet. App. 30a; and received substantial consideration for the terms he now disavows, Pet. App. 29a.

Because Richard's waiver was valid, federal law did not bar the divorce court from adopting the settlement as a judgment in 2016. And because that judgment complied with federal law, the subsequent enforcement of that judgment was not preempted.

III. Title 38's Anti-Assignment Provision Does Not Provide an Alternative Basis for the Judgment Below.

Richard's brief in opposition argued that the enforcement of the parties' divorce judgment violated 38 U.S.C. § 5301(a). That statute provides in relevant part: "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law." Because Roxane "paid some money up front for the right to receive a share of Richard's VA disability pay," Richard argued, the agreement is "prohibited" under the anti-assignment provision. Br. in Opp. 20–21.

Richard's consent to the divorce judgment resulted in a waiver of any argument based on the anti-assignment provision. But if the Court reaches the issue, no prohibited "assign[ment]" occurred.[6]

A. Richard's Consent to the Entry of the Decree Waived His Rights Under the Anti-Assignment Provision.

Irrespective of whether the divorce judgment was an "assign[ment]" under 38 U.S.C. § 5301(a), Richard

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[6] This argument does not fall within the question presented, which addresses only the USFSPA, not 38 U.S.C. § 5301(a). In addition, neither lower court decided it, and Richard, as the appellant below, did not adequately preserve this argument in the North Dakota Supreme Court. He addressed this provision only in describing *Howell*, Appellant's Br. 21–22, *Marschner v. Marschner*, No. 20250066 (N.D. Aug. 11, 2025); he advanced it as an independent ground for decision only in reply. Nevertheless, in an abundance of caution, Roxane addresses this issue.

waived any right to invoke that provision by consenting, through counsel, to entry of the divorce judgment.

The anti-assignment provision makes assignments "prohibited." *See* 38 U.S.C. § 5301(a)(3)(A). Thus, if a veteran purports to assign his benefits to a third party, he can argue in subsequent litigation that the assignment is illegal and hence unenforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("[I]llegal promises will not be enforced in cases controlled by the federal law").

But illegality is an affirmative defense that the defendant must plead. *See* Fed. R. Civ. P. 8(c)(1); N.D. R. Civ. P. 8(c)(1); *Kaiser Steel*, 455 U.S. at 74 (addressing whether a litigant "is entitled to plead and have adjudicated a defense that [a] promise is illegal" under federal law); *id.* at 86 (defense must be "raised by a party"). Affirmative defenses, if not timely asserted, can be forfeited or waived. *Wood v. Milyard*, 566 U.S. 463, 470 & n.4 (2012). Like the USFSPA, *see supra* Part II, the anti-assignment provision contains no indication that it is unwaivable in litigation.

Here, Richard, through counsel, affirmatively consented to the entry of the divorce judgment containing the purported "assign[ment]." Hence, Richard waived any illegality defense based on § 5301(a).

This analysis makes sense. Veterans who assign their benefits outside of litigation can subsequently obtain relief if they come to court. But if a veteran is *in* litigation, under the watchful eye of a divorce court, and elects to consent to the entry of a judgment containing

an "assign[ment]," nothing in § 5301(a) forbids him from doing so.

B. The Divorce Decree Is Not a Prohibited "Assign[ment]."

If the Court reaches the issue, it should hold that no prohibited "assign[ment]" occurred. Section 5301(a) describes the type of agreement it forbids: one "under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation." § 5301(a)(3)(A); *see* Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, 2671 (adding § 5301(a)(3)). That definition is consistent with the traditional legal meaning of "assign," which requires a "transfer" of the assignor's legal rights. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 292 (2009) (quoting *Black's Law Dictionary* 152 (4th rev. ed. 1968)). Thus, had Richard purported to transfer to Roxane his legal right to obtain disability benefits from the VA, he would have assigned his benefits within the meaning of § 5301(a).

Here, however, Richard never transferred to Roxane his legal right to obtain disability benefits from the VA. The orders *did* provide that if Richard one day waived retirement benefits for disability compensation, the consequence would be an obligation for *Richard* to pay Roxane "directly" an amount "sufficient to neutralize" the effect of his election. Pet. App. 96a–97a. But that is a personal obligation, measured by the shortfall but satisfiable from any assets—the ordinary structure of an indemnity and the opposite of an assignment.

Rose v. Rose, 481 U.S. 619 (1987), confirms this analysis. In *Rose*, this Court construed the anti-attachment clause of what is now § 5301(a), which is adjacent to the anti-assignment clause. That provision states that "[p]ayments of benefits … shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a). This Court held that a state court could hold a veteran in contempt for failing to pay child support even though his only income was VA disability compensation. 481 U.S. at 630–34. The anti-attachment provision, the Court explained, protects the benefits from being reached by legal process; it does not bar a court from requiring the veteran himself to pay. As the Court put it, "while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support." *Id.* at 635.

The majority opinion explained that the Court's interpretation was consistent with the anti-attachment provision's two purposes. First, its interpretation was consistent with the provision's goal of preventing the VA from being "placed in the position of a collection agency" because "the Administrator was not obliged to participate in the proceeding or to pay benefits directly to appellee." *Id.* at 630 (internal quotation marks omitted). Second, the Court's interpretation aligned with the provision's goal of compensating for "impaired earning capacity" because "Congress clearly intended veterans' disability benefits to be used, in part, for the support of

veterans' dependents." *Id.* at 631. The Court distinguished three prior cases—*Hisquierdo*, *Ridgway v. Ridgway*, 454 U.S. 46 (1981), and *Wissner v. Wissner*, 338 U.S. 655 (1950)—that had held that anti-attachment provisions in other statutory regimes preempted the application of state community-property laws. It reasoned that in the regimes at issue in *Hisquierdo*, *Ridgway*, and *Wissner*, Congress had made the recipient the "exclusive beneficiary" of the federal benefit, whereas VA disability compensation "[is] intended to support not only the veteran, but the veteran's family as well." *Rose*, 481 U.S. at 634.

Justice Scalia concurred in part and concurred in the judgment. He relied on the statute's plain text: "Neither an order basing the amount of a veteran's child support obligation in part on his disability benefits nor an order that he satisfy that obligation on pain of being held in contempt is an attachment, garnishment, or seizure." *Id.* at 643 (Scalia, J., concurring in part and concurring in the judgment). He continued: "Neither directs the disposition of the veteran's disability benefits or even specifically requires him to use them to satisfy his obligation." *Id.*

Section 5301(a)'s anti-assignment provision works the same way as the adjacent and parallel anti-attachment provision at issue in *Rose*. The anti-assignment provision too bars agreements that give a third party the right to the compensation stream itself, but not agreements directing a veteran to pay money to a third party from any of his assets. *Rose*'s rationales for construing the anti-attachment provision in that manner apply with identical force to the anti-assignment provision. As in

Rose, "the Administrator was not obliged to participate in the proceeding or to pay benefits directly to" Roxane, *Rose*, 481 U.S. at 630; the judgment does not direct the VA to pay disability benefits to anyone but the veteran and imposes no burden on the VA. Further, as in *Rose*, Roxane's position is consistent with the statutory purpose of protecting veterans' families and not just veterans themselves. Although *Rose* involved a child support order while this case involves a property settlement, *Rose* expressly declined to rest its holding on "the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division." *Id.* at 634. Its reasoning turned instead on the text and purpose of § 5301(a)—considerations that apply here as well. Likewise, Justice Scalia's textual analysis of the anti-attachment provision—by its terms, the statute applies to attachments, not court orders directing the veteran to pay money from any of his assets—applies equally to the statute's anti-assignment provision.

The specific-governs-the-general canon reinforces that the Court should not construe a divorce judgment allocating waived retirement pay as an "assignment." "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). That is doubly so where, as here, this Court "will not find preemption" of state family law "absent evidence that it is 'positively required by direct enactment.'" *Mansell*, 490 U.S. at 587 (quoting *Hisquierdo*, 439 U.S. at 581).

The anti-assignment provision is a general statute that applies to assignment agreements with any third

party. The USFSPA is a specific statute that addresses the treatment of military retirement pay in divorce. The USFSPA contains its own, *sui generis* anti-alienation provision, which bars a former spouse from disposing of her interest, § 1408(c)(2), while placing no such restriction on the veteran, *see supra* Part I.C. The USFSPA—not the anti-assignment provision—should govern the treatment of military retirement pay in divorce.

At a minimum, to the extent the term "assignment" in § 5301(a) is ambiguous, the Court should err on the side of the traditional view that an assignment requires an actual transfer of a legal entitlement. That interpretation would ensure that § 5301(a) does not regulate divorce settlements and would avoid the prospect of military divorces being governed by two separate, overlapping federal statutory regimes.

IV. At a Minimum, the Act Does Not Require North Dakota to Treat Its Own Final Judgment as Void.

For the reasons given above, the divorce judgment was legal when it was entered in 2016. Thus, federal law posed no barrier to its subsequent enforcement. But even if the divorce judgment were illegal—that is, even if the divorce court, in 2016, should have refused to enter the settlement agreement as a judgment, notwithstanding the parties' consent—the North Dakota Supreme Court's decision would still be wrong.

The 2016 divorce judgment was a final judgment. Under hornbook principles of res judicata, it should have been conclusive, even if the divorce court erred in entering it. The "res judicata consequences of a final,

unappealed judgment on the merits" are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *see Restatement (Second) of Judgments* § 17 (1982).[7]

Yet the North Dakota Supreme Court effectively nullified the 2016 divorce judgment by declaring it unenforceable. It perceived itself to be bound by the USFSPA to nullify the indemnification provision. Pet. App. 5a (characterizing the "dispositive" question as whether "a federal statute preempt[s] the district court's enforcement of the indemnification provision in the parties' divorce judgment"). It reached that conclusion by characterizing the indemnification order as "void." Pet. App. 8a. The practical effect of this ruling is that the indemnification provision in the 2016 divorce judgment was also rendered unenforceable and void.

That conclusion was wrong. Nothing in federal law requires state courts to ignore state-law principles of res judicata and retroactively declare final divorce judgments to be "void."

This Court's precedents dictate that conclusion. Consider *Sheldon v. Sheldon (In re Marriage of Sheldon)*, 124 Cal. App. 3d 371 (1981), in which a veteran argued after *McCarty* that a final judgment awarding his former wife a share of his retirement pay was void for

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[7] In the proceedings below, Roxane urged the North Dakota Supreme Court to uphold the 2016 judgment based on res judicata. *See* Appellee's Br. 22–24, *Marschner v. Marschner*, No. 20250066 (N.D. Sept. 22, 2025).

want of subject-matter jurisdiction because federal law had preempted the field all along. The California Court of Appeal rejected that argument. Invoking this Court's then-mandatory appellate jurisdiction, the veteran appealed to this Court, asking whether "federal preemption of state community property laws regarding division of military retirement pay render[s] state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law." 50 U.S.L.W. 3869. This Court dismissed the appeal for want of a substantial federal question. *Sheldon v. Sheldon*, 456 U.S. 941 (1982). That disposition was a decision on the merits, binding on lower courts as to "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Thus, *Sheldon* establishes that federal preemption of state community property laws—established in *McCarty* and partially left intact in *Mansell*—does not require reopening final divorce judgments.

Mansell confirms the point. Gaye Mansell argued that res judicata should have barred the reopening of the parties' pre-*McCarty* settlement. The Court held that whether res judicata "should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction." 490 U.S. at 586 n.5. The binding effect of a decree dividing military retirement pay, in other words, is a question of state law—which means that the USFSPA does not preempt that state law.

A first-principles analysis leads to the same conclusion. A judgment is void—and thus open to collateral

attack—"only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Espinosa*, 559 U.S. at 271. The Full Faith and Credit Clause draws the same line: a State may not disregard a sister State's judgment because it "deems it to be wrong on the merits," but it need not honor a judgment rendered without jurisdiction. *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (*per curiam*).

Nothing in the USFSPA suggests that a divorce court that errs in interpreting the USFSPA has exceeded its jurisdiction such that federal law mandates that divorce judgments be retroactively invalidated. The USFSPA is addressed to courts already possessing jurisdiction: it defines "court" to include "any court of competent jurisdiction of any State," § 1408(a)(1)(A). Thus, a court that misreads the USFSPA's substantive limits has erred in the exercise of jurisdiction it undoubtedly possesses; its judgment is correctable on appeal, not void. The USFSPA contains none of the express jurisdictional language necessary for a federal statute to create a jurisdictional rule. *See, e.g.*, *Fort Bend County v. Davis*, 587 U.S. 541, 550 (2019) ("[W]hen Congress does not rank a prescription as jurisdictional, courts should treat the restriction as nonjurisdictional in character." (alterations and quotation marks omitted)). The same is true for the statutes addressed in *McCarty* and the anti-assignment provision in 38 U.S.C. § 5301(a): none of these provisions purport to obligate state courts to reopen final judgments.

And for good reason. Retroactively reopening final judgments causes extreme unfairness, as this case illustrates. To "make the property distribution equitable," Roxane agreed to pay Richard $50,500 from her 403(b) retirement account, plus $90,000 in cash within ninety days of the judgment. Pet. App. 29a, 39a. Given these concessions, "Roxane receiving a portion of Richard's military pay was an important consideration for the parties in distributing the marital estate." Pet. App. 39a. Years after receiving all of that money up front, Richard persuaded the North Dakota Supreme Court to retroactively strip Roxane of her entitlement to her share of his retirement benefits. Despite her large up-front payment, Roxane has never gotten a penny of Richard's benefits and, if the North Dakota Supreme Court's opinion stands, she will get nothing for the rest of her life. Pet. App. 38a ("Richard is now arguing Roxane should receive nothing ever"). The USFSPA should not be construed to require this harsh outcome.

CONCLUSION

The judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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