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 Supreme Court of North Dakota

BRIEF OF MILITARY SPOUSE JD NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Military Spouse JD Network ("MSJDN") is a national professional association that supports military spouse attorneys and other military-connected legal professionals. Founded in 2011, MSJDN works to remove employment barriers, promote licensing accommodations, and provide education and professional support so military spouses can sustain legal careers despite frequent relocations and other demands of military life.

MSJDN's mission gives it a substantial interest in the economic security of spouses whose careers are shaped by military service. This case concerns their ability to negotiate agreements allocating the financial risks associated with military retirement. MSJDN submits this brief to explain how military life shapes spouses' employment, retirement planning, and divorce, and why those practical realities favor enforcement of voluntary indemnification agreements like the agreement at issue in this case.

SUMMARY OF ARGUMENT

Both military servicemembers and their spouses make sacrifices to support the mission of the Armed Forces. For servicemembers, those sacrifices are direct, weighty, and widely understood. But their spouses also shoulder a burden. To enable their partners' service, they may (for example) need to leave their jobs, reduce their working hours, or assume significant child-rearing responsibilities.

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[*] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus*, its members, or its counsel made such a contribution.

This case concerns how servicemembers and their spouses agree to honor those dual sacrifices during divorce. On petitioner's view, spouses may contract to separate their marital assets—including the servicemember's retirement pay—in a way that makes sense for their situation. But on respondent's view, no such freedom exists. Instead, he contends that Congress has foreclosed servicemembers from treating their retirement benefits as a divisible marital asset. That choice, respondent argues, invalidated even terms in separation agreements entered decades ago and relied upon by both spouses ever since.

Respondent's approach should not carry the day. It fails to honor the sacrifices military spouses make. It also fails to honor the liberty of servicemembers to enter contracts they deem beneficial. And it presents a host of practical difficulties. Most saliently, it would take a valuable bartering chip off the table in separation negotiations, making it harder for couples to reach amicable separation agreements and incentivizing costly and potentially acrimonious litigation.

The indemnification agreement in this case is standard contract fare. The Armed Forces have themselves promoted similar language, and for good reason: Indemnification agreements serve valuable public interests. They reduce strain on courts, keep servicemembers deployable, and help ensure children maintain a stable home environment.

These considerations counsel in favor of petitioner's proposed rule. For centuries, courts—including this Court—have declined to interpret statutes as abrogating private, freely entered contracts (or as eliminating the right to enter such contracts) absent a clear statement requiring that result. No such clear statement exists here. Instead, respondent's rule would upend

decades-old contracts and would preclude future contracts spouses deem in their mutual best interest. Along the way, it would deny servicemembers and their spouses a central promise of American law: "the dignity of individuals to make weighty decisions for themselves." *United States v. Tucci-Jarraf*, 939 F.3d 790, 797 (6th Cir. 2019).

ARGUMENT

I. The Practical Realities Of Military Divorce Favor Enforcement Of Negotiated Indemnification Agreements

Military divorce often divides assets that servicemembers obtain over the course of their careers—careers enabled by the sacrifice and support of their spouses. Military assignments and deployments often require spouses to leave their jobs, face periods of underemployment, reduce working hours, or assume greater responsibility for children. Those shared choices can concentrate the family's retirement security in the servicemember's benefits at the expense of their spouse's own assets. At divorce, a spouse may accept future retirement payments in exchange for present property. And a promise to cover specified later reductions in those payments (through indemnification) can be essential to the agreement.

The categorical rule adopted by the North Dakota Supreme Court would deprive spouses of that protection—*after* the property has already been divided. It would also deny future couples a way to allocate risk, even when other remedies cannot provide equivalent protection. Losing that option can impede settlement, disrupt children's housing and education, and impede deployment. These practical consequences favor petitioner. MSJDN is not asking this Court to reconsider *Howell v. Howell*, 581 U.S. 214 (2017), or *Mansell v.*

Mansell, 490 U.S. 581 (1989). Rather, it asks this Court to decline to extend the holdings of those cases to a veteran's voluntary undertaking as part of a negotiated settlement.

A. Military Spouses Often Pay a Financial Price During Their Marriage

Servicemembers pay a heavy price when they join the Armed Forces. Often, their spouses do, too. Military service yields specific challenges that "ha[ve] a significant, permanent adverse effect on the spouse's earning capacity." 1 U.S. Dep't of Def., *Report of The Fourteenth Quadrennial Review of Military Compensation: Main Report* 140 (Jan. 2025). Understanding the harmful consequences of the North Dakota Supreme Court's decision requires an appreciation of those challenges.

Start with the geographic demands of military service. Many military families relocate every two to three years. *See* Off. of Special Needs, U.S. Dep't of Def., *Exceptional Family Member Program: Family Support Reference Guide* 10:1 (July 2026). Those assignments sometimes *require* that military families separate. *See*, *e.g.*, Per Diem, Travel, & Transp. Allowance Comm., *Tour Lengths and Tours of Duty Outside the Continental United States (OCONUS)* 6 (Sept. 23, 2025) (JTR Supplement) ("*OCONUS Memo*") (noting possibility of unaccompanied 12-month tour in Iraq). Where separation occurs, civilian spouses with children often have to manage daily parenting alone. *See* U.S. Gov't Accountability Off., GAO-24-106263, *Military Spouse Employment: Part-Time Workforce Characteristics and Perspectives* 4 (Feb. 8, 2024) ("*GAO Part-Time Employment*"). That work does not come with a paycheck but generates significant

economic value for the household. *See* U.S. Gov't Accountability Off., GAO-26-107871, *Unpaid Household Work: Estimated Value and Time Spent on Domestic Tasks and Caregiving* 7-9 (Sept. 2026). And as relevant here, it typically comes at the cost of the civilian spouse's own career advancement.

In other cases, the entire family may be permitted to relocate to the servicemember's duty station. But that presents problems of its own. Military families generally receive "location *assignments*, rather than location choices." Council of Econ. Advisers, *Military Spouses in the Labor Market* 1 (May 2018). Those assignments can carry families to far-flung corners of the globe—for example: to Alaska, Germany, Guam, or Okinawa. *See OCONUS Memo* at 1, 4-6. These relocations can significantly interrupt civilian spouses' career trajectories.

With each move, those civilian spouses often must leave their employers, rebuild professional relationships and connections, and navigate licensing or certification requirements in a new jurisdiction. Sometimes, civilian spouses cannot find the same type of work at the new duty station, forcing them into underemployment. *See* Def. Pers. Analytics Ctr., Off. of People Analytics, U.S. Dep't of Def., *2024 Active Duty Spouse Survey (ADSS)* 60-61 (rev. Sept. 16, 2025) ("*2024 ADSS*") (noting 27% of spouses reported having "to take a job outside of [their] field"). Other times, taking a new job may bring lower pay and lost seniority. *See* Kristy N. Kamarck et al., Cong. Rsch. Serv., R46498, *Military Spouse Employment* 3-4, 6, 14 (Aug. 27, 2020) ("Kamarck, *Military Spouse Employment*"); 50 U.S.C. § 4025a(a), (c)-(e). Additionally, the servicemember's irregular schedule can leave the civilian spouse with primary childcare responsibility,

making flexible or part-time employment more practical. *See GAO Part-Time Employment* at 4.

These factors have measurable impacts on civilian spouses' careers. Per one recent survey, civilian spouses of active-duty servicemembers in the labor force face a roughly 20% unemployment rate—about five times the 4% national unemployment rate—and they frequently report difficulties with finding employment, with lost income, and with unreimbursed moving costs. *See 2024 ADSS* at 5, 15; U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* tbl. 25 (last modified Aug. 8, 2024) (providing 2024 annual averages). Indeed, among civilian spouses who were employed when their partners deployed or were activated in the preceding 24 months, roughly 60% took time off work, "four in 10 reduced [their] work hours," and "one in 10 left their job." Off. of People Analytics, U.S. Dep't of Def., *2023 Survey of Reserve Component Spouses* 37 (Nov. 2024).

Often, a military spouse's sacrifices have long-term effects. Repeated job changes and unemployment can impair lifetime earnings. *See* Kamarck, *Military Spouse Employment* at 6-7. And short tenure with successive employers can prevent employer retirement contributions from ever vesting. *See id.* Indeed, a spouse "could maintain near-continuous employment without remaining at any one workplace long enough for [employer] matches to vest." Dan Leeds et al., CNA, DRM-2021-U-031515-1REV, *Feasibility of Thrift Savings Plan Contributions by Military Spouses* 42 (May 2023). Those forced to take part-time employment may receive no employer-provided retirement benefits. *See GAO Part-Time Employment* at 7. Unsurprisingly, then, civilian spouses described feeling

"dependent on their service member spouse for their long-term financial security." *Id.*

Compounding this problem, civilian spouses sometimes must assume caregiving roles for their injured or disabled partners. To do so effectively, they must often reduce their hours or else exit the workforce entirely—costing both short-term earnings and long-term retirement contributions. *See* Katherine E. M. Miller et al., *Invisible Partners in Care: Snapshot of Well-Being Among Caregivers Receiving Comprehensive Support from Veterans Affairs*, 2 Health Sci. Rep. e112, § 4 (2019). Even when spouses qualify for a caregiver stipend from the Department of Veterans Affairs ("VA"), the payment is not designed to match their former earnings. *See* Final Rule, Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018, 85 Fed. Reg. 46,226, 46,269, 46,293 (July 31, 2020) (codified at 38 C.F.R. pt. 71). Nor does the stipend provide employer retirement benefits or earn credits toward Social Security retirement. *See id.* at 46,268-69, 46,289. Even where spouses receive current assistance, they lose the opportunity to build retirement resources through continuous employment.

B. Servicemembers' Retirement Benefits Are Often Military Families' Most Valuable Asset, but Valuing Those Future Benefits Presents Accounting Challenges

Rather than redressing these costs to military families by significantly increasing their cash compensation, the Armed Forces provide significant benefits—chief among them, generous retirement packages. Active-duty personnel generally qualify for longevity retirement after 20 years of service. In fiscal year

2022, the average age at retirement for active-duty, nondisability retirees was 42.1 among enlisted personnel and 46.5 among officers. *See* Kristy N. Kamarck, Cong. Rsch. Serv., RL34751, *Military Retirement: Background and Recent Developments* 1, 3 (updated June 3, 2024). Benefits potentially payable over decades can become central to the family's finances long before conventional retirement age. For new active-duty, nondisability retirees receiving pay at the end of fiscal year 2022, average gross monthly retired pay was $2,881 for enlisted personnel and $5,905 for officers—roughly $34,600 and $70,900 annually. *See* Off. of the Actuary, U.S. Dep't of Def., *Statistical Report on the Military Retirement System: Fiscal Year Ended September 30, 2022*, at 56 (Oct. 2023).

Retirement benefits are a significant portion of marital property for military families. "Retirement pay is often the largest asset in divorces where one party is an active or retired military member." 374th Airlift Wing, Off. of the Staff Judge Advoc., *Divorce & Retirement Pay* 1 (Mar. 31, 2021). As one military-divorce practitioner testified before Congress, military couples often lack marital property of equivalent value—for example, invested assets or home equity—to fairly compensate a civilian spouse if he or she does not receive an equitable share of the servicemember's retirement benefits. *See Garnishment of Benefits Paid to Veterans for Child Support and Other Court-Ordered Obligations: Hearing Before the H. Comm. on Veterans' Affs.*, 105th Cong. 10 (1998) (statement of Marshal S. Willick, ABA). In a divorce, this deficiency means that servicemembers often are not in a position to give their spouses real assets in exchange for a larger share of the servicemembers' retirement pay.

Congress recognized this reality when enacting the Uniformed Services Former Spouses' Protection Act. Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982) ("USFSPA"). Military life can make it "'extremely difficult to pursue a career affording economic security, job skills and pension protection.'" *Mansell*, 490 U.S. at 593 n.18 (quoting S. Rep. No. 97-502, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601). Thus, the Act expressly authorizes spouses to receive some division of eligible disposable retired pay pursuant to ordinary state law. *See* U.S. Dep't of Def., *Rights and Benefits of Divorced Spouses in the Military*, Mil. OneSource (Apr. 17, 2026).

The trouble comes in valuing those retirement benefits at the time of a divorce—especially where the divorce occurs prior to the start of such benefits. As noted above, ordinary active-duty longevity retirement generally requires 20 years of service; members who divorce before completing that service will separate before they have qualified for those retirement benefits and before they know the full extent of those benefits. *See*, *e.g.*, 10 U.S.C. § 7314. Reserve retirement also generally requires 20 qualifying years, with payments ordinarily beginning at age 60, subject to statutory exceptions. *Id.* § 12731(a), (f). Even after eligibility attaches, the commencement date may remain unsettled: The USFSPA does not authorize a court to require a member to retire at a particular time; rather, it directs payments to the former spouse only once the member is entitled to retired pay. *Id.* § 1408(c)(3), (d)(1).

Over time, Congress has made certain inputs into the retirement benefit package more predictable—but without guaranteeing eventual payment. For covered pre-retirement divorces finalized after December 23,

2016, federal law generally calculates the divisible pension using the member's retired-pay base and service credits at divorce, together with specified cost-of-living adjustments. *Id.* § 1408(a)(4)(B). Future promotions and additional service therefore do not necessarily increase the former spouse's divisible share. But this "frozen benefit" rule does not resolve whether retirement will occur, when payments will begin, or what disability-related deductions may apply. Fixing certain inputs does not fix the income the former spouse will ultimately receive.

Of particular relevance here, disability complicates the valuation task. Federal law excludes specified disability-retirement amounts—as well as retired pay waived to obtain veterans' disability compensation—from the disposable retired pay available for division. *Id.* § 1408(a)(4)(A)(ii)-(iii). Thus, depending on eligibility and benefit rules, the amount available for division may fall substantially or disappear. *See* Kristy N. Kamarck, Cong. Rsch. Serv., RL31663, *Military Benefits for Former Spouses: Legislation and Policy Issues* 7-8 (updated May 20, 2021). But at divorce, the spouses may not know whether a disability will arise, what rating will be assigned, or whether the member will ultimately elect to receive disability compensation in lieu of retirement pay. Nor does every disability award produce the same financial consequence. For example, retirees entitled to longevity retired pay and VA compensation for disabilities rated at least 50% may receive both payments without the usual waiver. 10 U.S.C. § 1414(a)(1)-(2). For servicemembers medically retired under Chapter 61, that exception also requires at least 20 qualifying years of service and preserves only the retired pay they would otherwise be entitled to receive based on their service. *Id.*

§ 1414(b)(1)-(2). The eventual reduction thus depends on circumstances that may remain unresolved for years after the property settlement.

The Department of Defense has itself recognized these valuation problems, noting "the numerous contingencies that affect members' eventual disposable retired pay." U.S. Dep't of Def., *A Report to Congress Concerning Federal Former Spouse Protection Laws* 74 (2001) ("*DoD Report*"). Any lump-sum payment, it explained, would require making assumptions about the servicemember's life expectancy, interest rates, future cost-of-living adjustments, and the possibility that disability compensation would reduce the former spouse's allocation. *Id.* at 75.

C. Military Divorces Depend on Both Parties' Ability To Rely on Indemnification Agreements

During divorce or separation, a military couple must account for *all* marital assets. That of course includes assets already jointly held by the couple—a house, vehicles, personal effects, bank accounts, and the like. But it can also reach assets that may vest in the future, including benefits related to retirement. For example, during separation a couple may decide "to allocate the house and IRA to one spouse," while the other retains retirement benefits. U.S. Gov't Accountability Off., GAO-20-541, *Retirement Security: DOL Could Better Inform Divorcing Parties About Dividing Savings* 2-3 (July 2020).

Spouses will often trade current assets for future retirement benefits. Presented with the promise of a steady stream of future retirement benefits, a civilian spouse may, for example, let a servicemember spouse retain—or keep most of the equity in—the family home, vehicle, or other personal property. Similarly,

the civilian spouse may agree to allocate more savings or investments to the servicemember, to assume more marital debt, or even to make a lump-sum equalizing payment. And the civilian spouse may consent to waive spousal support altogether, to accept a smaller spousal support award, or to terminate spousal support earlier than a court may otherwise order, all in exchange for future retirement benefits. *See*, *e.g.*, Super. Ct. of Cal., Cnty. of San Diego, Form D-294, *Mandatory Settlement Conference Term Sheet—Dissolution of Marriage* 5-11 (Mar. 2019) (addressing agreed allocations of property, debts, retirement benefits, equalizing payments, and spousal support).

The Marschners' separation agreement typifies this trend. Roxane Marschner paid Richard Marschner $50,500 from her retirement account and paid him a further $90,000 within 90 days of judgment. She made those payments as consideration for receiving a portion of Richard's military pension and federal retirement benefits upon his retirement. Both parties also waived spousal support. App. 2a-3a. The settlement's financial balance thus depended on an exchange of immediate transfers, future income, and support concessions.

Notably, these concessions implicate significant reliance interests. One such interest is straightforward: If a civilian spouse rests his or her assent to a separation agreement on retirement benefits that never materialize, the servicemember receives an improper windfall. And that is not a windfall courts can always correct. State law varies as to whether a court can revisit a previously agreed-upon separation agreement where a legal development frees one spouse of the obligation to follow through on a contractual obligation. *See* Brentley Tanner & Amelia Kays,

Winds of Change: New Rules for Dividing the Military Pension at Divorce, 30 J. Am. Acad. Matrim. Law. 491, 503 (2018).

Even where the law permits courts to reopen a prior separation agreement, the original assets may have changed hands (or may no longer exist). For example, if a servicemember retains equity in the family home in exchange for retirement benefits, he or she may have already sold the home before reaching retirement age. That result is even more likely for goods that are retained for shorter periods, such as cars, consumer property, or personal effects. At minimum, those goods cannot be expected to have the same value at the time of the servicemember's retirement as they had at the time of the separation agreement. *See* Daniel Carroll & Ross Cohen-Kristiansen, Fed. Rsrv. Bank of Cleveland, Econ. Comment. No. 2021-22, *Evaluating Homeownership as the Solution to Wealth Inequality* 4 (Dec. 20, 2021) ("Carroll & Cohen-Kristiansen, *Evaluating Homeownership*"). That makes unwinding an already-completed separation agreement an exceedingly challenging task. A similar concern lurks with regard even to purely liquid assets—bank accounts, IRAs, and the like. Cash available at the time of separation may be spent well before a servicemember's retirement benefits take effect. And one or both parties may later borrow against property allocated at separation, adding debt obligations that weigh against any resources available. *See* Kristopher J. Hilscher, *Military Pension Division: A Review of Cases Following Howell v. Howell*, 36 J. Am. Acad. Matrim. Law. 89, 125 (2023).

Additionally, after separation, one or both parties may choose to remarry (sometimes multiple times). *See* Alison Aughinbaugh & Donna S. Rothstein, U.S. Bureau of Lab. Statistics, *Patterns of Marriage*

and Divorce from Ages 15 to 55: Evidence from the NLSY79, Monthly Lab. Rev., Sept. 2024, tbls. 4, 7. The repeated commingling of funds from uninvolved third parties makes it almost impossible for any court to unscramble the egg and restore all assets to the state they were in at the time of a couple's separation—which could have occurred decades before. *See* Hilscher, 36 J. Am. Acad. Matrim. Law. at 125. It is also unclear whether state courts would ever modify a settlement agreement in such circumstances. While Chief Justice Fair McEvers's concurrence suggested such an effort may be technically possible under North Dakota law, it did not identify even a single proceeding where such modification actually occurred. *See* App. 9a-13a (Fair McEvers, C.J., concurring).

Even setting aside the mechanical difficulties of reopening separation agreements, the parties' actions in reliance on the agreements they have already made create additional complications. If, for example, civilian spouses knew they could not depend on receiving the agreed-upon retirement benefits (even with an indemnification agreement in place), they might have chosen to invest more in conventional retirement accounts, work longer, or opt for a more remunerative career path. Those choices cannot be remade when a shortfall appears (for the first time) years later. Older individuals necessarily "have fewer working years to recoup the lost funds." U.S. Gov't Accountability Off., GAO-26-107536, *Retirement Security: Most Defined Contribution Plans Do Not Require Spousal Consent to Remove Funds and Doing So Would Involve Trade-Offs* 28-29 (Mar. 2026). This problem is especially acute for former spouses of servicemembers who may discover their retirement (without the military benefits they were promised) will not go far enough—

sometimes, after decades of interrupted or diminished employment.

A rule like the one the North Dakota Supreme Court adopted could severely prejudice even recently divorced couples. Take, for example, the issue of spousal support. In some jurisdictions, once spousal support terminates, state law forecloses reinstating it. Maine, for example, provides that the complete termination of spousal support "forever precludes the reinstatement of spousal support in that action." Me. Rev. Stat. tit. 19-A, § 951-A(9). But even in those jurisdictions where support remains available, a later award may turn on a showing of need, income, and ability to pay rather than the value exchanged at divorce. *See Howell*, 581 U.S. at 222; Hilscher, 36 J. Am. Acad. Matrim. Law. at 123; Tanner & Kays, 30 J. Am. Acad. Matrim. Law. at 502. Thus, a spouse who waived short-term support for eventual retirement income may have no means of recouping the surrendered support claim should the retirement income be diminished. That concession, too, may become irrevocable long before the indemnification obligation comes due.

Indemnification agreements (like the ones the Marschners agreed to) are vital to ensuring both spouses get the benefit of their bargain. That is because an award of a percentage of retired pay does not guarantee any fixed monthly payment. Instead, the Department of Defense applies a percentage to disposable retired pay. *See* U.S. Dep't of Def., 7000.14-R, *Financial Management Regulation* vol. 7B, ch. 29, ¶ 6.1.5 (Feb. 2026). So if, for example, a servicemember's disposable retired pay fell from $2,000 to $1,200 per month, a spouse awarded 50% of the servicemember's retired pay would receive $600, instead of the $1,000 he or she anticipated. Thus, without an

indemnification agreement, the former spouse bears the risk that the awarded percentage will produce less income than anticipated.

This presents a problem for both sides in the separation negotiation process. Separating couples frequently wish to distribute the risk of reduced retirement payments evenly. But according to the North Dakota Supreme Court, Congress itself foreclosed that possibility by legislative fiat. That view, if credited, robs civilian spouses of the certainty that comes from guaranteed income in retirement. But it also robs servicemember spouses of the true value of their retirement benefits as a bartering chip in separation negotiations. As the Congressional Budget Office explains, people generally "prefer to receive a certain return on their investment rather than an uncertain one." Cong. Budget Off., *How CBO Uses Discount Rates to Estimate the Present Value of Future Costs or Savings* 4 (Oct. 2024). Thus, if servicemember spouses can promise only uncertain future benefits, they may have to surrender more assets *now*—such as home equity, physical goods, and cash—to bridge the value gap.

More fundamentally, indemnification agreements maximize the flexibility available to both sides. They permit, for example, protection against specified reductions in the retirement income one or both sides receive. They also permit narrower protection, such as guaranteeing only a fixed minimum payment. Consider an example. Suppose a separating couple has only two assets: a house they own together, and a servicemember's future retirement benefits. The couple may not wish to liquidate the house, which could involve selling it at a loss (and disrupting the home life for their children). So they could instead

make a deal: One spouse gets the house; the other spouse will be made whole (with interest) through an increased share of retirement benefits in the future. With enforceable indemnification agreements, the parties can negotiate those exchanges by calculating the net present value of the promised payments and allocating the specified risks by contract. Without indemnification, though, the parties must separately *risk-adjust* any amount of promised retirement benefits. And if the parties cannot agree on the risk, they will struggle to enter a separation agreement in the first place.

The need to risk-adjust retirement benefits would present a challenge even if servicemember spouses had no control over the retirement benefits they received. But, of course, that is far from the case. Subject to eligibility and military requirements, a servicemember can choose when to seek voluntary retirement. The former spouse must therefore account for retirement decisions that can postpone the expected income stream. Later benefit elections can likewise reduce the former spouse's recovery. The Defense Finance and Accounting Service warns eligible retirees, for example, that switching to Combat-Related Special Compensation means "your former spouse's payments may decrease, or stop altogether." Def. Fin. & Acct. Serv., *CRDP/CRSC Open Season Frequently Asked Questions* (updated Dec. 18, 2024). The valuation problem thus includes choices by individuals whose financial interests may diverge sharply from the civilian spouse's. The ability to enter into an indemnification agreement allows the parties to dispassionately allocate the consequences of those choices well before they are actually made.

Indemnification provisions have a longstanding place in military-divorce practice. In 2006, a professor at the Judge Advocate General's Legal Center and School explained that agreements or orders dividing military retired pay were "likely to contain an indemnity clause," ordinarily protecting the dollar amount rather than simply the percentage awarded. John P. Jurden, *Recent Cases Regarding Division of Military Retired Pay When the Servicemember Elects to Receive Disability Compensation*, Army Law., July 2006, at 30, 30. Practitioners continued to recommend negotiated protection after *Howell*; for example, Marine Corps legal-assistance guidance identified contractual indemnification as a major strategy to guard against later reductions in retired pay. *See Overview of North Carolina Divorce and Separation and Legal Assistance Services* 17-18 (rev. July 28, 2020).

Other contractual approaches to separation agreements cannot cover the ground of indemnification agreements. One suggested approach is an offset—a servicemember spouse pays the civilian spouse to accept the added risk of diminished retirement benefits by including a concrete incentive at the time of separation. But such a buyout works only if the couple has enough other property to fund it. That is a problem given the significant scale of military retirement benefits. In the related context of pension buyouts, one judge has recognized that "there's seldom enough other marital property to balance out the spreadsheet." Joseph A. DeWoskin, Mark E. Sullivan & Dan Wiley, *The Military Divorce: An Overview*, 58 Ct. Rev. 58, 61 (2022). And even where significant other marital assets do exist, they cannot always be easily accessed. For example, cashing out a traditional IRA before age 59-1/2 may trigger income tax and, absent

an applicable exception, an additional 10% tax. *See* Internal Revenue Serv., Publ'n 590-B, *Distributions from Individual Retirement Arrangements (IRAs)* 24-25 (Jan. 2026). And homes and cars are not cash equivalents: Cars tend to lose value over time, while selling a home can take months, requires significant transaction costs, and, in a distressed or rushed sale, yields less than its market value. *See* Carroll & Cohen-Kristiansen, *Evaluating Homeownership* at 4-5.

Moreover, an offset requires that the recipient manage uncertainty that receiving guaranteed retirement benefits can help avoid. When parties exchange guaranteed pensions for capital, they assume various risks: for example, that they will outlive their money, that unexpected expenses will deplete their savings, that they will suffer investment losses, and that they will make poor withdrawal decisions. *See* U.S. Gov't Accountability Off., GAO-15-74, *Private Pensions: Participants Need Better Information When Offered Lump Sums That Replace Their Lifetime Benefits* 50 (Jan. 2015). A military pension share's value and duration depend on the award and survivor coverage. Even where a lump sum is available, a spouse may reasonably prefer protected payments to capital that must be invested and spent over time.

The North Dakota Supreme Court's rule would strip away the negotiated protection after the spouses had bargained for and relied on it. The servicemember could retain the property, cash, or support concessions already received, while the former spouse loses the protection obtained in exchange. That result would upset a division of the marital estate completed years earlier. Enforcing negotiated indemnification preserves the original exchange without requiring the parties to reconstruct their finances years later.

D. Barring Enforcement of Negotiated Indemnification Agreements in Military Divorces Would Harm Important Public Interests

"The [S]tate has an interest in the domestic relations of its citizens," *Goodloe v. Hawk*, 113 F.2d 753, 756-57 (D.C. Cir. 1940), and in particular "[m]arriage and divorce laws are of vital public concern," *Oliver v. Oliver*, 185 F.2d 429, 433 (D.C. Cir. 1950). That interest favors amicable separation over acrimonious litigation. But as explained above, *supra* Part I.C, barring indemnification deprives military couples of a term sometimes needed to reach accord. This Court has recognized that restricting the tools available in a negotiation "might well preclude the settlement of a substantial number of cases." *Evans v. Jeff D.*, 475 U.S. 717, 733-34 (1986). And the Department of Defense has noted this concern in related contexts, too: Restricting the ability of both parties to negotiate "limits the flexibility of the parties and the courts in negotiating property settlement agreements." *DoD Report* at 75. Thus, the primary practical effect of allowing the North Dakota Supreme Court's rule to stand is that fewer cases can settle amicably. The predictable result? Fewer "civil end[s] to a marriage" and more costly litigation. U.S. Dep't of Def., *Understanding Mediation*, Mil. OneSource (Apr. 14, 2026).

The costs of a failed settlement agreement may fall disproportionately on children. Consider again the home-for-pension exchange discussed above. Permitting that contract to stand allows one of the spouses to retain the family home. And, depending on their custody arrangement, it could allow their children to remain there. But if that contract is unenforceable, either parent may seek to simply cash out. Where neither parent can finance a buyout of the other's interest

in the home (which may often be the case in separations of younger couples), selling the home may become necessary. Children may thus have to leave their home—and, potentially, their school—all because federal law allegedly preempted a settlement option their parents would otherwise have chosen. That possibility risks compounding the disruptions military children already face from frequent relocations. *See*, *e.g.*, Nat'l Acads. of Scis., Eng'g, & Med., *Strengthening the Military Family Readiness System for a Changing American Society* 140-41 (2019). And it threatens to impair academic achievement. *See* U.S. Gov't Accountability Off., GAO-11-40, *K-12 Education: Many Challenges Arise in Educating Students Who Change Schools Frequently* 16-17 (Nov. 2010).

Preserving the settlement option additionally supports military readiness. Branches may provide that a servicemember is "considered nondeployable until a Family care plan is validated and approved." U.S. Dep't of the Army, Reg. 600-20, *Army Command Policy* ¶ 5-3g(6) (Apr. 15, 2026). Those plans must often address dependents' financial security, transportation, and continuity of care, and must be revised when separation or divorce changes the member's responsibilities. *See* U.S. Dep't of Def., Instr. 1342.19, *Family Care Plans* encl. 3, ¶¶ 1.c(1)(c)-(d), 1.d(3) (May 7, 2010) (incorporating Change 1, Nov. 30, 2017). Contentious divorce proceedings in state court can delay that approval. By contrast, amicable separation agreements can resolve those core issues, making it easier for our troops to get back to serving the Nation's interests, domestically and overseas.

II. This Court Should Avoid Interpretations Of Federal Laws That Unduly Interfere With Settled Contractual Rights

Congress legislates against a backdrop of enforceable private promises. Out of its respect for that backdrop, this Court will "presume[] that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Under that presumption, this Court will not treat a statutory enactment as voiding private contracts unless Congress "say[s] so." *National Bank v. Matthews*, 98 U.S. 621, 627-29 (1878). Thus, unless allowing private contracts to stand would mean "enforcing the precise conduct" an act prohibits, this Court follows "the overriding general policy" of "preventing people from getting other people's property for nothing when they purport to be buying it." *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959).

These principles predate the Founding and find support in both the text and the structure of the Constitution. And they counsel a straightforward result here. Respondent's reading would expand a statutory constraint on the *judiciary's* power to divide military benefits into a categorical prohibition on *individuals'* contracting with one another—wiping out, in the process, separation agreements that have stood for decades. This Court should favor any reasonable interpretation that avoids such a result. Petitioner's interpretation does precisely that.

A. History and Tradition Reflect a Strong Hostility To Assuming Government Action Abrogates Private Contracts

Well before the Founding, the common law recognized that "a statute is not to be construed so as to work a destruction of a right previously attached."

Dash v. Van Kleeck, 7 Johns. 477, 502-03 (N.Y. Sup. Ct. 1811) (Kent, C.J.) (citing Bracton, Coke, and early British authorities). Of special concern was the possibility that government action would nullify contracts freely entered into by individuals. Bracton, for example, construed the Statute of Merton to preserve pasture rights created by voluntary grants. Given the "freely given consent" supporting those grants, he reasoned, the statute "does not nullify a feoffment." 3 Henry de Bracton, *On the Laws and Customs of England* 181 (George E. Woodbine ed., Samuel E. Thorne trans., 1977). Centuries later, the King's Bench applied the same solicitude to a promise made in consideration of marriage, declining to invalidate oral promises "upon which men had trusted and depended." *Helmore v. Shuter* (1678) 89 Eng. Rep. 764, 765 (K.B.); 2 Show. K.B. 16, 17. As Blackstone later explained, the security of such acquired interests counted among the "absolute rights of" every Englishman. 1 William Blackstone, *Commentaries on the Laws of England* *123, *134-35.

This concern with overriding settled contracts crossed the Atlantic and is reflected in the Constitution in two express ways. Most directly, the Contracts Clause prohibits state enactments of a "Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. It also played a role in the development of the Ex Post Facto Clause, which provides that "[n]o . . . ex post facto Law shall be passed." *Id.* § 9, cl. 3. Although this Court has interpreted that Clause as concerning only *penal* provisions, *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798), Madison, at least, initially thought the Contracts Clause redundant on the view that the protection was "already done by the prohibition of ex post facto laws." 2 *The Records of the*

Federal Convention of 1787, at 439-40 (Max Farrand ed., 1911). And those who disagreed with that reading, such as John Dickinson, saw that as a problem: Because the Ex Post Facto Clause "related to criminal cases only," other rights required "some further provision." *Id.* at 448-49.

Beyond those enactments, though, the Constitution took as a background premise the law's respect for the right to contract. As Madison put it, "laws impairing the obligation of contracts" stand contrary to "every principle of sound legislation." The Federalist No. 44 (James Madison). Rather, the law should aim to "give a regular course to the business of society." *Id.* Wilson, for his part, recognized that "[t]he common law is a law of liberty," bottomed on the view that "[a] man can bind himself." James Wilson, *Lectures on Law*, pt. 2, ch. V, *in* 1 *Collected Works of James Wilson* 576-77 (Kermit L. Hall & Mark David Hall eds., 2007).

Of special relevance here, Hamilton addressed proposed legislation that would defeat existing assignments of military pay. He objected to the proposed measure in that it would "vary the risks of parties" or "supersede the contracts between them." Alexander Hamilton, *Arrears of Pay: Hamilton to Washington* (May 28, 1790), *in* 2 *The Works of Alexander Hamilton* 327, 330 (Henry Cabot Lodge ed., 1904). Such measures, he explained, were "not less positive violations of property than a direct confiscation." *Id.*

B. This Court Has Long Presumed Legislative Enactments Do Not Interfere with Contract Rights Absent a Clear Statement

Congress may, if it wishes, pass statutes that abrogate private contracts—and this Court has long recognized as much. But while the Constitution does not "harden[] . . . into a mandate" any prohibition on

federal interference with settled contracts, *cf. Sveen v. Melin*, 584 U.S. 811, 827 (2018) (Gorsuch, J., dissenting), this Court has nevertheless applied a presumption favoring enforcement of private agreements. Put differently, it will not lightly assume Congress meant to abrogate private contracts when the statute's text and structure do not require that result.

This rule appeared in some of this Court's earliest cases. In *United States v. Fisher*, Chief Justice Marshall stressed that an intention to infringe rights or overturn fundamental principles must be expressed with "irresistible clearness." 6 U.S. (2 Cranch) 358, 390 (1805). The following year, *United States v. Heth* addressed compensation for services already partly performed. 7 U.S. (3 Cranch) 399, 407-09 (1806) (opinion of Johnson, J.). Justice Johnson accepted Congress's authority to set federal compensation, but declined to presume that Congress intended "to defeat a reasonable expectation of her officer, suggested by her own laws." *Id.* at 408. Justice Paterson similarly required "clear, strong, and imperative" language before giving the statute the proposed operation. *Id.* at 413 (opinion of Paterson, J.).

This Court's early decisions interpreting state (rather than federal) encroachments on contractual interests pointed the same way—even though those provisions fell under the express prohibition of the Contracts Clause. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), for example, Chief Justice Marshall grappled with a Georgia statute that sought to rescind a land grant. While he applied the Contracts Clause, his decision sounded also in more "general principles which are common to our free institutions," *id.* at 139—including the observation that, where "[c]onveyances have been made, those conveyances

have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact," *id.* at 135. Justice Johnson carried this point further still. Without relying on the Contracts Clause, he agreed that the State could not revoke its grant, invoking "a general principle, on the reason and nature of things." *Id.* at 143-45 (Johnson, J., concurring in part).

To this day, this Court continues to look to issues of "contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). Its analysis starts from the premise that "agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931). And it has shied away from adopting statutory constructions that would "unsettle many accounts" over a period of "several years." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 754 (1947).

Applying this principle, this Court has declined to hold—without compelling statutory evidence—that the mere fact that a party breaks a government rule relating to a contract permits the counterparty to escape the consequences of the deal that counterparty freely entered into. So, for example, in *Matthews*, a bank lent money in exchange for a security interest in land. 98 U.S. at 627-29. Even assuming federal law prohibited that land-secured loan, this Court stressed that the statute nowhere declared the security void. *Id.* "If Congress so meant, it would have been easy to say so." *Id.* at 627. Similarly, in *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941), this Court rejected a reading of the Securities Act of 1933 that would invalidate an option agreement because

of its relationship to an unregistered public offering. *Id.* at 39-45. While Congress prescribed sanctions on unregistered public offerings, it did not include contractual invalidation on that list. *Id.* at 42-45. Because enforcement would not produce the public injury underlying the objection, this Court explained that "what the parties have agreed to ought not to be struck down." *Id.* at 44. And in *Kelly*, this Court rejected a party's effort to use the antitrust laws to void contracts for goods, insisting instead upon the venerable policy "of preventing people from getting other people's property for nothing." 358 U.S. at 520-21.

C. This Presumption Favors Enforcement of Voluntary Indemnification Agreements in Military Divorces

This Court's presumption in favor of the right to contract counsels in favor of petitioner's proposed interpretation of the USFSPA here. As petitioner explains, Congress enacted the Act to restore the state authority that *McCarty v. McCarty*, 453 U.S. 210 (1981), displaced, while leaving *McCarty*'s preemption rule in place for excluded benefits. *See* Pet. Br. 21-25. But *McCarty* never foreclosed servicemembers from voluntarily contracting to share in those benefits. *See id.* at 22-24. The Act's operative provisions limit courts' power to divide benefits *under state law*. They do not restrict what servicemembers may promise. *See id.* at 25-31. Petitioner therefore offers the more plausible interpretation of the USFSPA. If, however, this Court finds itself at equipoise based on the statute's text, context, and history, it should favor petitioner's reading—a reading that does not assume Congress meant to upend hundreds of thousands of separation agreements involving military spouses (some of them decades old).

Enforcing a voluntary promise preserves the distinction this Court has drawn between obligations imposed by state law and those assumed by contract. Again, *Howell* barred *a court* from restoring a former spouse's retirement share through an indemnification order. 581 U.S. at 221-22. But a negotiated indemnity agreement rests on a different foundation: the servicemember's assent. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), recognized this distinction in construing a federal preemption provision. It held that, while federal law displaced certain "state-imposed obligations," it permitted claims for breach of "self-imposed undertakings." *Id.* at 228-29. Enforcing the promise thus holds the parties to the terms they selected. It also respects the traditional state role in domestic relations. *See Mansell*, 490 U.S. at 587-89.

This Court's treatment of other federal payments reinforces the same distinction. In *Hobbs v. McLean*, 117 U.S. 567 (1886), for example, this Court enforced a party's promise to share a future federal payment because it gave the other party no right to collect directly from the government. *Id.* at 575-77. Likewise, in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), this Court barred a constructive trust on military-insurance proceeds, while nevertheless observing that the former spouse and children "may have a claim" against the servicemember's estate for breach of his agreement. *Id.* at 59.

Here, the parties' retirement order expressly required Richard Marschner to pay Roxane Marschner "directly" when federal payments or allotments were insufficient, including when disability compensation reduced her recovery. App. 96a-98a. That provision thus created a personal obligation to make up the agreed shortfall. Enforcing that obligation need not

confer on Roxane Marschner ownership of the protected benefits or a right to demand them from the government. The USFSPA should not be construed to destroy that distinct promise merely because the amount owed under the indemnification agreement is calculated by looking to how much the servicemember's retirement payments have been reduced.

Respondent's construction would instead let Richard Marschner retain the consideration he received (including payments of $50,500 and $90,000, and a waiver of spousal support) while depriving Roxane Marschner of the retirement benefits she negotiated for. App. 2a-3a. Thus, this case implicates the concern raised in *Kelly*—parties "getting other people's property for nothing when they purport to be buying it." 358 U.S. at 520-21. And as explained in Part I, the parties to this dispute are hardly the only ones who have relied on similar indemnification provisions. When Congress passed the USFSPA, it could not have meant to make such freely negotiated contracts unenforceable. In all events, it never indicated otherwise. This Court should presume that "what the parties have agreed to ought not to be struck down." *A. C. Frost*, 312 U.S. at 44.

CONCLUSION

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

Respectfully submitted,

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