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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-1031, Howell v. Howell.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

MR. UNIKOWSKY: Mr. Chief Justice, and may it please the Court:

In Mansell v. Mansell, this Court held that the Uniformed Services Former Spouses' Protection Act does not authorize State courts to treat waived Military Retirement Pay as divisible property in divorce. The question in this case is whether Mansell's holding applies only to waivers that preceded the divorce, or whether it applies to all waivers no matter when they occur, and we respectfully submit that the latter interpretation is correct. And I'd like to make two points this morning. One is that we think the text of the statute compels our interpretation, and the second is that we think our interpretation just makes sense.

So our first argument is based on the text, and I think it's just inescapable that what the State court did here was divide Petitioner's waived retirement pay. And I think that can be seen from the fact that if

1 the State's court's order had simply just said,  
2 henceforth, Petitioner's waived retirement pay is now  
3 divided, if that's -- those were the words of the  
4 modification order, there would have been no difference  
5 at all in effect than what actually occurred in the  
6 modification. So --

7 JUSTICE GINSBURG: Suppose that what the  
8 court had said is, taking a look at what the retirement  
9 pay is now, how much it is total, and had specified then  
10 a dollar amount for the wife equivalent to what the half  
11 was before the disability benefits, that would be okay;  
12 and if it takes disability later, she still keeps the  
13 amount that was awarded, the dollar amount.

14 MR. UNIKOWSKY: So, I'm sorry. If the  
15 question was if the -- if the modification order had  
16 simply said you have to pay a dollar amount equal to the  
17 amount that you've waived, if that was the modification  
18 order, we can assume the same preemption concern that  
19 exists because that's the economic equivalent of a  
20 division of the --

21 JUSTICE SOTOMAYOR: No. I -- I think  
22 Justice Ginsburg's question is, the original divorce  
23 decree here said Petitioner's entitled to and is awarded  
24 as her sole and separate property 50 percent of  
25 Respondent's military retirement. If it had read

1 Petitioner's entitled to \$250 a month, period, full  
2 stop, to ensure that that is received by her, she'll get  
3 \$250 a month from his Military Retirement Pay.

4 MR. UNIKOWSKY: So I -- if -- if that was a  
5 settlement, then I think that it would be enforceable.

6 Our position today has nothing to do with  
7 the enforcement of settlements. In this case, the  
8 divorce court said that the settlement as written only  
9 authorized Respondent to receive half of Petitioner's  
10 pension. That's why it modified it.

11 But if the original order had simply  
12 specified a dollar value per month, then we would have  
13 no objection to enforcing that. In the same sense that  
14 if Petitioner had agreed to express indemnification  
15 provision and thereby, you know, waived his rights under  
16 the USFSPA, we think that litigation waiver would be  
17 okay, would be enforceable, just like any other waiver  
18 in litigation.

19 So I -- I do agree that if there's simply a  
20 dollar figure that Petitioner had signed, that would be  
21 unobjectionable. And the other --

22 JUSTICE SOTOMAYOR: So could she go back to  
23 court now and ask for a dollar figure instead?

24 MR. UNIKOWSKY: I -- I don't think so,  
25 because I think that that would be a modification

1 imposed by the court that would be -- that Petitioner  
2 never agreed to, so he's never waived this protection  
3 over --

4 JUSTICE SOTOMAYOR: She can't go back into  
5 court -- I thought in divorce courts you can go back and  
6 change circumstances and seek a modification of the  
7 monetary awards. Why can't she do that?

8 MR. UNIKOWSKY: Well, I think the question  
9 is whether this particular type of changed circumstance,  
10 which is a waiver of Military Retirement Pay, authorizes  
11 this particular remedy, which is this indemnification  
12 order.

13 JUSTICE KENNEDY: Is -- is the answer that  
14 there's a difference in adjusting alimony payments  
15 and property -- and -- and property settlements that  
16 have been concluded?

17 MR. UNIKOWSKY: Yes, Justice Kennedy.  
18 Absolutely. We -- we don't agree the USFSPA is  
19 interfering with the State court's power over alimony.  
20 And I think we expressly say that in our reply brief.

21 I mean, if Petitioner -- if -- excuse me --  
22 Respondent needed more alimony, the statute has the  
23 savings clause that expressly says that she can come  
24 back to court and get more.

25 JUSTICE GINSBURG: An alimony is something

1 that one spouse pays to the other based on economic  
2 need. The division of property gives a spouse the  
3 property outright. It's hers. It's not something that  
4 she is getting from somebody else. It is hers, because  
5 there's an enormous difference between equitable  
6 division of property and alimony.

7 MR. UNIKOWSKY: Yes. That is our exact  
8 position, Justice Ginsburg. We think that the statute  
9 does not interfere with the ability toward alimony, but  
10 this was a division of property, and here's a Federal  
11 statute which is defining the ex-spouse's property  
12 interest as half of the residual share of the pension.  
13 So --

14 CHIEF JUSTICE ROBERTS: This -- this is a  
15 pretty basic question I should know the answer to, but  
16 when you talk about dividing the property, is that by  
17 any proportion?

18 MR. UNIKOWSKY: Yes --

19 CHIEF JUSTICE ROBERTS: You get  
20 two-thirds/one-third? It's not -- doesn't have to be  
21 50/50?

22 MR. UNIKOWSKY: That's correct. So Arizona  
23 is a community property State, and so property is almost  
24 invariably divided 50/50. There -- there are some  
25 exceptions which are not applicable to this case.

1           Other states, equitable division states,  
2 sometimes deviate from 50/50 divisions, but even if they  
3 were 60/40, I think that would still be a division of  
4 property; it would just be an unequal division of  
5 property.

6           JUSTICE BREYER: Is it under the community  
7 property law that the 50 percent that the spouse  
8 received of the retirement pay was hers even if they  
9 hadn't been divorced?

10           In other words, what is community property?  
11 I thought community property is the two spouses'  
12 interest in the property, each of which owns half from  
13 day one. Is that right?

14           MR. UNIKOWSKY: Yes. That is what  
15 community -- how community property works. But here,  
16 the Federal statute is defining what the State courts --

17           JUSTICE SOTOMAYOR: So is -- is --

18           JUSTICE BREYER: You're not -- I'm not  
19 arguing for you. In that case I'll ask him. But the  
20 divorce decree changed nothing. It simply gave her what  
21 was hers.

22           MR. UNIKOWSKY: Yes. That is our  
23 interpretation of the divorce decree.

24           JUSTICE SOTOMAYOR: So how could he take any  
25 action that impinges on what's her money or her property



1 right?

2 MR. UNIKOWSKY: Well --

3 JUSTICE SOTOMAYOR: I -- I think that's the  
4 U.S.'s position and your adversary's, which is, if, as a  
5 result of the original settlement divorce decree, it  
6 became her property, what right did he have any -- to  
7 take any action that would remove that property or take  
8 it away from her?

9 MR. UNIKOWSKY: Well, I think the question  
10 is what is her property right. And you're right. If --  
11 if you define her property right as one half of the  
12 total retirement pay, regardless of whether a waiver has  
13 occurred, then yes, under that conception of that being  
14 her property right, in fact, Petitioner would have  
15 converted part of her property right.

16 But the point is the Federal statute, what I  
17 think it's saying is it doesn't allow the State courts  
18 to define the community property right that way. What  
19 it's saying is the definition of the community property  
20 right is the total amount of the retirement pay minus  
21 the waived portion.

22 And so if the State court -- and, in fact,  
23 that's actually what the State court did in the -- in  
24 the Petitioner appendix pages 12a and 13a. I mean, what  
25 it's saying is that Respondent's property right was half

1 of the total retirement pay, but I think that's exactly  
2 what this Federal definition is designed to prevent  
3 State courts from doing.

4 So, you know, I -- that's why I think that  
5 it's just inescapable that what happened in this case  
6 was just a flat-out division of Petitioner's waived  
7 retirement pay. And so that's why we view this as just  
8 a direct conflict with Federal law.

9 I don't think the Court even needs to get to  
10 implied preemption and purposes and objectives. We  
11 think this is just doing what -- the -- the thing that  
12 Federal law says that State courts can't do.

13 JUSTICE GINSBURG: What about them saying we  
14 divided the property based on a certain expectation that  
15 the wife would have so much, and now, because the amount  
16 is lower, then the divorce decree should be reopened so  
17 we can give her more of another asset to make up for  
18 what she's missing.

19 MR. UNIKOWSKY: So I think that reopening  
20 the decree to just give her another asset would be --  
21 which is essentially what happened in this case -- would  
22 be preempted by Federal law.

23 Now, we're not saying Federal law preempts  
24 the situation where State court says: Okay, when we  
25 find as a matter of State law that the ex-spouse just

1 didn't understand what she was signing, there's some  
2 kind of mutual mistake.

3           So if -- the reopening of the decree would  
4 not be preempted. In that case, if the parties just  
5 reached a new settlement, that would be okay, or if the  
6 divorce court entered a new decree that complied with  
7 Federal law, that would be okay too.

8           JUSTICE GINSBURG: What would be  
9 noncomplying with Federal law if you reopened the  
10 divorce decree and the judge says now you get a share --  
11 a larger share of some other property?

12           MR. UNIKOWSKY: Well, I think that that  
13 would essentially render Mansell a -- a dead letter  
14 because, you know, just returning to the pre-divorce  
15 context, the effects of Mansell where the waiver  
16 happened before the divorce, it seems to me that if a  
17 divorce court just said, I'm going to raise the  
18 equitable share by the exact amount of the waiver  
19 because I just don't agree with Mansell and I want to  
20 nullify it, I mean, that would just directly conflict  
21 with the whole point of Mansell's holding, which is that  
22 the waiver of the retirement pay lowers the amount of  
23 divisible property.

24           I'd also hasten to add that that -- that is  
25 not what happened here. Arizona is not an equitable

1 division State. I think the Court was saying that all  
2 the assets have to be divided 50/50 and just defined the  
3 relevant asset subject to division as the total amount  
4 of the Military Retirement Pay, which I think is just  
5 contrary to the Federal definition.

6 JUSTICE KAGAN: But could a court say, well,  
7 in light of the fact that the woman is not getting the  
8 usual community property division, that that factor  
9 could -- that that could factor into the determination  
10 of alimony or the determination of child support?

11 MR. UNIKOWSKY: So I think it actually  
12 could, yes. I think that if the situation before the  
13 court was, you know, because of this waiver, I just -- I  
14 can't afford daycare payments for the child and I -- I'm  
15 responsible for them. And she can come back to court  
16 saying, I need child support, that's a need-based issue,  
17 it's not a property division, then yes. This -- the  
18 saving clause of this statute carves out child support  
19 and alimony orders from the preemptive force.

20 So I think that, as long as the court is  
21 applying child support and alimony standards, which are  
22 based on need, it's based on -- they're usually  
23 temporary until the child becomes the age of majority  
24 or, you know, the wife gets back -- or the husband gets  
25 back on his or her feet. So as long as the court is

1 actually applying the alimony and child support  
2 standards, we actually don't read this statute to  
3 impinge on a State court's authority at all. That's  
4 just not what's happened in this case.

5 JUSTICE GINSBURG: Well, as I pointed out,  
6 those are different animals than that -- the -- the  
7 property belongs to her, alimony and child support.

8 And alimony, suppose she remarries. It  
9 ends, right?

10 MR. UNIKOWSKY: Correct. Yes.

11 I'd like to just turn for a moment as to why  
12 we feel our -- our position makes sense, because we  
13 framed our second argument in our brief as ensuring the  
14 purpose of the veteran keep all of his disability pay,  
15 both in form and in substance.

16 I think it makes sense that Congress would  
17 have wanted veterans to keep all their disability pay  
18 for the obvious reason that it's the veteran who's  
19 disabled. And the point of the disability pay is to  
20 substitute for income that the veteran can't earn  
21 because of his or her disability. That's how it's  
22 defined. You get a disability rating if you have a  
23 reduced income potential. And so I think that this --  
24 it makes perfect sense. I think everyone agrees that  
25 the veteran should keep the disability pay.

1           The reason this dispute has come up is that  
2 Congress has made this decision to cut a veteran's  
3 pension or to force a veteran to waive a portion of his  
4 own pension, which has already been earned, if he also  
5 becomes disabled and accepts the disability pay. And  
6 that's a pretty harsh judgment that Congress made,  
7 essentially, to protect the public fisc, but that's what  
8 Congress did.

9           So I think that what the statute is doing is  
10 saying if the veteran is forced to do that, then the  
11 veteran and the ex-spouse will both have their amounts  
12 reduced by an equal amount; in other words, what's  
13 divisible is just going to be the residual share. So I  
14 think that's what this statute is doing.

15           And then if you frame it that way, I think  
16 it makes perfect sense to treat the pre-divorce scenario  
17 and the post-divorce scenario as parallel. Because I  
18 don't think that the goal of protecting disability pay  
19 really has anything to do with the timing of the  
20 disability relative to the divorce. In other words, if  
21 you have two disabled veterans and they're both  
22 divorced, I think that their interest in keeping their  
23 disability pay is the same, even if one of them happened  
24 to become disabled the year before his divorce and the  
25 other one happened to become disabled the year

1 afterwards. So I think that, you know, framed in those  
2 terms, I think the -- the purpose of arguments don't  
3 distinguish between the pre-divorce and the post-divorce  
4 scenario.

5 JUSTICE SOTOMAYOR: The problem is, really,  
6 that when people are getting divorced and they already  
7 know they can't divide up the disability pay, that the  
8 courts have a full picture and can then determine  
9 alimony and child custody with those factors in mind.  
10 And we presume that, at the time of their divorce, this  
11 woman was relying on a certain amount of income that  
12 would be fixed for the rest of her life, and she planned  
13 her life around that income. And he has now taken an  
14 act independent of her and not just reducing her income,  
15 but with her reduction of income, he's also getting a  
16 tax benefit. So he's getting, you know, whatever, 20  
17 percent, a third more than she is by this unilateral  
18 act.

19 In terms of policy, that is a substantially  
20 different impact --

21 MR. UNIKOWSKY: Well --

22 JUSTICE SOTOMAYOR: -- and one that, you  
23 know, the government is taking the position that if  
24 you're doing this post-divorce, you're changing the  
25 nature of the policy.

1           MR. UNIKOWSKY: I -- I think that all we're  
2 asking for is for parallel treatment in the pre-divorce  
3 context and the post-divorce context.

4           JUSTICE SOTOMAYOR: No. But what I'm saying  
5 to you, as a matter of policy, is that right?

6           MR. UNIKOWSKY: Well, I think --

7           JUSTICE SOTOMAYOR: I don't -- I mean, I  
8 don't know the answer legally, but is -- there is a  
9 difference in terms of what Congress might have expected  
10 or not expected.

11           MR. UNIKOWSKY: Well, first of all, it's not  
12 really clear to me that the policy interests are so much  
13 stronger post-divorce than pre-divorce. They're  
14 different, but I'm not sure they're stronger. I mean,  
15 there's certainly a lot of equitable arguments in the  
16 pre-divorce context. I mean, these are typically  
17 spouses from longer marriages who often relied on the  
18 disability pay during the marriage. They may have, you  
19 know, quit their job to care for their veteran spouse  
20 who's disabled.

21           JUSTICE SOTOMAYOR: Sure. But that goes to  
22 the issues of alimony and -- and child support. Those  
23 will get made up there.

24           MR. UNIKOWSKY: Well, then, that -- they may  
25 get made up in alimony and child support, but there's --



1 you know, the deprivation of property in that case has  
2 it's own harshness.

3 Now, I think there's a difference --

4 JUSTICE GINSBURG: But the point is the  
5 divorce court will know if he's already getting  
6 disability pay, then her share of the pension will be so  
7 much less. And with that knowledge, the divorce court  
8 can say, so I'm going to give her more of some other  
9 property.

10 MR. UNIKOWSKY: So I don't think the divorce  
11 court can do that in that context because then Mansell  
12 would be essentially a dead letter. In other words, if  
13 the divorce court said, well, you know, this -- this  
14 person waived his retirement pay and, you know, I don't  
15 like that and so -- you know, I don't agree with the  
16 Mansell rule, so I'm just going to increase the  
17 equitable share to just balance out the waiver --

18 JUSTICE SOTOMAYOR: Well --

19 MR. UNIKOWSKY: -- we think they don't have  
20 --

21 CHIEF JUSTICE ROBERTS: The judge doesn't  
22 have to say that.

23 MR. UNIKOWSKY: Well, I mean -- I mean --

24 CHIEF JUSTICE ROBERTS: Right? I mean, the  
25 alimony -- they're all -- there's not a set number that

1 this has to be. And it seems to me that it -- it would  
2 be a situation where we're certainly going to take into  
3 account the whole picture. And I think it would be  
4 perhaps unreasonable for the judge to say, well, I'm  
5 going to look at everything in figuring out the amount  
6 of alimony, but I'm not going to look at the fact that  
7 he's getting, you know, disability pay.

8 MR. UNIKOWSKY: That may be. And so if a  
9 court could do that before the decree, we also think the  
10 court can do that after the decree. All we're saying is  
11 that before the decree, the court couldn't just adjust  
12 dollar for dollar to compensate for the waiver, because  
13 that would essentially overrule Mansell. And if the  
14 court can't do that before the decree, we're just asking  
15 for parallel treatment after the decree.

16 JUSTICE KAGAN: But sorry to come back to  
17 this, Mr. Unikowski, but you are making a distinction,  
18 right, that the court can take into account this rule  
19 when it's setting alimony and child support? It just  
20 can't take into account this rule when distributing  
21 other kinds of property; is that right?

22 MR. UNIKOWSKY: Right. Distributing  
23 property, yes. I mean, alimony and child support --

24 JUSTICE KAGAN: Right.

25 MR. UNIKOWSKY: -- is not really a property

1 distribution.

2 JUSTICE KAGAN: Right. You're making a  
3 distinction between need-based payments and property  
4 division.

5 MR. UNIKOWSKY: Yes. That is the  
6 distinction, yes.

7 JUSTICE KAGAN: And -- and this rule can be  
8 taken into account in the former, but not in the latter.

9 MR. UNIKOWSKY: Right. And that's the same  
10 pre- and post-divorce. We're just drawing no  
11 distinction between the original decree and the  
12 modification.

13 If there's no further questions, I'll  
14 reserve my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Wirken.

17 ORAL ARGUMENT OF CHARLES W. WIRKEN

18 ON BEHALF OF THE RESPONDENT

19 MR. WIRKEN: Mr. Chief Justice, and may it  
20 please the Court:

21 The authority granted to the States by the  
22 Former Spouses Protection Act to treat -- to treat  
23 marital -- to treat Military Retirement Pay as property  
24 and divide it necessarily operates at the time of the  
25 divorce. The text of the Act, its primary purpose to

1 protect the former spouse, and the practical realities  
2 of divorce make the time of divorce paramount. That is  
3 when family courts must determine the extent of all of  
4 the marital property, divide that property, and also  
5 coordinate the multiple moving parts of a divorce, which  
6 include spousal maintenance, which is often intertwined  
7 with the division of property.

8           Now, the authority to divide Military  
9 Retirement Pay is limited only by the Act's exclusion of  
10 amounts of retirement pay that are then being deducted  
11 as the result of a previous waiver to receive disability  
12 benefits. And whether that division at the time of  
13 divorce occurs before the member's retirement, as the  
14 statute expressly allows, and, therefore, before any  
15 waiver has occurred, or the division occurs after  
16 retirement, the State law consequences of the property  
17 division must follow along.

18           And those consequences can include the fact  
19 that the -- in -- in a particular State that the  
20 retirement pay awarded to a spouse is considered to be  
21 that spouse's vested property. And also, the  
22 consequential right of the State to formulate remedies  
23 to protect and affect that property right, to compensate  
24 for any damage that might be done to that property  
25 interest.

1                   And another consequence I -- that I think  
2 has come up here today is -- is that of the finality of  
3 the divorce decree and whether the State court has the  
4 ability to go back and modify -- after a waiver of  
5 retirement pay in favor of disability pay, to go back  
6 and modify a division of property. I think --

7                   CHIEF JUSTICE ROBERTS: What --

8                   MR. WIRKEN: I --

9                   CHIEF JUSTICE ROBERTS: What is the general  
10 answer to that? I mean, it -- I gather there's a  
11 distinction between the finality of division of -- with  
12 respect to property, as opposed to some other -- as  
13 opposed to cash, I guess, or -- or income. Is -- is  
14 there that difference?

15                   MR. WIRKEN: I think the -- I think the  
16 general answer, Your Honor, is that the a decree  
17 dividing -- to the extent it divides property is final.  
18 And for good reason. And in Arizona, certainly when  
19 there is a settlement agreement, as there was here, and  
20 it then becomes incorporated into the divorce decree,  
21 it's impossible, I would say, to go back and modify the  
22 division of property.

23                   You know, one of the objectives of family  
24 law courts is to achieve finality and -- and not have  
25 folks coming back in the future. Certainly, child

1 support and spousal maintenance can be exceptions, but  
2 there has to be a substantial and continuing change of  
3 circumstances in order to justify revisiting, reopening,  
4 modifying child support or spousal maintenance.

5 But property division is -- is thought to be  
6 set in stone. At the time of divorce, the -- the  
7 spouses are splitting the sheets and the Court must  
8 determine how many sheets there are and how big they are  
9 and decide who gets what. And what that is -- what is  
10 decided at that point in time is what they have going  
11 forward. And neither one can do anything to affect what  
12 was -- that community property that was divided and then  
13 becomes now the separate property of each of those  
14 spouses.

15 JUSTICE KENNEDY: So suppose the only asset  
16 is the pension. Then would the family court's order  
17 here be permissible?

18 MR. WIRKEN: I'm sorry. Supposing that the  
19 retirement is the only asset?

20 JUSTICE KENNEDY: The retirement is the only  
21 asset.

22 MR. WIRKEN: And your question is what?

23 JUSTICE KENNEDY: Then -- then what -- would  
24 the family court's order here be proper?

25 MR. WIRKEN: Yes. The order here to

1 indemnity, to create a remedy here, of course. Whether  
2 it's the only asset or not, it's certainly in that  
3 hypothetical -- because her community property interest  
4 has been transformed into her separate property interest  
5 and then unilaterally damaged by the actions of her  
6 ex-husband.

7 JUSTICE SOTOMAYOR: Well, how do you deal  
8 with your adversary's position that her borrowing from  
9 our prior case that the only reasonable expectation that  
10 the Court or she could have had was that his military  
11 pay was always subject to a potential deduction for  
12 disability pay? That's basically his argument, that the  
13 act tells anyone relying on military pay that it can, as  
14 a matter of law, be changed by a disability award.

15 MR. WIRKEN: I disagree with my friend,  
16 because --

17 JUSTICE SOTOMAYOR: I know you do. The  
18 question is how and why.

19 (Laughter.)

20 MR. WIRKEN: Well -- well, Congress gave the  
21 States the right to treat this kind of property  
22 according to State law. And, therefore, you know, going  
23 along with that, when -- in a community property State  
24 or in any State, whatever the property scheme may be,  
25 the Court gets to divide what was then before the Court.

1           And in -- in this situation, there had been  
2 no waiver whatsoever, and so the Court is looking at  
3 making a -- looking at the big picture, has -- as a  
4 couple of you have referenced, they -- they're looking  
5 at all of the assets in making -- and, by the way, it's  
6 an equitable division in Arizona. It's not an even  
7 division, as in California and other community property  
8 State. And the Court is doing what is equitable in  
9 trying to balance the division of property among them.

10           Once having done that, the die is -- is --  
11 is cast. It is set in stone and the --

12           JUSTICE BREYER: Suppose it turns out that  
13 in time one, we enter a divorce decree. The divorce  
14 decree says and in addition, you're going to get half of  
15 what Uncle Joe gives Sam, the husband. By that time, it  
16 turns out to be -- I mean, from the beginning, Uncle Joe  
17 leaves property in a form that it's illegal to give to  
18 the woman. I can imagine cases.

19           I mean, can the State give money that later  
20 on it turns out that it was absolutely illegal to give  
21 that person that money? I don't know how that works. I  
22 would be very surprised if res judicata in divorce cases  
23 says: Okay, I'm sorry, we have a decree here, and then  
24 we're going to violate Federal law because the decree  
25 violates Federal law, as it turns out.



1 MR. WIRKEN: Well, as I understand your  
2 hypothetical --

3 JUSTICE BREYER: Maybe it's too complicated.

4 MR. WIRKEN: You're talking about a State  
5 court --

6 JUSTICE BREYER: I'm saying there's a  
7 Federal law here, and the Federal law says: I'm very  
8 sorry, you cannot give this money to the spouse, for  
9 good reason or bad, perhaps bad. But it says you can't.  
10 And is the fact that you gave that money to the spouse  
11 ahead of time, why does that matter? That's his  
12 argument.

13 MR. WIRKEN: And there are two things going  
14 on here, and -- and one of them is at the time of this  
15 divorce and many divorces, there is no disability  
16 benefit --

17 JUSTICE BREYER: Yes, there is.

18 MR. WIRKEN: -- paid.

19 JUSTICE BREYER: There is a disability. The  
20 disability is that if it turns out that what you are  
21 giving over time is money that was turned in to get the  
22 disability, it is illegal for you to do it. Now, that's  
23 what's there at the time of the decree.

24 MR. WIRKEN: No. The -- the -- what is  
25 illegal is the division of retirement pay that has

1 already been waived to receive disability --

2 JUSTICE BREYER: No. That's not what it  
3 says in the statute. It says in the statute that it is  
4 illegal to treat disposable retired pay as property of  
5 the member and his spouse. That is what is now legal.  
6 That's legal; right? With an exception.

7 The exception is the result of a waiver of  
8 retired pay. That, you can't do. So you can't do it on  
9 day 1; you can't do it day 20; you can't do it day 30.  
10 And what they are saying is a well-known property  
11 interest. It is an interest that you do not get till  
12 day 40. But you can't divide it on day 1. Just like  
13 it's a -- like, you know, they're used to be these  
14 property interests that you received on a contingency.

15 MR. WIRKEN: The statute in Subsection D(1)  
16 in the last sentence contemplates the division of  
17 military retirement pay even before the service member  
18 has retired, and, therefore, before there could have  
19 been any waiver and any disability benefits taken.

20 JUSTICE BREYER: That's true. So it's given  
21 to her, but it's subject under Federal law to a  
22 contingency. We used to have our first-year property  
23 class filled with this kind of stuff. I mean, you know,  
24 somebody would get a horse, but he'd only get the horse  
25 on the contingency that Uncle Joe died, which doesn't

1 happen for 30 years. But, nonetheless, say something  
2 that happens to that property subject to the contingency  
3 on day 1. That's what this sounds like to me.

4 MR. WIRKEN: And -- and I respectfully must  
5 disagree --

6 JUSTICE BREYER: That's fine.

7 MR. WIRKEN: -- because it also says -- it  
8 doesn't speak in -- in the form of a contingency, as I  
9 read it. It speaks in the form of authorizing the  
10 states --

11 JUSTICE BREYER: I know.

12 MR. WIRKEN: -- to divide the -- the  
13 retirement pay, according to State law, at the time of  
14 the divorce. And if at that time there is no  
15 disability -- the retirement pay hasn't been waived, no  
16 disability benefits are being claimed, they aren't being  
17 divided.

18 What's being divided, and necessarily so, is  
19 the expectation of this retirement, and -- and for good  
20 reason, because all these moving parts have to be  
21 somehow balanced equitably between these spouses. The  
22 State court gets to say: You get 50 percent or you get  
23 X dollar amount or you get X percentage. And it doesn't  
24 have to be fifty-fifty. But whatever it is, the State  
25 court decides that, in its wisdom at that moment in

1 time, as a -- only a State court can do best.

2 JUSTICE GINSBURG: Why isn't your solution,  
3 and I think you're saying when he elects the disability,  
4 when -- when he does that, then the State court can  
5 provide an indemnification for her that's equal to the  
6 amount that she's losing. But isn't that just an  
7 end-run around the Mansell decision? The Mansell  
8 decision says --

9 MR. WIRKEN: No.

10 JUSTICE GINSBURG: Why not?

11 MR. WIRKEN: Because it's not a -- it's not  
12 a division of any disability pay. There's not a  
13 redistribution of property being made.

14 This decree divided the military retirement  
15 pay 50/50, and that part of this decree was never  
16 changed when the court issued its remedy order to -- for  
17 Miss -- for the benefit of Mrs. Howell. The 50/50  
18 division still remained, but that 50 percent had become  
19 worth less, and by the unilateral action of the husband,  
20 so he was ordered to make a make-up payment to her to  
21 reimburse her for her loss. It really wasn't a  
22 modification of the decree at all by the way.

23 CHIEF JUSTICE ROBERTS: Well -- well,  
24 that's --

25 MR. WIRKEN: It -- it was an enforcement.

1 CHIEF JUSTICE ROBERTS: Maybe this isn't  
2 that, but that -- that's very legalistic in the sense  
3 that you're saying well, you can't divide this, but you  
4 have to pay her money so that's she's put in the same  
5 position as if you'd divided this.

6 Is that your suggestion?

7 MR. WIRKEN: Well, no. I -- I understand  
8 the -- the parallel that my colleague draws and that you  
9 suggest in your question, but they -- it's not a legal  
10 equivalent. It practically -- there's no way to escape  
11 the fact that it's dollar for dollar because it wouldn't  
12 make any sense to --

13 CHIEF JUSTICE ROBERTS: Well, if I were --

14 MR. WIRKEN: -- remedy for a lesser or  
15 greater amount than what she lost.

16 CHIEF JUSTICE ROBERTS: If I were a  
17 legislator and I passed this law for a particular  
18 purpose, and at the end of the day the result is the  
19 same as if the law hadn't had any -- it has no practical  
20 effect at all, I would think that's contrary to -- to  
21 what the legislation was designed to accomplish.

22 MR. WIRKEN: But you as a legislature  
23 sitting across the street adopted this to protect that  
24 spouse and to enable States to divide the retirement pay  
25 as property according to State law at the time of the

1 divorce. And --

2 CHIEF JUSTICE ROBERTS: Well, then maybe I'm  
3 the one who insisted on the part of the law that says  
4 when it's disability, you don't get to divide that.

5 MR. WIRKEN: If it has already been waived,  
6 it cannot be divided. But here, when she divorced, it  
7 had not been waived. There is no disability to divide,  
8 and -- and none was divided.

9 And I think we should not lose sight of the  
10 fact that these parties made an agreement. This wasn't  
11 something that was litigated and adjudicated. It was  
12 the product of a settlement agreement and implicit in  
13 that agreement is a covenant of good faith and fair  
14 dealing, and that one will not do anything in -- in his  
15 discretion to injure the contract benefits of the -- of  
16 the other, the wife. And yet he unilaterally chose,  
17 voluntarily chose, to apply for disability benefits.

18 CHIEF JUSTICE ROBERTS: But when -- when  
19 did -- the disability benefits started how many years  
20 after the divorce?

21 MR. WIRKEN: 13 or 14, Your Honor.

22 CHIEF JUSTICE ROBERTS: Well, then I mean, I  
23 think it's -- it's not like there was a bait and switch  
24 involved.

25 MR. WIRKEN: Not suggesting that. But

1 the -- whenever it was, the agreement goes on far longer  
2 than that. And as I think was suggested in your  
3 colleague's question, Justice Sotomayor, that there was  
4 an expectation that this wife had and it was basically  
5 rooted in that settlement agreement that they made.

6 So -- and certainly, Mansell doesn't preempt  
7 the right of spouses to -- to make agreements for the  
8 division of their community property. It may prohibit  
9 an agreement for the division of retirement pay that has  
10 already been waived to receive disability benefits, that  
11 much is clear, but that is the extent of the preemption  
12 or prohibition in Mansell.

13 JUSTICE SOTOMAYOR: So the -- the agreement,  
14 the court's order I know required him to pay a certain  
15 amount. It -- it took care of the Laches question.  
16 What happens moving forward? The military pays her 50  
17 percent minus the disability pay and he has to pay  
18 separately the difference?

19 MR. WIRKEN: Exactly. And -- and what is --

20 JUSTICE SOTOMAYOR: Where he gets it from it  
21 doesn't matter?

22 MR. WIRKEN: And where -- where he gets it  
23 from, he -- you know, he has his share of the military  
24 retirement pay and it can legitimately come from that.

25 JUSTICE SOTOMAYOR: And -- and you may not

1 know this, I don't know if it's in the record. Does he  
2 have a -- a job after he retired?

3 MR. WIRKEN: Your Honor, I do not know,  
4 and -- and it --

5 JUSTICE SOTOMAYOR: More curiosity.

6 MR. WIRKEN: -- it is -- it is not in the  
7 record. If it were I would know that and I -- I don't  
8 know.

9 JUSTICE GINSBURG: But you said he could pay  
10 her this amount, this indemnification out of the  
11 disability --

12 MR. WIRKEN: He -- no, he can pay it out of  
13 his share of the military retirement pay. His -- let's  
14 say that, you know, he was getting -- when they  
15 divorced, it was all military retirement, a hundred  
16 percent, and let's say it gets reduced by 20 percent by  
17 virtue of his disability rating, so he still has 40  
18 percent, as does she, of the original retirement pay.  
19 He -- he can pay her out of his 40 percent of that  
20 retirement pay. He can also pay her out of other  
21 assets. He is -- he is not directed to pay her out of  
22 disability benefits. And -- and this is not a situation  
23 where the record reflects that he has no other assets.  
24 And -- and indeed, he -- he has his share of the  
25 retirement pay.



1           I -- I think it -- it's key that Congress  
2 gave the States the right to divide retirement pay at  
3 the time of divorce according to respective State law,  
4 and that when that happens, the divided interests are  
5 vested in each of the parties, and this order to  
6 indemnify does -- does not violate the Act. It does not  
7 preempt State law. It does not effectively divide  
8 disability benefits. And to a point raised by my  
9 colleague, the order is -- is not one that modified the  
10 decree at all. It was an enforcement order.

11           Now, I know you might say that the Arizona  
12 Supreme Court characterized it as a modification. The  
13 court did so for a different reason. It was deciding  
14 whether a State statute regarding modification applied.  
15 It determined that it did not, but it first determined  
16 that there was a modification because there was no  
17 indemnification provision in the decree.

18           But for purposes of this Act, a modified  
19 decree is defined in the definitions as a -- a court  
20 order that affects a division of property. There was no  
21 division of property affected by the indemnification  
22 order. It was, instead, in the nature of an  
23 enforcement. In fact, the Arizona Supreme Court at  
24 least twice refers to it as a reimbursement order or an  
25 indemnification order or a make-up payment. It was

1 enforcing. It never changed anything in the original  
2 divorce decree. So it was not a modification for  
3 purposes of the Act.

4           What should the rule be? Given the concern  
5 of Congress for former spouses, Congress could not have  
6 intended to allow a service member to -- to obtain a  
7 divorce, divide the MRP, and then apply for disability  
8 benefits and waive MRP and leave the former spouse  
9 without a State court --

10           CHIEF JUSTICE ROBERTS: Well, it's --  
11 concern for former spouses is certainly evident in the  
12 Act, but as we've always said, no statute pursues its  
13 purpose at all costs, and with obviously a different  
14 purpose applicable with respect to the part of the law  
15 that says you can't divide disability payments. So I  
16 don't think you can resort to the purpose of the statute  
17 in -- in a general sense to -- to resolve every  
18 subsidiary legal issue.

19           MR. WIRKEN: But the primary purpose,  
20 according to Congress, was to protect the -- the spouse.

21           CHIEF JUSTICE ROBERTS: Yeah. And it's  
22 subsidiary purpose was to do so in a way that preserved  
23 disability payments and didn't allow them to be divided.

24           MR. WIRKEN: To be divided. But -- and I --  
25 this is, again, a situation, a case in which there were

1 no disability benefits to divide at the time of divorce  
2 when her property rights were vested in her.

3 So this Court should therefore hold that the  
4 division of Military Retirement Pay is determined  
5 according to State law at the time of divorce and that  
6 an order remedying damage to such a share is not  
7 preempted by the Act.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Eisenstein.

10 ORAL ARGUMENT OF ILANA H. EISENSTEIN

11 FOR UNITED STATES, AS AMICUS CURIAE,

12 SUPPORTING THE RESPONDENT

13 MS. EISENSTEIN: Mr. Chief Justice, and may  
14 it please the Court:

15 Let me start with the concern that Your  
16 Honor has about what the effect of Mansell is under the  
17 rule that we propose. States in our view are permitted  
18 to give a -- a relief to spouses after a post-divorce  
19 indemnification affects the already separated share of  
20 the wife, and it still -- the rule of Mansell and the  
21 Spouses' Protection Act still retains its effect because  
22 the -- the subsequent waiver shrinks the pie that is  
23 available for the remedy, but it doesn't change or  
24 dictate what division the State court had to take either  
25 in the first instance or in giving a remedy to the

1 former spouse. So we take a broader view of the State  
2 courts' ability to respond to changes in circumstance,  
3 whether that change be because of a waiver of -- waiver  
4 of disability benefits or any other reason. And that  
5 the Act's primary function is to leave to State law the  
6 ability to equitably divide these assets in the first  
7 place.

8 JUSTICE BREYER: Explain this. I'll have an  
9 easier time if you can explain it.

10 What the decree says is 50 percent of the  
11 retirement goes to the husband and 50 percent to the  
12 wife. It doesn't say what the retirement is.

13 Suppose that -- that ten years later,  
14 government raises the retirement. Does the wife get  
15 more?

16 MS. EISENSTEIN: So, your Honor, I believe,  
17 under your Honor's hypothetical, the answer is yes,  
18 but --

19 JUSTICE BREYER: Okay. Yes. Yes.

20 MS. EISENSTEIN: Yes, but it is up to a  
21 State court to determine --

22 JUSTICE BREYER: State court says yes.  
23 Okay.

24 MS. EISENSTEIN: Yes.

25 JUSTICE BREYER: Yeah. Now, second thing

1 is, unfortunately, Congress lowers the amount. Does the  
2 half go down to the wife too?

3 MS. EISENSTEIN: So, once again, under -- it  
4 depends on State law. So --

5 JUSTICE BREYER: It depends on State law.  
6 In other words -- in other words, if you say that 50  
7 percent goes to the wife, 50 percent goes to the  
8 husband, and you cut it, then more than 50 percent will  
9 go to the wife.

10 MS. EISENSTEIN: That's right, because -- so  
11 let me be clear of what we think the role of the Spousal  
12 Protection Act is.

13 The Spousal Protection Act instructs State  
14 courts how to calculate the disposable retired pay  
15 available for division, and otherwise puts disposable  
16 retired pay on equal footing at any other civilian asset  
17 so that it allows the State court to treat the  
18 disposable retirement pay as any other marital property  
19 in a variety of ways.

20 One is it can equitably divide those assets  
21 in any way it sees fit, from zero to one hundred  
22 percent.

23 JUSTICE BREYER: Suppose the statute, it  
24 said, following Mansell, that the wife cannot have more  
25 than 50 percent of the actual after tax income from

1 retirement. Then can the State do it?

2 MS. EISENSTEIN: The after tax income from  
3 retirement.

4 JUSTICE BREYER: Yeah.

5 MS. EISENSTEIN: Well, I think that the  
6 state could do, in terms of a remedy, is all they could  
7 divide is the --

8 JUSTICE BREYER: I'll tell you what.  
9 There's a statute, a federal statute, says if taxes go  
10 up, or if the payments are reduced for retirement, under  
11 no circumstances can the wife obtain more than the  
12 reduced -- half the reduced payment.

13 MS. EISENSTEIN: Right. So if they could --

14 JUSTICE BREYER: And then can the State  
15 court do something about that?

16 MS. EISENSTEIN: It couldn't if it limited  
17 it to any other sources of income.

18 JUSTICE BREYER: I'm not keeping that out of  
19 it.

20 MS. EISENSTEIN: Right.

21 JUSTICE BREYER: I'm saying can the State  
22 just say, well, we don't care. There is a state statute  
23 which says that we have to keep the wife's share at no  
24 more than 50 percent. But let's forget about that.  
25 There's a federal statute to that effect. We'll have

1 our State law. Can't do that, can it?

2 MS. EISENSTEIN: If I understand your  
3 Honor's question, which is that there's only military  
4 retirement pay, and the question is can the wife get  
5 more than 50 percent share of it --

6 JUSTICE BREYER: In a state statute that  
7 says no.

8 MS. EISENSTEIN: The answer is no.

9 JUSTICE BREYER: Right.

10 MS. EISENSTEIN: And that would be --

11 JUSTICE BREYER: So if that says no, then  
12 why, if it goes down because of the choice of the  
13 husband, who is protected in this choice by the  
14 exception, why is that different.

15 MS. EISENSTEIN: It's different because  
16 there are other assets besides the military -- the  
17 disability benefits used to satisfy the indemnification  
18 order in this case, and so there's a very --

19 JUSTICE BREYER: Is that the only  
20 difference?

21 MS. EISENSTEIN: I think that's a  
22 significant difference.

23 JUSTICE BREYER: All right. That's the only  
24 difference. So in other words, if it says, no, you  
25 cannot give the wife more than 50 percent of the

1 pension, then what they could do is have the decree, and  
2 it says the wife gets 50 percent, gets -- sorry -- you  
3 can't -- you cannot give them more than 50 percent --  
4 I'm getting mixed up in my thing.

5           It says you can't give more than 50 percent,  
6 and then there's a statute says you can't give -- you  
7 can't give 60 percent, but the judge says, here's what  
8 I'll do: I'll give you 50 percent from this, and I'd  
9 like to give you more than 60 percent so I'm going to  
10 take 10 percent from something else.

11           MS. EISENSTEIN: Well, I think that the  
12 economic equivalent is not the only test, and that's the  
13 test that Petitioner wants this court to adopt. I think  
14 this Court needs to look at the legal basis for the  
15 award.

16           And as the discussion highlighted earlier,  
17 there are many economically equivalent ways that a court  
18 can reach the same division of property and total  
19 financial transfer from one party to the other, some of  
20 which are legal under this federal law and some of which  
21 are not.

22           CHIEF JUSTICE ROBERTS: It seems to me  
23 that -- in other words, you're saying -- you're  
24 basically saying there's no real substance to this law.  
25 All the court has to do is find some charade to get to



1 the same result.

2 I mean, would it be all right under your  
3 view if they say, okay, you get 50 percent of -- all  
4 the -- no disability payments yet. You get 50 percent  
5 of the retirement pay. Listen to me. But in the event  
6 that there is disability pay -- there are disability  
7 payments that result in a reduction of the military pay,  
8 I appreciate that I cannot divide the disability pay,  
9 but your share of the retirement pay is going to go up  
10 as if we were dividing the disability pay. Is that good  
11 or bad?

12 MS. EISENSTEIN: Well -- well, your Honor, I  
13 think it -- it is -- it is okay to the extent that the  
14 court is applying its generally applicable principles of  
15 property division to treat the portion that is available  
16 under federal law --

17 CHIEF JUSTICE ROBERTS: The court wants to  
18 make sure that the spouse, whether wife or husband,  
19 receives half of the military retirement pay, and  
20 that -- and going forward. So she does -- he or she  
21 does exactly what I set forth; says, okay, you're  
22 entitled to half. But if there's disability pay, you're  
23 entitled to an additional amount exactly equal to half  
24 of the disability pay.

25 MS. EISENSTEIN: Well, yes. I think the

1 statute expressly contemplates fixed sum awards. And so  
2 the -- the --

3 CHIEF JUSTICE ROBERTS: So you have a law  
4 that says -- you have a law that says you can't divide  
5 disability pay, and yet, you say it's okay to say, well,  
6 I'm not going to divide it, but I'm just going to award  
7 you an amount equal to what it would be if I divided it.

8 MS. EISENSTEIN: Well, let me be clear.

9 CHIEF JUSTICE ROBERTS: That's the sort of  
10 thing that gives, you know, law a bad name. It's  
11 just --

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: It makes a charade  
14 out of the statute.

15 MS. EISENSTEIN: Well, your Honor, I  
16 respectfully submit that State courts have a lot of  
17 experience in treating differently separate property,  
18 marital property, separate income, property interest.  
19 That is the kind of bread and butter that State  
20 courts -- those kind of distinctions are the bread and  
21 butter that State courts apply their own state law to.  
22 And so this Act --

23 CHIEF JUSTICE ROBERTS: What does -- what  
24 does that have to do with my question?

25 MS. EISENSTEIN: So the question is, your

1 Honor, in terms of the ability -- your Honor was  
2 concerned that the State order could be a sham. But  
3 State courts are in the practice of treating as --  
4 defining and treating as what is the quantum of marital  
5 property and fairly applying those State rules.

6 So what the Spousal Protection Act does is  
7 it throws to the State court the broad authority to  
8 treat disposable retirement pay as marital property,  
9 along with all of the civil assets. Having made that  
10 division and giving that broad authority to divide the  
11 property, presumably it comes with the ability to  
12 enforce that division. And the spouse's now separate  
13 property interests are presumably given the bundle of  
14 rights that the State would normally give to protect it.  
15 And assuming --

16 CHIEF JUSTICE ROBERTS: Well, but again, the  
17 law does something else too. It says you cannot divide  
18 disability payments.

19 MS. EISENSTEIN: Right. So that takes the  
20 pie that can be divided and shrinks it. It doesn't tell  
21 State courts how to allocate that benefit. And so when  
22 it comes to considering the role that disability  
23 benefits play, we propose the rule should be that  
24 disability benefits cannot be treated under the State  
25 law as divisible property. But it can be a

1 consideration. And most State courts, under the  
2 equitable division schemes, consider the separate --

3 CHIEF JUSTICE ROBERTS: You know States --  
4 consideration. You say it can be divided, just in a way  
5 that the law prohibits, so long as we don't say it's  
6 divided. So we take half of it and add it to the  
7 required military pay.

8 MS. EISENSTEIN: Well -- well, your Honor,  
9 we don't -- I don't interpret your Honor's hypothetical  
10 as a division of property. I interpret your Honor's  
11 hypothetical as getting a contingent interest in other  
12 property that may be available. The work that --

13 CHIEF JUSTICE ROBERTS: But money is money.  
14 Whether it gets the additional amount from the  
15 disability pay or from something else doesn't make a  
16 difference.

17 MS. EISENSTEIN: Well, your Honor, money  
18 isn't money. When the State court originally had the --  
19 the broad discretion to allocate anywhere from zero  
20 percent to one hundred percent of not only the -- the  
21 civilian assets but the disposal retirement pay in the  
22 first place.

23 JUSTICE ALITO: I think the question is can  
24 a State depart -- a -- a State court depart from the  
25 rule that the State court would use in dividing property

1 solely for the purpose of making up for the fact that  
2 the disability payment cannot be divided.

3 MS. EISENSTEIN: No. And so --

4 JUSTICE ALITO: I thought that's what you  
5 were saying they could do.

6 MS. EISENSTEIN: No, your Honor. I think  
7 that the court can use its broadly applicable rules for  
8 enforcing existing property divisions; in this case, the  
9 Arizona rule is one that prohibits a party from  
10 unilaterally harming the interest of the other spouse,  
11 and gives a makeup remedy. But there's still important  
12 protections that the Spousal Protection Act gives to  
13 disability benefits. No matter what, the  
14 anti-attachment provision -- this isn't the Spousal  
15 Protection Act, other federal law, which is the  
16 anti-attachment provision -- protects disability  
17 benefits from any kind of award to satisfy a property  
18 claim. It can be used for alimony and child support,  
19 but it -- that -- in the event that there's only  
20 disability benefits at issue, there is no relief.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MS. EISENSTEIN: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Unikowsky, you  
24 have 13 minutes.

25 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKI

1 ON BEHALF OF THE PETITIONER

2 MR. UNIKOWSKY: Thank you, Mr. Chief  
3 Justice.

4 So I actually agree that finality in divorce  
5 decrees is very important. And we're not -- our  
6 position is not trying to alter, sort of, ordinarily  
7 applicable rules of res judicata.

8 But the question in this case is finality as  
9 to what. And we have an answer from the Arizona Supreme  
10 Court. The court interpreted the decree to say that  
11 what it did was it divided Petitioner's pension,  
12 whatever it was. And that is a ruling that I think we  
13 have to accept as this case reaches the Court; that's a  
14 state law interpretation which binds this Court.

15 And so what the court held, however, is that  
16 it was not going to enforce the decree as written. It  
17 was going to import a State law rule that basically says  
18 that the relevant divisible asset was the total amount  
19 of the retirement pay and divide that.

20 I think the court is quite clear. It's  
21 saying that it conceptualizes the property interests as  
22 the total amount of money that Petitioner was receiving,  
23 and it said that by waiving retirement pay, the  
24 Petitioner converted a portion of respondent's property.  
25 And so it's saying that Respondent holds a property

1 interest in half of that waived amount. So that's just  
2 the same thing as treating waived retirement pay as  
3 divisible. And so --

4 JUSTICE GINSBURG: How consequential is the  
5 issue before us? Because if you're right, then in all  
6 future divorce settlements, they won't say half of the  
7 Military Retirement Pay. They'll give a dollar amount  
8 which is equal to what the Military Retirement Pay is  
9 before any disability payment kicks in.

10 MR. UNIKOWSKY: Well, that might be  
11 negotiated for consideration. I mean, there's actually  
12 a lot of reported cases in which --

13 JUSTICE GINSBURG: What consideration? I  
14 mean, being aware of this possible diminution, the  
15 lawyer for the -- for the spouse will say, I don't want  
16 to get half of the MRP; I want to get a dollar amount  
17 that's equivalent to what half of the MRP is right now.

18 MR. UNIKOWSKY: Well, I mean, the veteran  
19 doesn't have to agree to that. I mean, the settlement  
20 is bilateral. And if the veteran doesn't agree, then  
21 they'll just go to divorce court and there'll be a  
22 decree where the court, we would say, would have to just  
23 divide the retirement pay as mandated by Congress.

24 Now, we agree that settlements are good.  
25 And there have been many reported cases where the

1 veteran says, look, I'll -- I'll make you this promise  
2 if you agree to give me, you know, the car or whatever.  
3 So we're not -- we're not reading this statute as  
4 impinging on settlements.

5           But in this case, the court held that what  
6 the settlement was, was just dividing the pension  
7 whatever it was 50-50. The fact that Petitioner is  
8 required to pay this reimbursement order, it's not what  
9 he had agreed to; it's this order imposed by State law  
10 saying that it was going to treat Respondent as holding  
11 a property interest in half of the amount of the waived  
12 retirement pay, which we think is -- is what the Federal  
13 statute prohibits.

14           And in response to Justice Sotomayor's  
15 question earlier, yes, I think that the reasonable  
16 expectation is that the waivers might occur. I think  
17 it's important to recognize that waivers of retirement  
18 pay for disability are not rare or obscure. There's  
19 hundreds of thousands of veterans who have done just  
20 that. And I don't think it's a tremendous shock to an  
21 experienced divorce lawyer that this might happen. And  
22 so during negotiations for a divorce settlement, this  
23 may come up. So I just think the idea that, you know,  
24 there's no way to predict this could conceivably happen,  
25 I think, is just inconsistent with the reality of -- of



1 divorce litigation in military divorces.

2 I'd like to respond to the -- the comments  
3 of -- of counsel about other assets, that it's perfectly  
4 fine to divide the accrual of disability pay as long as  
5 there are just other assets used to fund it.

6 So first of all, I think that's quite  
7 contrary to this Court's decision in Hillman and several  
8 other cases. I think it's both counterintuitive, and I  
9 think that the holding of those cases is that you can't  
10 do that, because just the four corners of the -- the  
11 Hillman holding was that, you know, Federal law preempts  
12 a statute that doesn't directly act on property, but  
13 just has property go into a bank account and then is  
14 transferred to the other bank account, which is  
15 essentially the same situation as here.

16 And I think it's also quite pertinent that  
17 what the statute says is that it's division of waived  
18 retirement pay that's impermissible. And recall that  
19 waived retirement pay literally is not money you're  
20 getting. The definition of waived retirement pay  
21 literally is the money that you're not getting so you  
22 can get disability pay. So when we talk about dividing  
23 waived retirement pay, what just that inherently means  
24 is forcing you to pay an amount from your general assets  
25 equal to that waived retirement pay to the other spouse.

1 So I just think that, you know, it's not even just  
2 legalistic. I just think the statute cannot be  
3 construed to permit operation on the general assets.

4 And I just want to make one other point.  
5 And, you know, Justice Sotomayor asked questions earlier  
6 about sort of the policy distinctions between pre- and  
7 post-divorce waivers. And we're not denying that  
8 there's no policy distinctions at all. I mean, we can't  
9 deny that. Of course there are differences in policy.  
10 And I think that the interest of the disabled veteran is  
11 the same before and after. But there are policy  
12 distinctions at stake.

13 I think the question in this case is whether  
14 this statute can be interpreted to recognize that those  
15 policy distinctions and distinguished between those two  
16 scenarios, and I just don't think you can't get it out  
17 of the statutory text, which does prohibit waived  
18 retirement pay from being treated as divisible no matter  
19 when the waiver occurs.

20 If the Court has no further questions, I'll  
21 rest. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 The case is submitted.

24 (Whereupon, at 12:10 p.m., the case in the  
25 above-entitled matter was submitted.)

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