No. 14-131

In The Supreme Court of the United States

JAMES R. HERALD,

Petitioner,

v.

DIXIE L. STEADMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The husband in this divorce proceeding is eligible for Social Security benefits, which are not "transferable or assignable." 42 U.S.C. § 407(a). The wife is ineligible for Social Security but is eligible for Civil Service Retirement System (CSRS) benefits, which are assignable by "any court decree of divorce, annulment, or legal separation." 5 U.S.C. § 8345(j)(1)(A).

The question presented is:

Does Section 407(a) preclude a state divorce court from taking into account that one spouse will receive Social Security benefits, in its discretion to allocate the other spouse's CSRS benefits equitably, when the court does not transfer, assign, offset, or value the amount of the Social Security benefits?

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set out in the petition (Pet. 1–2, Pet. App. 100a–109a), the following provisions are also involved.

The Civil Service Retirement Act, 5 U.S.C. § 8345(j)(1), provides, in relevant part:

> Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based on service of that individual shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of –
>
> > (A) any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation; . . . .

Oregon's domestic relations code, OR. REV. STAT. § 107.105(1), provides, in relevant part:

> Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:
>
> . . . .
>
> (f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the

parties as may be just and proper in all the circumstances. In determining the division of property under this paragraph, the following apply:

> (A) A retirement plan or pension or an interest therein shall be considered as property.
>
> . . . .

STATEMENT

Family law has long been the province of state courts. Thus, in areas such as distributing marital assets upon divorce, this Court strongly presumes that federal statutes do not preempt states' traditional discretion. While the Social Security Act expressly forbids "transfer[ring] or assign[ing]" Social Security benefits, it does not govern other types of retirement benefits. 42 U.S.C. § 407(a). By contrast, the Civil Service Retirement Act expressly defers to state family courts' decisions on assigning Civil Service Retirement System (CSRS) benefits in "any court decree of divorce, annulment, or legal separation." 5 U.S.C. § 8345(j)(1)(A).

In this divorce case, the husband is eligible for Social Security benefits, while the wife is eligible for CSRS but not Social Security. When dividing the marital assets, the state family court did not transfer, assign, offset, or even value the husband's Social Security benefits. Instead, it merely exercised its

equitable discretion not to distribute to the husband a portion of *the wife's* CSRS benefits. The court included a portion of them – to the extent that they exceeded what she would have received had she participated in Social Security – in the assets to be divided.

This case involves no division of authority, let alone one warranting this Court's intervention. The allegedly conflicting state supreme court decisions either did not address federal preemption, involved community-property jurisdictions, or involved directly offsetting the *value* of a participant's actual Social Security benefits rather than merely considering their existence. The decision below is thus consistent with decisions of other state courts and with federal law's broad deference to state family law. Further review is unwarranted.

A. Statutory Background

1. *State Systems for Dividing Marital Property*. States have long provided different systems for distributing property upon dissolution of a marriage. Congress enacted federal retirement and benefit programs against this varied backdrop.

Like forty other states, Oregon follows the common law, treating marital assets as separately owned property during the marriage. Also like other common-law states, Oregon follows the rule of equitable distribution, which directs the divorce court to divide the parties' real and personal property "as may be just and proper in all the circumstances." OR. REV. STAT.

§ 107.105(1)(f); *see also* Andrew Cosgrove, Note, *Breaking Up Is Hard to Do . . . Especially Where Bankruptcy Is Involved*, 14 AM. BANKR. INST. L. REV. 235, 254–55 & n.121 (2006) (collecting state divorce-distribution statutes).

By contrast, fewer than ten states use a community-property regime, inherited from civil-law countries, in which spouses jointly own most property acquired during the marriage. Cosgrove, *supra*, at 252 & n.104 (collecting statutes). Some community-property states nevertheless provide for equitable distribution upon divorce. *E.g.*, TEX. FAM. CODE §§ 7.001–008; WASH. REV. CODE § 26.09.080. Other community-property states provide for equal distribution, so that courts award one half of the community property to each spouse. Nevada and California each follow this equal-distribution rule. CAL. FAM. CODE § 2550 ("[T]he court shall . . . divide the community estate of the parties equally"); NEV. REV. STAT. ANN. § 125.150(1)(b) (court "[s]hall, to the extent practicable, make an equal disposition of the community property," unless it "finds a compelling reason to [deviate from equal distribution] and sets [its reasons] forth in writing"). While equal distribution focuses on past acquisition and current ownership, equitable-distribution systems are flexible enough to incorporate forward-looking criteria. *See* Catherine T. Smith, *Philosophical Models of Marriage and Their Influence on Property Division Methods at Divorce*, 11 J. CONTEMP. LEGAL ISSUES 214, 218–19 (1997).

2. *Federal Benefits Systems*. Before 1984, federal employees received pension benefits exclusively under the Civil Service Retirement System (CSRS), 5 U.S.C. §§ 8331–8351. Those hired thereafter were automatically enrolled in the Federal Employees Retirement System (FERS), 5 U.S.C. §§ 8401–8480.

a. CSRS is a defined-benefit system that bases pension benefits on an employee's historical pay and years of service. 5 U.S.C. § 8339. Participants in CSRS do not participate in Social Security based on their government employment. 42 U.S.C. § 410(a)(5).

Federal law does not prescribe how family courts should treat CSRS benefits when they distribute marital assets upon a divorce. The statute does acknowledge that a state court *may* award such benefits to the other spouse. It provides for direct payment of such transferred benefits, but only "*if and to the extent expressly provided for* in the terms of – (A) any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." 5 U.S.C. § 8345(j)(1) (emphasis added).

Congress enacted this provision to defer to "State laws and State courts" because they "have always contributed in matters of domestic relations and property rights." S. REP. NO. 95–1084, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1379, 1383 (reprinting letter from chairman of U.S. Civil Service Commission to Senate Committee on Government Affairs

supporting H.R. 8771). Congress deferred to state divorce courts' specific competence "to determine such questions as an individual's obligation to a former spouse on an individual case basis after considering many factors such as the financial status of both parties . . . . " *Id.*; *see also id.* at 7 (noting that H.R. 8771 "contains no limitations on the portions of the annuity that could be awarded") (letter from Deputy Comptroller General of the United States).

b. FERS includes a basic annuity based on historical pay and years of service, which is much smaller than the CSRS annuity, as well as full participation in the Social Security program.[1] Thus, the recipient pays Social Security payroll taxes and receives FERS benefits "in addition to the benefits payable under the Social Security Act." 5 U.S.C. § 8403.

Like CSRS benefits, basic FERS annuities are assignable by "any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." 5 U.S.C. § 8467(a)(1). Social Security payments, however, "shall not be transferable or assignable" nor "subject to execution,

[1] FERS also includes a savings program for employee contributions and matching employer contributions. CSRS permits employee contributions to a savings program but with no matching employer contributions.

levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a).

B. Facts and Procedural History

1. Mr. Herald and Ms. Steadman were married for 21 years. They divorced in 2010, when he was 51 and she was 53.

Although both are federal employees, they have different pension plans. Ms. Steadman participates in CSRS but will not receive Social Security benefits. Mr. Herald participates in FERS and will also qualify for Social Security benefits.

2. Under Oregon law, state family courts have broad discretion to accomplish the statutory objective of equitably distributing the marital assets. Towards that end, the family court here ordered an equal division of the couple's IRAs, 401(k), and savings plans, as well as Mr. Herald's FERS benefits. Pet. App. 71a, 82a–83a, 86a–87a.

In re Marriage of Swan, 720 P.2d 747 (Or. 1986), held that the value of Social Security benefits cannot themselves be considered for division in a divorce. Thus, the family court here neither inquired into the value of Mr. Herald's benefits nor divided, transferred, or assigned them. The court found, however, that it would not be "just, fair or equitable" to transfer half of Ms. Steadman's CSRS benefits to Mr. Herald, because he would retain *all* of his Social

Security benefits and she would receive none. Pet. App. 71a.

To address this inequity, the family court did not exempt all of Ms. Steadman's CSRS benefits from division, but rather set aside a portion of them that she would retain. Specifically, the court calculated the benefits that *Ms. Steadman* would have received had she participated in Social Security. It set aside this hypothetical benefit of $391.41 per month from the assets to be divided, as well as portions earned before her marriage, and then divided the remainder of her CSRS benefits equally. *See* Pet. App. 71a, 84a–86a; Trial Tr. vol. 3, 15:12–16, Apr. 29, 2010. It ordered no alimony. Pet. App. 79a.

3. The court of appeals unanimously affirmed. Pet. App. 67a. The court held that the decree did not violate 42 U.S.C. § 407(a)'s anti-assignment provision. Mr. Herald, the court explained, would "receive the full amount of his social security benefits without invasion, division, or impermissible offset." Pet. App. 65a–66a.

4.a. The Oregon Supreme Court affirmed. Pet. App. 28a. It noted this Court's recognition that "[t]he regulation of domestic relations is traditionally the domain of state law." Pet. App. 14a (citing *Hillman* v. *Maretta*, 133 S. Ct. 1943 (2013) and *In re Burrus*, 136 U.S. 586, 593–94 (1890)). Thus, it limited what had been broad dicta in *Swan* and held that the family court did not violate Section 407(a) simply "by considering Social Security benefits in fashioning a just and

proper property division." Pet. App. 14a n.5, 23a. To determine what is "just and proper," Oregon family courts must "take[ ] into account the social and financial objectives of the dissolution, as well as any other considerations that bear upon" the equities. Pet. App. 24a–25a (internal quotation marks omitted). Ms. Steadman's ineligibility for Social Security benefits, the court noted, was merely one of these considerations.

The court stated that an outright transfer or assignment of Mr. Herald's Social Security benefits, or an offsetting award of other assets based on his benefits' value, would violate Section 407(a) and *Swan*. Pet. App. 28a. But, it explained, "the [trial] court did not assign or transfer husband's benefits to wife or offset the value of those benefits in awarding other property to wife." *Id.* Rather, "the [trial] court awarded wife a greater share of *her own* CSRS benefit in recognition of the likelihood that, otherwise, her income at retirement – in comparison to husband's income – would be inequitably lower." *Id.* (emphasis added).

The court ruled that the preemptive reach of Section 407(a) does not "extend[ ] so far beyond the words that Congress used." Pet. App. 15a, 29a n.11 (quoting *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 151 (2001)). Thus, it does not preclude merely considering the existence of Social Security benefits in fashioning a just and equitable division of property. Pet. App. 28a–29a.

b. Concurring in the judgment, Justice Walters adopted an even narrower view of Section 407(a)'s preemptive scope. This Court's "robust respect for the states' traditional role in family law," she reasoned, counseled against extending implied preemption in this realm. Pet. App. 41a (citing *Hillman* and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013)). She also distinguished this Court's decision in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979). There, she noted, this Court relied on language in the Railroad Retirement Act that forbade "anticipat[ing]" benefits. *Id.* at 588 (interpreting 45 U.S.C. § 231m(a)). Here, by contrast, such a ban is absent from Section 407(a) of the Social Security Act. Pet. App. 39a; *see also* Pet. App. 33a n.13 (majority opinion, noting same distinction).[2] Thus, Justice Walters would have held that "the only direct limitation that Congress imposed upon states when it enacted section 407 was a prohibition on judicial transfer or assignment of and execution on a participant's Social Security benefits." Pet. App. 41a.

c. Justice Kistler dissented. He thought that "reduc[ing] the amount of wife's retirement benefits that were subject to division" contravened *Hisquierdo*. Pet. App. 42a. He "d[id] not mean to suggest," however, "that the Social Security Act

[2] Petitioner alleges, without supporting citation to the record, that Ms. "Steadman conceded that [*Hisquierdo*] applie[s]." Pet. 9 n.4. We are unaware of and cannot find any such concession.

precludes any consideration of Social Security benefits in making a just and equitable division of property." Pet. App. 43a. "Nothing in the Social Security Act prevents trial courts from determining that, in light of the parties' differing needs . . . , one spouse should get the 'long half' of all the property." Pet. App. 49a.

REASONS FOR DENYING THE PETITION

Nothing about this state divorce case warrants this Court's review. First, the decision below is consistent with decisions of other state supreme courts. None of those decisions holds that 42 U.S.C. § 407(a) preempts state family courts' equitable discretion regarding how to allocate CSRS benefits to divorcing spouses. Moreover, the cases relied on by petitioner are factually, legally, and temporally remote from this one. Not one has rejected the approach adopted by the decision below. And all predate recent legal developments underscoring the States' paramount authority over the field of domestic relations. The strong trend is consistent with the decision below.

Second, the decision below is correct. Family law is traditionally the domain of state law, and there is a strong presumption against federal preemption. The Civil Service Retirement Act, 5 U.S.C. § 8345(j)(1), expressly acknowledges that state family courts may determine whether and how to divide CSRS benefits. And nothing in the Social Security Act restricts allocation of *non*-Social Security benefits. If anything,

Congress has consistently *expanded* state family courts' ability to reach federal benefits in divorce and child-support proceedings.

This Court's decision in *Hisquierdo* does not compel a different result. *Hisquierdo* depended on the Railroad Retirement Act's express ban on "anticipat[ing]" statutory benefits under that law, together with California's community-property regime of equal distribution and the grant of a direct offset equal to the value of the participating spouse's benefits. 45 U.S.C. § 231m; 439 U.S. at 573–90. None of those factors is present here.

Finally, this case does not involve the actual transfer, assignment, or even offset of the value of a participating spouse's Social Security benefits. So this case would be a poor vehicle for reviewing any alleged division of authority over those issues.

I. COURTS ARE NOT DIVIDED ON WHETHER THE SOCIAL SECURITY ACT PREEMPTS STATE COURTS' DISCRETION TO ALLOCATE *NON*-SOCIAL SECURITY ASSETS EQUITABLY UPON DIVORCE WHEN ONE PARTY RECEIVES SOCIAL SECURITY

A. No State Bars Equitable Allocation of CSRS or Similar Benefits in a Divorce Proceeding, on Grounds of Preemption by the Social Security Act

Despite his efforts to frame a much broader conflict (Pet. 12–14), petitioner concedes that "the exact circumstances this case presents" are far

narrower. Pet. 14. The precise issue is whether, in a case where one spouse will collect Social Security and the other will not, 42 U.S.C. § 407(a) preempts a state court's equitable discretion to let the spouse without Social Security keep some of her own CSRS (or similar) benefits. *Id.* Here, the trial court let Ms. Steadman keep a portion of *her own* CSRS benefits equal to what she would have received had she participated in Social Security. Pet. App. 4a.

In trying to construct a conflict, petitioner cites three decisions from intermediate appellate courts – the Pennsylvania Superior Court; the New Jersey Superior Court, Appellate Division; and the Tennessee Court of Appeals. Pet. 15; *cf.* Pet. 13 n.5, 14 n.6. But these decisions are not from "state court[s] of last resort" and cannot create a conflict, since state supreme courts are free to overrule these intermediate appellate decisions. S. CT. R. 10(b).

Petitioner cites only two state supreme court decisions that he claims have "specifically rejected this hypothetical benefit approach." Pet. 15. Neither is apposite.

1. *Skelton* v. *Skelton* did not involve Social Security benefits or federal preemption at all. The issue there was whether a trial court "erred in including [the husband's state] fireman's pension as marital property for distribution" under state law. 5 S.W.3d 2, 3 (Ark. 1999). The husband claimed that his state benefits should be entirely exempted by analogy to Social Security, since he participated in the local

fireman's pension fund in lieu of Social Security. *See id.* at 4. The Arkansas Supreme Court disagreed, citing "fundamental difference[s] between" the two systems. *Id.* at 5. Moreover, because *Skelton* did not involve Social Security benefits, the Arkansas Supreme Court had no occasion to consider whether the Arkansas trial court could have done what the Oregon family court did here: consider all the equities in dividing a non-Social Security pension.

2. *Schaffner* v. *Schaffner* did not concern federal preemption either. 713 A.2d 1245 (R.I. 1998). There, the husband had elected to participate in CSRS rather than Social Security. *Id.* at 1247. He argued that state law *required* the trial court to exclude a portion of his CSRS benefit, equal to what his Social Security benefits would have been, from the marital property distribution. *Id.* His rationale was that part of his benefits deserved the same legal treatment as Social Security benefits, *id.*, even though the CSRS statute lacks the anti-assignment language of Section 407(a). The Rhode Island Supreme Court rejected the argument that categorical exclusion of CSRS benefits, or even a hypothetical Social Security equivalent amount, was required as a matter of state law. *See id.* at 1247–48. Instead, it emphasized that "equitable distribution of marital assets is within the discretion of the trial [court]." *Id.* at 1247.

Furthermore, the court affirmed the trial court's exercise of discretion, including its generally equal distribution of the husband's CSRS benefits, based on the facts of the case. The wife had no retirement

pension, her Social Security benefits were "relatively insignificant," and those benefits would commence "much later" than her husband's benefits. 713 A.2d at 1247, 1249. On those facts, distributing more of the CSRS benefits to the husband "would only achieve an inequitable distribution of marital assets." *Id.* at 1249. The state supreme court did not hold – and had no occasion to hold – that granting a larger CSRS exemption, on appropriate facts, would have been an abuse of discretion.

Moreover, the trial court in *Schaffner* had ruled that once the wife began collecting Social Security, her share of the husband's CSRS benefits would be reduced by half the amount of her Social Security benefits. 713 A.2d at 1247. The state supreme court affirmed even this direct offset, holding that "the only way to provide for equitable distribution of the marital assets is to divide [the husband's] CSRS benefits equally *and to take into account [the wife's] Social Security benefits when they commence*." *Id.* at 1249 (emphasis added). "[B]ecause the marital assets cannot be equitably distributed in any other manner, we affirm the trial justice's marital asset distribution plan." *Id.* Having affirmed such a direct offset, the court would, *a fortiori*, have held that merely considering one spouse's ineligibility for Social Security is permissible. Far from conflicting with the decision below, *Schaffner* goes beyond it.

B. The Decision Below Does Not Conflict with the Rule in Any Other State

Seeking to manufacture a broad division of authority, petitioner cites five additional decisions from state supreme courts. Pet. 13–14 (citing *In re Marriage of Crook*, 813 N.E.2d 198 (Ill. 2004); *Webster* v. *Webster*, 716 N.W.2d 47 (Neb. 2006); *Wolff* v. *Wolff*, 929 P.2d 916 (Nev. 1996); *Cox* v. *Cox*, 882 P.2d 909 (Alaska 1994); and *Olson* v. *Olson*, 445 N.W.2d 1 (N.D. 1989)). The law in none of these states, however, conflicts with the decision below.

1. *Crook* explicitly refused to rule on whether courts could partially exempt non-Social Security pensions from distribution. Because "the parties ha[d] not argued" this point, *Crook* "le[ft] the resolution of that issue for another day." 813 N.E.2d at 206. Thus, the question presented remains open in Illinois.

2. *Olson* was abrogated in relevant part by a state statutory amendment in 2011. In cases involving one spouse with Social Security and another with a government pension like CSRS, North Dakota law now prescribes the exact approach adopted below: "the court shall compute what the present value of the social security benefits would have been to the party with the government pension . . . and subtract that amount from the value of the government pension in order to determine the government pension's marital portion [subject to equitable distribution]." N.D. CENT. CODE § 14–05–24(2). That is the approach

followed by the Oregon family court and affirmed by the court below here.

3. In *Cox*, the Alaska trial court declined to consider the wife's Social Security benefits when dividing marital assets. 882 P.2d at 920. The state supreme court affirmed, finding no abuse of discretion. *Id.* It rested its decision not on federal preemption or 42 U.S.C. § 407(a), but simply on its pragmatic judgment that considering speculative future benefits would not be "wise." *Id.* It never considered excluding some non-Social Security benefits from assets to be distributed, so Alaska courts remain free to follow the decision below in a future case.

4. *Wolff* was predicated on Nevada's community-property regime and its equal-distribution requirement. Absent exceptional circumstances, Nevada family courts must base marital property distribution on an equal division of community property. NEV. REV. STAT. ANN. § 125.150.1(b). But including Social Security benefits within that equal-distribution computation would conflict with this Court's determination that Social Security benefits are not "accrued property rights," but only a "noncontractual interest" in "a form of social insurance." *Flemming* v. *Nestor*, 363 U.S. 603, 609, 610 (1960). Thus, the trial court in *Wolff* erred in reducing the wife's community-property interest in the husband's state pension based on the amount of her Social Security contributions and benefits. *See* 929 P.2d at 921. But *Wolff's* refusal to treat the value of Social Security benefits as a factor is inapposite in equitable-distribution states such as

Oregon, which may base property distribution on future needs, not just current property rights.

5. *Webster* is distinguishable on two grounds, both of which also apply to *Crook*, *Wolff*, and *Olson*. First, *Webster* and the other three cases simply forbade calculating the value of the *Social Security participant's* anticipated benefits and offsetting or subtracting that value from the *participant's* share of marital property, in full or in part. As *Webster* summarized its holding, "the anti-assignment clause of the Social Security Act . . . prohibit[s] a direct offset." 716 N.W.2d at 56; *accord Crook*, 813 N.E.2d at 204–05; *Wolff*, 929 P.2d at 921; *Olson*, 445 N.W.2d at 11. While most cases, including the decision below here (Pet. App. 28a), forbid directly offsetting the value of Social Security benefits, "[m]ost of these courts, . . . especially those in equitable division states as compared to community property states, have not found a more generalized consideration of Social Security benefits to be an impermissible factor." *Webster*, 716 N.W.2d at 55 (citations omitted). And none of these four allegedly contrary decisions says anything about the actual issue here: how a court should treat the *non-participant's non-Social Security* benefits.

Second, all four cases relied on Oregon's seminal 1986 precedent, *In re Marriage of Swan*. *Crook*, 813 N.E.2d at 205; *Webster*, 716 N.W.2d at 56; *Wolff*, 929 P.2d at 921; *Olson*, 445 N.W.2d at 10. Thus, they are all undermined by the Oregon Supreme Court's limitation of *Swan* in this case. *Swan* had opined broadly that, under federal law, "[f]amily courts, in

making a division of property, cannot consider Social Security benefits." 720 P.2d at 751. But in the decision below, the Oregon Supreme Court narrowed that sweeping "dictum," which "was not necessary to the decision in *Swan*." Pet. App. 14a & n.5. The decision below clarified *Swan's* holding as barring only "an outright transfer or assignment of a participant's Social Security benefits" or "an offsetting award in value of other assets based on the value of a participant's Social Security benefits." Pet. App. 27a–28a. With that limitation of the seminal precedent undergirding *Crook*, *Webster*, *Wolff*, and *Olson*, those decisions may well be similarly limited in future decisions. And, as the decision below does not conflict with *Swan*, it likewise does not conflict with any of those decisions.

C. The Consensus Will Likely Continue to Grow with Time

The state-court trend flows against petitioner's position. All of the precedents rejecting preemption have been decided in the last two decades – the majority since 2000. Pet. 12–13; Pet. App. 1a. Most of the cases on which petitioner attempts to rely, by contrast, are from the previous century, and none is more recent than 2006. *See Webster* (2006); *Crook* (2004); *Skelton* (1999); *Schaffner* (1998); *Wolff* (1996); *Cox* (1994); *Olson* (1989). None of petitioner's cases resolved the precise question presented here, *Crook* expressly reserved the question, and *Olson* was legislatively abrogated in relevant part in 2011.

In addition, all of the decisions on which petitioner relies predate this Court's recent decisions in *United States* v. *Windsor* and *Hillman* v. *Maretta*. As we explain immediately below, both of these decisions emphasized the strong presumption against preemption of state family law. In light of this trend, any tension will continue to resolve itself without the need for this Court's intervention.

II. THE SOCIAL SECURITY ACT DOES NOT PREEMPT STATE COURTS' DISCRETION TO EXCLUDE *NON*-SOCIAL SECURITY BENEFITS FROM MARITAL PROPERTY DIVISION TO EFFECT AN EQUITABLE DISTRIBUTION

1. *The Strong Presumption Against Preemption of State Family Law*. "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2691 (internal quotation marks omitted). In order to respect this state prerogative, this Court has consistently applied a "presumption against preemption" of state laws in this area. *Hillman*, 133 S. Ct. at 1950. "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo*, 439 U.S. at 581 (quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). "State family and family-property law must do 'major damage' to 'clear and substantial' federal

interests before the Supremacy Clause will demand that state law be overridden." *Id.* (quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)).

2.a. *The Statutory Text*. Congress has expressly acknowledged the authority of state courts to allocate CSRS benefits equitably, as the trial court did here. By statute, CSRS benefits shall be paid to another person "if and to the extent" that such payment is "expressly provided for in the terms of . . . any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement." 5 U.S.C. § 8345(j)(1).

Here, the trial court permissibly considered the inequity that would occur if Mr. Herald received full Social Security benefits while also sharing equally in Ms. Steadman's CSRS benefits. As the state court of appeals reasoned, Mr. Herald's argument amounts to claiming: "'What is mine is mine, and what is hers is half mine.'" Pet. App. 62a. Thus, the trial court properly exercised its discretion to allow Ms. Steadman to retain some of her CSRS benefits.

b. The plain text of the Social Security Act preempts only a narrow category of state-court actions: those that "transfer[ ] or assign[ ]" future Social Security benefits or amount to "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a).

This provision, however, is not implicated by a state family court's mere consideration that one party

will receive Social Security benefits, in equitably allocating other assets, including *non*-Social Security benefits. Nor does Section 407(a) trump the Civil Service Retirement Act's express acknowledgement that state courts have discretion whether to transfer CSRS benefits, discussed above. Particularly given the strong presumption against preempting this traditional field of state law, the statute does not forbid more than it expressly proscribes.

Here, the trial court focused on Ms. Steadman's lack of benefits and the amount she would have received from Social Security if *she* had participated. The court thus declined to distribute an equivalent portion of her own CSRS benefits. It never took into account the value of Mr. Herald's benefits, let alone assigned, transferred, or garnished them, or offset their value.

3. *Congressional Amendments Accommodating Divorce Courts.* Petitioner argues that 42 U.S.C. § 659(a), by expressly authorizing garnishment for alimony and child support, gives rise to an *expressio unius* inference against considering benefits for other purposes. Pet. 22. That inference is unwarranted. Congress added Section 659 to a separate subchapter of the Social Security Act devoted to mechanisms for child support enforcement. There is no reason to conclude that Congress's enactment of a provision addressing child support conveys by silence any inference about its views on division of marital property.

Moreover, Section 659 was just one of a series of amendments to federal benefits statutes *expanding* deference to the discretion of state family courts; it in no way suggests that Congress intended to *contract* such deference. Indeed, in each of these other instances, Congress acted in response to decisions of this Court threatening federal preemption of state control over core issues of family law. Collectively, these amendments demonstrate Congress's discomfort with broad preemption holdings like that sought by petitioner.

For instance, this Court in *Hisquierdo* held that the Railroad Retirement Act's ban on "anticipat[ing]" benefits preempted transferring railroad retirement benefits or offsetting their value against the recipient's share of community property. 439 U.S. at 583–90; *see infra* pp. 25–26. In response, Congress amended the Railroad Retirement Act to permit such division of certain benefits, thereby abrogating *Hisquierdo*. *See* Railroad Retirement Solvency Act of 1983, Pub. L. No. 98–76, 97 Stat. 411 (1983) (codified at 45 U.S.C. § 231m(b)(2)). Likewise, this Court held that federal law preempted a state divorce court's division of military retirement benefits as community property. *McCarty* v. *McCarty*, 453 U.S. 210, 236 (1981). Shortly thereafter, Congress amended the statute to permit such division and abrogate *McCarty*. *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97–252, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408(c)(1)).

By contrast, Congress has declined to amend federal benefit programs when this Court has found no preemption of state-court rulings allocating federal veterans' or ERISA benefits. *E.g.*, *Rose* v. *Rose*, 481 U.S. 619 (1987) (finding that veterans' benefits program did not preempt state family court contempt finding for failure to pay child support); 38 U.S.C. § 5301(a) (veterans' benefits program); *Carpenters Pension Trust Fund of N. Cal.* v. *Campa*, 444 U.S. 1028 (1980) (dismissing for lack of a substantial federal question a claim that a divorce court's division of ERISA benefits violated ERISA's non-alienation provision); 29 U.S.C. § 1056(d)(1) (continuing ban on "assign[ing] or alienat[ing]" ERISA benefits remains, with explicit provision added to ensure enforceability of qualified domestic-relations orders, *id.* § 1056(d)(3)). The pattern is quite clear: Congress has consistently reinstated or expanded the ability of state family courts to transfer or assign federal benefits but not narrowed it.

4. *Equitable Consideration Does Not Treat Social Security as Property.* Factoring one spouse's ineligibility for Social Security benefits into an equitable distribution does not treat those benefits as property. *Contra* Pet. 23. As noted, Social Security benefits are not "accrued property rights," but rather "a form of social insurance." *Flemming*, 363 U.S. at 609, 610 (internal quotation marks omitted). But, in equitably dividing marital assets, family courts routinely consider facts other than property rights. These include each party's age, employment, earning

capacity, health, disabilities, child custody, and future needs. *See, e.g.*, Pet. App. 25a–26a; ALASKA STAT. § 25.24.160(a)(4); DEL. CODE. ANN. tit. 13, § 1513; 750 ILL. COMP. STAT. ANN. § 5/503(d); R.I. GEN. LAWS § 15–5–16.1(a). For example, Oregon treats a homemaker's work as contributing to marital assets, even though it is uncompensated. OR. REV. STAT. § 107.105(1)(f)(B).

Petitioner's argument confuses the rule in the many states that engage in forward-looking, equitable distribution of marital assets with that in the few community-property states that command *equal* distribution. Equal distribution focuses on what rights amount to community property at the time of the divorce; equitable distribution does not. Thus, in *Hisquierdo*, this Court repeatedly emphasized that California had treated Railroad Retirement Act benefits as community property. The Court reiterated the phrase "community property" about two dozen times throughout the opinion. 439 U.S. at 573–90. Likewise, *Wolff* explained that, under Nevada's community-property regime, Social Security benefits are not "community property subject to division between the spouses." 929 P.2d at 920 (internal quotation marks omitted). These authorities are inapposite to equitable-distribution states, as equitable distribution does not mandate commodifying benefits as property.

5.a. Hisquierdo *Further Distinguished*. Moreover, Section 407(a)'s wording is far from "identical" to that of the Railroad Retirement Act provision at issue in *Hisquierdo*. *Contra* Pet. 20. The latter subsection ends with a distinctive phrase banning "anticipat[ion]" of

railroad retirement benefits. 45 U.S.C. § 231m(a) ("nor shall the payment [of benefits] be anticipated"). *Hisquierdo* devoted an entire section of its opinion to expounding the import of this word: "the offsetting award respondent seeks would improperly anticipate payment . . . . " 439 U.S. at 589. The Social Security Act provision, by contrast, does not ban or even mention "anticipat[ion]." 42 U.S.C. § 407(a).

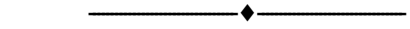
b. Finally, even if *Hisquierdo* applied, it would at most forbid a direct offset of the value of a participant's Social Security benefits, not mere consideration of their existence. *Hisquierdo* rejected giving the non-participating spouse "an offsetting award of presently available community property to compensate her for her interest in [the participant's] expected benefits." 439 U.S. at 588. That direct offset collided with the anti-anticipation provision. Here, however, no one sought to value Mr. Herald's expected Social Security benefits, let alone offset them. The only issue is whether a family court may consider the non-participating spouse's asymmetrical ineligibility for Social Security as a factor in letting her keep more of *her own* CSRS benefits. Pet. App. 28a.

III. THIS CASE IS A POOR VEHICLE

The facts of this case are far removed from any on which state supreme courts might conceivably be divided. The court below agrees with all other courts that Social Security benefits are not marital or community property and may not be transferred or

assigned when dividing marital property. *See* Pet. App. 5a–6a; *accord*, *e.g.*, *Skelton*, 5 S.W.3d at 4; *Wolff*, 929 P.2d at 920–21. Similarly, Oregon and all other states that have addressed the question agree that *non*-Social Security benefits *may or may not* be divided, subject to a court's discretion. *See* Pet. App. 28a; *accord, e.g.*, *Cox*, 882 P.2d at 920–21; *Schaffner*, 713 A.2d at 1246–47 (affirming division of CSRS benefits). Petitioner cites no case that has rejected a state court's discretion to divide CSRS benefits as it deems equitable, as expressly accommodated by 5 U.S.C. § 8345(j)(1).

At a minimum, this Court should await a vehicle in which a state court deviates from this consensus, by transferring, assigning, or perhaps directly offsetting the value of a participant's actual Social Security benefits. Here, however, the courts below did not transfer, assign, offset, or even consider the value of Mr. Herald's Social Security benefits. Because no conflict is implicated on these facts, this case is an unsuitable vehicle.[3]



[3] The trial record in this case establishes that Ms. Steadman had recently completed treatment for breast cancer that had spread to her lymph nodes. *See* Trial Tr. vol. 2, 121:8–122:3, Apr. 23, 2010. Recently, and long after the record in this case was compiled, Ms. Steadman's cancer has unfortunately recurred and metastasized to her liver. Her oncologist has informed her that her remaining life expectancy is about two years, to age 60. App. 1a. The trial court order does not begin to reduce Mr. Herald's share of Ms. Steadman's CSRS benefits unless and until she reaches the age of 62. Pet. App. 85a–86a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 26, 2014

APPENDIX

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November 11, 2014
RE: DIXIE L. STEADMAN

To whom it may concern:

Per PET/CT scan performed on 10/17/2014, Dixie Steadman (BD XX/XX/1956), showed progression of her metastatic breast cancer in her liver. Her overall median survival is two years which means she has a 50/50 chance of being alive at 2 years. Please call with any questions.

Sincerely,

/s/ John Smith
John W. Smith II, M.D.
503-239-7767.
