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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellant/Petitioner,

SCT Docket No. 161892
COA Docket No. 324853
Circuit Court No. 07-15064-DM

vs.

RAY JAMES FOSTER,

Defendant/Appellee/Counter-Plaintiff/Respondent

APPELLANT'S BRIEF
(ORAL ARGUMENTS REQUESTED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... i.

QUESTIONS PRESENTED ..... iv.

STATEMENT OF FACTS 1

STATEMENT OF THE CASE 4

ANALYSIS OF FEDERAL PREEMPTION 7

ARGUMENT I –
The Parties' Divorce Judgment is Final and May Not Be Modified Unless the Family Court Did Not Have Subject Matter Jurisdiction Over the Parties' Divorce Action 12

ARGUMENT II –
Not All Types of Federal Preemption Deprive State Courts of Subject Matter Jurisdiction 15

ARGUMENT III –
Defendant-Appellee's Argument that the Federal Government Has Exclusive, Comprehensive Administrative, Regulatory, and Judicial Authority Over All Claims Regarding Military Benefits is Wrong as a Matter of Law 24

ARGUMENT IV –
Federal Law Does Not Deprive State Courts of Subject Matter Jurisdiction Over the Type of Veterans' and Military Disability Benefits at Issue in this Case 28

ARGUMENT V –
Direct v. Collateral Attack 31

ARGUMENT IV –
Defendant-Appellee Failed to Seek Relief From the Applicable Provisions of the Consent Judgment Pursuant to MCR 2.612(C)(1)(a) 35

RELIEF REQUESTED 37

RECEIVED by MSC 2/11/2021 11:58:08 AM

TABLE OF AUTHORITIES

Cases

Arbuckle v. GM, LLC, 499 Mich 521,
855 NW2d 232 (2015) 15, 18, 19, 23

Boucher v. Boucher, 34 Mich App 213;
191 NW2d 85 (1971) 12

Buczkowski v. Buczkowski, 351 Mich 216,
222-223; 88 NW2d 416 (1958) 13, 14

Cipollone v. Ligget Group, Inc., 505 US 504;
516, 112 S. Ct. 2608, 2617, 120 L.Ed2d 407 (1992) 16

Claflin v. Houseman, 93 US 130; 23 L Ed 833 (1876) 26

Colestock v. Colestock, 135 Mich App 393, 397;
354 NW2d 354 (1984) 12, 13

In Re Ferranti, 540 Mich 1, 22; 934 NW2d 610 (2019) 14

Foster v. Foster, Court of Appeals
Docket No: 324853 ..... 4, 5, 7

Henderson v. Shinseki, 562 US 428, 431 (2011) 24

Henry v. Laborers' Local 1191, 495 Mich 260;
848 NW2d 130 (2014) 15, 16, 26, 27
28

Hicks v. Miranda, 422 US 332, 344; 95 S Ct 2281;
45 L Ed 2d 223 (1975) 30

Hisguierdo v. Hisguierdo, 439 US 572, 581 (1979) 20, 22

Howell v. Howell, ____ US ____;
137 S. Ct. 1400; 197 L Ed 2d 781 (2017) ..... iv, 4, 5, 8, 9,
10, 12, 22, 23,
25, 28, 31

Int'l Longshoremen's Ass'n, AFL-CIO v. Davis,
476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986) 26

Jackson City Bank & Trust Co. v. Fredrick,
271 Mich 538, 544; 260 NW 908 (1935) 13, 14, 34

Laffin v. Laffin, 280 Mich App 513;
760 NW2d 738 (2008) 36, 37

Mansell v. Mansell, 490 US 581; 109 S Ct 2023;
104 L Ed 2d 675 (1989) 9, 22, 28, 29, 30, 31

In re Marriage of Mansell, 217 Cal App 3d 219, 227;
265 Cal Rptr 227 (1989) 29

Marshall v. Consumer Power Co., 65 Mich App 237,
244-245; 237 NW2d 266 (1976) 26

McCarthy v. McCarthy, 453 US 210, 220 (1931) 20

McGinn v. McGinn, 126 Mich App 689;
337 NW2d 632 (1983) 13, 14

Mondou v. New York, N H & H R Co., 223 US 1;
32 S Ct 169; 56 L Ed 327 (1912) 26

Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw
Child Dev Bd, 472 Mich 479, 493; 697 NW2d 871 (2005) 24

Rose v. Rose, 481 US 619 (1987) 19, 20, 21, 22 25

Ryan v. Brunswick Corp., 454 Mich 20; 557 NW2d 541 (1997) 15, 16, 17, 22 27, 28

Sheldon v. Sheldon, 456 US 941 (1982) 30, 31

In re Marriage of Sheldon, 124 Cal App 3d 371, 376-384;
177 Cal Rptr 380 (1981) 30

Sprietsma v. Mercury Marine, 537 US 51;
123 S Ct 518; 154 L Ed 2d 466 (2002) 27

Town & Country Motors, Inc. v. Local Union No. 328,
355 Mich 26; 94 NW2d 422 (1959) 15, 17

Violette v. Smith & Nephew Dyonics, Inc., 62 F3d 8, 11 (Ca 1, 1995),
cert den, 517 US 1167 (1996) 19, 26

World Architects & Engineers v. Strat,
474 Mich 233, 232 n 3; 713 NW2d 750 (2006) 27

RECEIVED by MSC 2/11/2021 11:58:08 AM

RECEIVED by MSC 2/11/2021 11:58:08 AM

Other Authorities

10 US Code § 1408 9

38 USC § 301 ..... 19, 24

38 USC § 511 ..... 7, 22, 24

38 USC § 3107 21

38 USC § 7252 25

38 USC § 7266 25

42 USC § 659 10

46 USC § 4306 ..... 16, 17

Court Rules

MCR 2.116 ..... 17, 27

MCR 2.612 ..... 4, 24, 32, 35 36, 37

MCR 7.305 4

MCL 418.354 18

Constitutional Provisions

Article I, Section 8, Clauses 12 through 13 11

RECEIVED by MSC 2/11/2021 11:58:08 AM

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in concluding that in all cases, and in particular this case, state courts are deprived of subject matter jurisdiction when principals of federal preemption are applicable?

Appellant Answers: Yes

Appellee Answers: No

II.

Whether the Court of Appeals erred in concluding that Defendant/Appellee did not engage in an improper collateral attack on the consent judgment because the trial court lacked subject matter jurisdiction to enforce the consent judgment with respect to the offset provision due to principles of federal preemption?

Appellant Answers: Yes

Appellee Answers: No

III.

Whether the US Supreme Court's decision in *Howell v. Howell*, 581 US ___; 137 SCT 400; 197 L Ed 2nd 781 (2017) would grant Defendant-Appellee the ability to challenge collaterally the relevant terms of the consent judgment in this case given that federal law precludes a provision requiring that Plaintiff/Appellant receive reimbursement or indemnification payments to compensate for reductions in the Defendant's military retirement pay resulting from his election to receive combat-related disability compensation?

Appellant Answers: No

Appellee Answers: Yes

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STATEMENT OF FACTS

The parties were married on August 6, 1988, and Plaintiff-Appellant filed for divorce on November 20, 2007. Defendant-Appellee had served in the military during, and prior to, the marriage, and he retired from the Army in September 2007. Defendant-Appellee testified at the divorce hearing, which involved finalizing the parties' settlement, that he was receiving both military retirement pay and military disability benefits based on injuries he had sustained during active duty. Both parties waived their right to seek spousal support and agreed that Defendant-Appellee's disability benefits were not subject to division by the court because they were not considered marital property under federal law. Pursuant to the property settlement, Plaintiff-Appellant was awarded 50 percent of Defendant-Appellee's disposable military retirement pay, as calculated based on Defendant-Appellee's creditable military service during the marriage. The parties also agreed to the inclusion of the following provision in the divorce judgment, which has been referred to as the "offset provision": "If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become

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disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court."

Shortly after the entry of the divorce judgment, Defendant-Appellee became receiving combat-related disability compensation, which reduced the amount of his "disposable military retired pay" and consequently the amount Plaintiff-Appellant received from Defendant-Appellee's disposable military retired pay. This was the precise circumstance that the parties contemplated in agreeing to the offset provision.

Defendant-Appellee failed to comply with the consent judgment by not paying Plaintiff-Appellant the difference between the reduced amount of retirement pay she ended up receiving and the amount that she had received immediately after the consent judgment was entered. Plaintiff-Appellant sought relief from the trial court.

On May 24, 2010 Plaintiff-Appellant filed a Motion and Order to Show Cause that was finally heard on September 30, 2010. At the hearing it was established that Plaintiff-Appellant began receiving approximately $811.82 per month representing her share of Defendant-Appellee's disposable military retired pay in April 2009. She continued to receive monthly payments through February 2010. At the end of February 2010 Plaintiff-Appellant was notified that because Defendant-Appellee had elected to receive combat-related disability compensation her monthly benefit would be reduced to $212.00 per month.

At the September 30, 2010 hearing the court did not hold Defendant-Appellee in contempt for not paying Plaintiff-Appellant the difference in the benefit amount she was receiving pursuant to the offset provision. The court, by order dated October 8, 2010, ordered Defendant-Appellee to pay Plaintiff-Appellant $1,000 per month, with $812 credited as current payments due under the consent judgment and $188 to be credited against the arrearage of

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$34,398 until the arrearage was paid in full. Defendant-Appellee did not appeal the order of the court nor did he seek relief from the applicable provisions of the consent judgment.

Defendant-Appellee was ultimately held in contempt at a hearing held on April 26, 2011. The order following that hearing was entered on May 11, 2011. No appeal was filed and no relief from the order or consent judgment was sought. At that time, Plaintiff-Appellant had filed another motion to have Defendant-Appellee show cause why he should not have been held in contempt for failing to abide by the terms of court orders that had been entered on December 3, 2008 and October 8, 2010.

On June 27, 2014 Defendant-Appellee was before the court for a determination of whether he should, once again, be held in contempt for failing to obey court orders. During the course of the June 27, 2014 hearing, Defendant-Appellee presented a number of excuses as to why he failed to comply with the terms of the consent judgment of divorce or the court's subsequent orders. Defendant-Appellee claimed that the judgment of divorce was entered in violation of federal law and was, therefore, unenforceable. Defendant-Appellee also claimed that at the time the judgment was entered he was suffering from PTSD, that he was "incoherent of what he was signing," and that his attorney failed to adequately represent his interests as they related to his military disability benefits. The court reminded Defendant-Appellee that despite the fact that he had argued repeatedly that federal law made what the court had ordered improper or illegal no appeals had been filed or relief from the judgment sought. Defendant-Appellee was told, "You've had your opportunities to properly appeal this, and you have not." (Transcript of June 27, 2014 hearing, Page 15).

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A number of other hearings and status conferences were held subsequent to the June 27, 2014 hearing, with the last hearing being held on December 22, 2014. By that time, Defendant-Appellee had appealed the order holding him in contempt.

STATEMENT OF THE CASE

Defendant-Appellee initial Claim of Appeal was not filed until December 1, 2014. Defendant-Appellee argued that the trial court erred in holding him in contempt because Plaintiff's attempts to enforce the consent judgment were preempted by federal law. The Michigan Court of Appeals affirmed the trial court's ruling in an unpublished per curium decision dated October 13, 2016 in *Foster v. Foster*, Court of Appeals Docket No: 324853. The Court of Appeals concluded that the matter was not preempted by federal law and noted that, "Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms. However, he never appealed that judgment nor has he moved for relief from the judgment, MCR 2.612. Thus, defendant is engaging in an improper collateral attack on the divorce judgment."

Defendant-Appellee's initial Application for Leave to Appeal to this Court was filed on November 30, 2016. The Application for Leave to Appeal the October 13, 2016 order of the Court of Appeals was considered by this Court and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the order of the Court of Appeals was vacated and the matter was remanded to the Court of Appeals for reconsideration in light of the US Supreme Court ruling in *Howell v. Howell*.

On March 22, 2018 the Court of Appeals once again affirmed the trial court's ruling. The Court of Appeals concluded that "Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms; however, he never appealed that judgment, nor has he moved for relief from that judgment, MCR 2.612." (Citations omitted). The Court of Appeals

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stated that the defendant's failure to appeal the original divorce judgment precluded collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions.

Defendant-Appellee again sought relief in this Court. This Court granted Defendant-Appellee's Application for Leave to Appeal to consider the federal preemption question, the continuing viability of *Megee,* (citations omitted), in light of *Howell*, and the propriety of the contempt order entered against Defendant-Appellee. This case was argued before this Court on October 3, 2019. The Court entered its Opinion and Order on April 29, 2020, wherein it states, in part, that; "… the trial court was preempted under federal law from including in the consent judgment the offset provisions on which Plaintiff relies. The broad language of *Howell* precludes a provision requiring that Plaintiff receive reimbursement or indemnification payments to compensate for reductions in Defendant's military retirement pay resulting from his election to receive disability benefits, including CRSC as provided under Title 10." *Foster v. Foster*, Michigan Supreme Court Opinion, Pages 20-21.

The Court did not express an opinion on the effect of its holding on Defendant's ability to challenge, on collateral review, the contempt judgment. The matter was remanded a second time to the Court of Appeals so that the panel could address the effects of the April 29, 2020 ruling on the Defendant's ability to collaterally attack the consent judgment.

On July 30, 2020 the Court of Appeals issued an Opinion finding that the matter was, in fact, preempted by federal law, and that Defendant did not engage in an improper collateral attack on the consent judgment because the trial court lacked subject matter jurisdiction to enforce the same.

On or about October 5, 2020 Defendant-Appellee filed, in the trial court, a Motion for Restitution wherein he sought restitution for payments he was "compelled" to make to the

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Plaintiff by the trial court as well as costs and reasonable attorney fees incurred in the approximately six (6) years of appellate proceedings. In the Brief in Support of Motion for Restitution filed on behalf of Defendant-Appellee, it states, "Counter-Plaintiff (referring to Mr. Foster) has argued since 2008 that his constitutional rights and entitlements to his federal military disability pay were wrongfully appropriated from him in direct violation of pre-existing preemptive federal law which voids out any attempt on the part of the State to take these benefits from him. Counter-Plaintiff has engaged the assistance of attorneys and appellate counsel and has had to fight through three Court of Appeal cases, two State Supreme Court reviews and now, once again, an attempt on the part of Counter-Plaintiff [sic] and her counsel to thwart the course of justice." Defendant-Appellee's Brief in Support of Motion for Restitution, Page 14. (Emphasis added). The "attempt to thwart the course of justice" comment was a reference to the then pending Application for Leave to Appeal in this Court filed on behalf of Plaintiff-Appellant. Defendant-Appellee's counsel states, "This history is what occurred after nearly 7 years of litigation in this court [referring to the trial court] in which Counter-Plaintiff implored the court to properly assess his rights under federal law." Defendant-Appellee's Brief in Support of Motion for Restitution, Page 14. Based on these statements of "alternative facts", Defendant-Appellee sought restitution from Plaintiff-Appellant in the amount of $145,650.00. In an Order dated November 12, 2020 the trial court stated, "The Plaintiff shall reimburse the Defendant the sum of $72,000.00 as restitution." Plaintiff has appealed that order. Defendant has filed a counter-appeal. While the basis for the counter-appeal is unclear, it is logical to conclude that Defendant-Appellee will argue that the trial court erred by not awarding him attorney fees and costs.

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Defendant-Appellee has argued, repeatedly, that were federal preemption applies, "… state courts are without jurisdiction in the most elementary sense" and orders entered in contravention thereof are "void" for want of jurisdiction over the subject matter. This principle, which applies here, has significant impact on the court's jurisdictional orientation to this case, and especially with respect to the court's question concerning the status of the circuit court's contempt orders, which were themselves based on a federally preempted, and therefore absolutely void judgment." (Defendant-Appellee's Brief to this Court as Appellant dated February 27, 2019, page 2. Emphasis added).

ANALYSIS OF FEDERAL PREEMPTION

The US Constitution and Acts of Congress have given to the federal government exclusive power over certain matters such as interstate commerce, to exclusion of state jurisdiction. Federal preemption occurs where federal law so occupies the field that state courts are prevented from asserting jurisdiction. Justice Viviano, in his concurring opinion in *Foster v. Foster*, in reference to Defendant-Appellee's argument cited above, stated; "Therefore, before addressing the precise legal issue in this case, I will first explain why defendant's assertion that all types of federal preemption deprive state courts of subject matter jurisdiction is wrong as a matter of law." Concurring Opinion, Page 5.

As a corollary to Defendant-Appellee's assertion that all types of federal preemption deprive state courts of subject matter jurisdiction, he now argues that the federal government not only has exclusive power (jurisdiction) over determinations regarding eligibility for military benefits, but also over the adjudication of all claims and/or disputes related to such determinations. In citing 38 USC § 511 Defendant-Appellee references the existence of a "comprehensive administrative, regulatory, and judicial apparatus that has been established by

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Congress to address all claims regarding military benefits and their division among veterans and their dependents exclusive of any other person, agency or court." Respondent's Answer to Petitioner's Application for Leave to Appeal (After Second Remand), Page 13. This is yet another of Defendant-Appellee's overly broad and unsubstantiated assertions. In the instant action, the trial court, during the course of the divorce proceeding, made no determination or findings of fact as to Defendant-Appellee's eligibility for military benefits, the extent of his disability relative to injuries sustained in combat and the dollar amount of benefits that he should or should not be receiving. The trial court, in exercising its exclusive jurisdiction over divorce actions and by entering the consent judgment, approved a provision regarding the disposition of Defendant-Appellee's military pension benefits. The trial court also approved of the inclusion of the offset provision in the consent judgment. This court held that the trial court was preempted under federal law from including in the consent judgment the offset provision. Neither this Court, nor the US Supreme Court in *Howell v. Howell* concluded that the inclusion by a state court of this type of offset provision in a judgment of divorce was an improper exercise of subject matter jurisdiction. In fact, *Howell* does not provide any guidance on this issue.

In *Howell* the Court writes, "We see nothing in this circumstance that makes the reimbursement award to Sandra any the less an award of a portion of military retirement pay that John waived in order to obtain disability benefits and that is the portion that Congress omitted from the Act's definition of 'disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse." *Howell*, Page 1406.

The Court went on to conclude that, "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted."

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The Court, however, stated; "We recognize, as we recognized in *Mansell*, the hardship that congressional preemption can sometimes work on divorcing spouses (citation omitted) but we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support." *Howell*, Page 1406. (Emphasis added).

10 US Code § 1408(d)(5) states, "If a court (defined as any court of competent jurisdiction of any state) order described in paragraph (1) (a court order providing for the payment of child support or alimony) provides for a division of property (including a division of community property) in addition to any amount of child support or alimony or the payment of any amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay." (Emphasis added).

Disposable retirement pay means the total monthly retired pay to which a member is entitled less amounts which are deducted as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 or Title 38, which is disability compensation.

This language, along with *Howell,* suggests that a state court of competent jurisdiction can order a military spouse to pay alimony/spousal support that is calculated or recalculated based, in part, on the contingency that some military retirement pay might be waived due to an election to receive benefits under Title 5 or Title 38, but that the payment of the ordered alimony

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must be made by the Secretary from the disposable retired pay after effective service of the applicable court order.

42 USC § 659 states, "Notwithstanding any other provisions of law moneys (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States… to any individual, including members of the Armed Forces of the United States, shall be subject in like manner and to the same extent as if the United States… were a private person, to withholding in accordance with state law enacted pursuant to subsections (a)(1) and (b) of Section 666 of this title and regulation by the Secretary under such subsections, and to any other legal process brought by a state agency administering a program under a state plan approved under this part or by an individual oblige, to enforce the legal obligation of the individual to provide child support or alimony."

Moneys that are subject to process include moneys payable to an individual considered by the Secretary of Veteran's Affairs to be compensation for service connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retained pay in order to receive such compensation. 42 USC § 659(a)(2)(h)(1).

In *Howell,* the Supreme Court, in interpreting federal law held that a state court cannot treat combat-related special compensation as a marital asset and enter an order requiring the recipient to pay a portion of it to his or her spouse as part of the division of assets. However, the court also stated that a state court can take into account possible reductions in disposable retired pay based on any election to receive CRSC in calculating or recalculating alimony. What the court in *Howell* is saying is that a provision in a judgment of divorce that requires a military spouse to reimburse the non-military spouse for a reduction in retired pay due to an election to

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receive disability compensation is preempted by federal law, but if a trial court were to order the military spouse to pay alimony calculated based on the expectation that there would be a reduction in military retired pay based on an election to receive disability compensation such an order would not be preempted. Federal law, as cited above, states that if a trial court of competent jurisdiction enters any order for payment of alimony by a member or former member of the Armed Services, the alimony can be payable either out of disposable retired pay or out of service-connected disability benefits.

As Justice Viviano noted in his concurring Opinion, it has long been established that so long as Congress has not provided for exclusive federal court jurisdiction, state courts may exercise subject matter jurisdiction over federal law claims whenever by their own constitution they are competent to take it.

The Defendant-Appellee has made the following sweeping statement to this court:

> "Since only retired pay is disposable and therefore divisible under USFSPA any state court order that allows or forces division of any other veteran's benefits (those benefits considered non-disposable, which include disability pay and necessarily CRSC pay, which is based on the service member's combat-incurred disability) is and <u>always</u> has been preempted by federal law because Congress has total and absolute authority over the designation and provision of veterans' benefits under Article I, Section 8, Clauses 12 through 13 of the US Constitution." Page 12. [Emphasis added].

In response to Plaintiff/Appellant's Application for Leave to Appeal to this Court, Defendant-Appellee states on Page 4, "In the instant case, the Court of Appeals correctly analyzed what is simply restated law in Michigan – federal preemption goes to the subject matter jurisdiction of the state courts because where federal preemption applies, the federal government has retained its sovereign authority over the issue. The state court has no authority to exceed its constitutional jurisdiction in such matters."

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While it is true that a state court does not have subject matter jurisdiction over a determination regarding a service member's eligibility to receive military benefits, state courts do, however, have subject matter jurisdiction over domestic relations matters and, based on the decision in *Howell* and the federal statutes cited above, can consider the extent and amount of a service member's benefits (regardless of their classification) in calculating and awarding child support and spousal support. A state court can, in exercising its subject matter jurisdiction over a divorce action, order a service member to pay spousal support, even if the service member's source of income includes disability compensation, and the spousal support ordered is to be paid, either in whole or in part from that source of income.

In the instant case, the trial court, by entering the consent judgment containing the offset language, ordered the division of CRSC which was determined to be preempted by federal law. This was a mistake of law by the trial court, which is non-jurisdictional. This mistake rendered that portion of the judgment voidable, not void, and contrary to the opinion of the Court of appeals could not be challenged by collateral attack and could only have been reached by some form of direct attack.

ARGUMENT I
The Parties' Divorce Judgment is Final and May Not be Modified Unless the Family Court Did Not Have Subject Matter Jurisdiction Over the Parties' Divorce Action.

There are portions of divorce judgments that are subject to modification, such as child support, periodic alimony, child custody and parenting time. As Justice Viviano noted, citing *Colestock v. Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984) citing *Boucher v. Boucher*, 34 Mich App 213; 191 NW2d 85 (1971) "… the property settlement provisions of a divorce judgment are final and, as a general rule, cannot be modified." Thus, "A judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the

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judgment may have been wrong or rested on a subsequently overruled legal principle." *Colestock,* 135 Mich App at 397-398, citing *McGinn v. McGinn*, 126 Mich App 689; 337 NW2d 632 (1983).

In *Buczkowski v. Buczkowski*, 351 Mich. 216, 222-223; 88 NW2d 416 (1958), this Court examined whether a spouse could move to vacate a separate maintenance decree when the moving spouse did not appeal the decree, had already accepted money under the settlement, and waited four years after entry of the decree to assert defects with it. The sole challenge to the decree was that the court lacked jurisdiction to enter it because it contained a legally invalid provision. Id. at 220-221. This Court declined to vacate the decree, explaining as follows:

> We are cited to no authority to support this contention and it is manifestly in error. The court had jurisdiction of the parties and it had jurisdiction of the subject matter of the suit, that is, support and maintenance. Having such jurisdiction it also had jurisdiction to make an error if, indeed, it did…
>
> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. * * * The judgment of the court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.
>
> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co. v. Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:
>
> > There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.

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[*Buczkowski*, 351 Mich at 221-222 (cleaned up).]

In the matter of *In Re Ferranti*, 540 Mich 1, 22; 934 NW2d 610 (2019), this Court, citing *Jackson City Bank Trust Co. v. Fredrick*, 271 Mich 538, stated:

> "[W]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called in question collaterally." [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545].

In *McGinn,* the Court of Appeals explained the importance of finality in the context of divorce judgments:

> Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the husband as his separate property would flaunt the rule of res judicata and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn*, 126 Mich App at 693 (citation omitted) (Emphasis added).]

At the final hearing held in the divorce action, Plaintiff-Appellant was asked, "… are you able to support yourself with the monies that you're earning or that will be paid to you under this Judgment of Divorce? And when I say that, I'm speaking specifically of the military retirement benefits that you're going to receive." Transcript, Page 10, lines 12-16. Plaintiff-Appellant responded, "with the military retirement portion that I receive and the money, yes."

Plaintiff-Appellant began receiving $811.82 per month which was reduced to $212.00 once Defendant-Appellee began receiving combat-related disability compensation. For a period of several months, Plaintiff-Appellant did not receive any share of Defendant-Appellee's benefits

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resulting in an arrearage of $34,398.00. Now, Plaintiff-Appellant is faced with the possibility of having to pay Defendant-Appellee $72,000.00 in restitution, notwithstanding the fact that he failed to appeal, or seek relief from the consent judgment for a period in excess of 6 years.

Defendant-Appellee's reliance on federal preemption as a defense to a contempt proceeding brought nearly 7 years after entry of the consent judgment to enforce the offset provision is, as the Court of Appeals has held, a collateral attack on a final judgment.

ARGUMENT II
Not All Types of Federal Preemption Deprive State Courts of Subject Matter Jurisdiction

State courts have subject matter jurisdiction over federal preemption defenses. The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.

Accordingly, where state and federal courts have concurrent jurisdiction over a federal cause of action, and a state proceeding on such a cause of action presents a federal preemption issue, the proper course is to seek resolution of that issue by the state court.

Defendant relies on a number of cases in support of the argument that "Michigan jurisprudence provides that a judgment or order contrary to federal law is void ab initio." Specifically, Defendant-Appellee has cited *Arbuckle v. GM, LLC*, 499 Mich 521, 855 NW2d 232 (2015); *Henry v. Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), *Ryan v. Brunswick Corp.*, 454 Mich 20; 557 NW2d 541 (1997); and *Town & Country Motors, Inc. v. Local Union No. 328*, 355 Mich 26; 94 NW2d 422 (1959).

The issue in *Henry v. Laborers*, supra. was whether, and the extent to which, Plaintiff's claims asserted under the Michigan Whistleblower Protection Act were preempted by the National Labor Relations Act and the Labor Management Reporting and Disclosure Act. In

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Henry there was a federal forum for the adjudication of Plaintiff's claim. The issue in *Ryan v. Brunswick Corp*, a wrongful death action, was whether the provisions of the Federal Boat Safety Act preclude state court claims of negligence (common-law products liability claim) arising from the failure to equip a recreational motorboat with a propeller guard. The court noted that, "Federal preemption is either express or implied. If express, the intent of Congress to preempt state law must be clearly stated in the statute's language or impliedly contained in the statute's structure and purpose. *Ryan* citing *Cipollone v. Ligget Group, Inc.*, 505 US 504; 516, 112 S. Ct. 2608, 2617, 120 L.Ed2d 407 (1992). In the absence of express preemption, implied preemption may exist in the form of conflict or field preemption. Conflict preemption acts to preempt state law to the extent that it is in direct conflict with federal law or with the purpose and objectives of Congress. Field preemption acts to prevent state law where federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it."[1]

The Federal Boat Safety Act states, "States … may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment… that is not identical to a regulation prescribed under Section 4302 of this title [46 USC § 4306]."

The FBSA did not require (at the time the case was decided) boat motors to be manufactured with propeller guards. Plaintiff argued that the defendant had a duty to design and

[1] In *Howell,* the court, with respect to reimbursement or indemnification provisions, stated, "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." This, according to the analysis in *Ryan* and *Cipollone* would fall under the definition of conflict preemption, i.e. a state law or state court ruling in direct conflict with federal law. The court in *Howell* did not conclude in its analysis that decisions or orders by a state court relative to the distribution of military benefits fall under the definition of field preemption which acts to prevent state law or state court action where federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. Field preemption would, by its definition, deprive a state court of subject matter jurisdiction over an issue.

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manufacture a motor with a propeller guard. The court held, "Because state regulations requiring propeller guards are preempted by the FBSA, and because the federal government does not require that motors be manufactured with propeller guards, we conclude that the grant of summary disposition pursuant to MCR 2.116(c)(4) and (c)(8) was proper." 2.116(c)(4) provides for summary disposition based on the court's lack of subject matter jurisdiction. The rational stated was that a state court action finding a defendant boat manufacturer negligent for failing to manufacture a motor with a propeller guard would be akin to the state court imposing a regulation that is not consistent with, or identical to a regulation prescribed under 46 USC § 4306. It would have been more logical for the court to conclude that given the state of federal law at the time, i.e. boat manufacturers are not required to install propeller guards, summary disposition for failure to state a claim upon which relief could be granted was appropriate. The lack of subject matter jurisdiction reference was made without explanation. It is also important to recognize that in *Ryan* there was no "federal cause of action." A tort case, based on product liability, would have been within the subject matter jurisdiction of the state court. The court failed to apply applicable federal law to a state court matter, i.e. that boat manufacturers are not required to install propeller guards. If the federal statute at issue required boat manufacturers to install propeller guards, subject matter jurisdiction would not have been an issue. (See additional analysis of *Ryan v. Brunswick* set forth herein).

In *Town & Country Motors, Inc. v. Local Union No. 328*, 355 Mich 26; 94 NW2d 422 (1959) a car dealership sought and obtained an order restraining the Union and its agents from picketing at its place of business, and from engaging in other related activities. Defendants argued that the circuit court had no jurisdiction to hear and decide the issues presented and that

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Congress had, through the enactment of the National Labor Relations Act, established a federal forum for the adjudication of such issues. This Court agreed.

In *Arbuckle v. GM, LLC*, 499 Mich 521, 855 NW2d 232 (2015) Plaintiff sustained a work related injury while working for GM. Plaintiff received a disability pension and was awarded worker's compensation benefits relating to his disability. Eventually Plaintiff also received Social Security Disability benefits. GM and the applicable unions had executed a letter of agreement by which GM agreed not to coordinate worker's compensation disability benefits and disability pension benefits for its employees under MCL 418.354, which requires a reduction of worker's compensation benefits by coordinating with disability benefits. The letter of agreement was incorporated into the collective bargaining agreement between GM and the UAW. Following numerous iterations of the CBA and subsequent letters of agreement, GM and the UAW adopted a formula by which GM would coordinate benefits using disability pension benefits to reduce the amount of worker's compensation benefits for all workers and retirees (which included Plaintiff) regardless of when they retired. Upon receiving notice that his benefits would be reduced, Plaintiff requested a hearing before the director of the Worker's Compensation Agency, who concluded that GM was improperly using Plaintiff's Social Security Disability benefits to offset his worker's compensation benefits in violation of MCL 418.354(11). After a number of administrative hearings, it was determined that GM was permitted to coordinate Plaintiff's disability pension benefits. Plaintiff appealed to the Court of Appeals which held that GM was not permitted to coordinate Plaintiff's disability pension benefits. GM sought leave to appeal to the Michigan Supreme Court.

This Court held that GM may coordinate Plaintiff's disability pension benefits because the parties' collective bargaining agreement and subsequent modifications to them "did not vest

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Plaintiff's right to uncoordinated benefits." This Court, in its analysis of Plaintiff's claims stated:

> "A threshold question was whether Arbuckle's claim of entitlement to uncoordinated worker's compensation benefits was actually a claim under § 301 of the Labor Management Relations Act (federal statute citations omitted) and therefore preempted by federal law. While § 301 gives federal courts jurisdiction over controversies involving CBAs, state courts have concurrent jurisdiction over them. Section 301, however, nonetheless preempts state substantive law. State courts must apply federal law in deciding these claims because only federal law governs the interpretation and application of CBAs. Accordingly it was necessary to decide whether this case was properly characterized as a claim subject to the preemptive force of § 301. Preemption under § 301 occurs when a decision on the state claim is inextricably intertwined with consideration of the terms of the labor contract and when application of state law to a dispute requires the interpretation of a CBA. A two-part test is used to determine whether § 301 preemptive applies. The court must first examine whether proof of the state-law claim requires interpretation of the terms of a CBA and, second, ascertain whether the right claimed by the plaintiff was created by the CBA or state law. If application of the test reveals a right that both arises from state law and does not require contract interpretation, there is no preemption, but if a state law claim fails these two requirements, it is preempted by § 301."

The critical portion of the court's analysis is that where a federal statute preempts state substantive law, the state courts must apply federal law in cases where only federal law governs the issue. This is consistent with the decision in *Violette v. Smith & Nephew Dyonics, Inc.* where the court made a distinction between "choice-of-forum" and "choice-of-law" preemption. The court held that, "Where Congress has designated another forum for the resolution of a certain class of disputes … such designation deprives the courts of jurisdiction to decide those cases. Where, however, the question is whether state tort or federal statutory law controls, preemption is not jurisdictional…" *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F3d 8, 11 (Ca 1, 1995), cert den, 517 US 1167 (1996), Pages 11-12.

In *Rose v. Rose*, 481 US 619 (1987) the issue before the court involved calculation of child support by the trial court taking into consideration the total amount of benefits received

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which consisted of benefits from the Veteran's and Social Security Administrations. Appellee-Veteran argued that only the Veteran's Administration or Social Security Administration could order him to contribute additional sums for child support. As Defendant-Appellee has done in this case, the Appellant in *Rose* invoked the Supremacy Clause of the US Constitution, Article VI, Cl. 2. In *Rose*, Appellant sought a ruling from the circuit court that it lacked jurisdiction over the disability benefits he received from these federal agencies. The circuit court found Appellant in willful contempt for failing to pay child support. The Tennessee Court of Appeals affirmed, rejecting Appellant's contention that Veteran's and Social Security Administrations have exclusive jurisdiction to specify payment of child support from disability benefits they provide. The US Supreme Court has stated, in its analysis of the federal preemption of state law issue that the law must not do major damage to clear and substantial federal interests or else the Supremacy Clause will demand that state law be overridden. *McCarthy v. McCarthy*, 453 US 210, 220 (1931). *Hisguierdo v. Hisguierdo*, 439 US 572, 581 (1979). In *Rose, supra* the Tennessee Court of Appeals, in applying the precedent established in the aforementioned cases determined that Congress had intended disability benefits to support the beneficiary and his dependents, and thus the circuit court's order directing Appellant to pay a portion of these benefits for the support of his children or be held in contempt, did not undermine a substantial federal interest. *Rose* at 628.

The US Supreme Court found that the Tennessee Court of Appeals correctly identified the constitutional standard for determining whether the applicable state statute, as construed and applied by state courts authorizing the award of Veteran's disability benefits as child support, conflicts with federal law and is therefore preempted under the Supremacy Clause. The Supreme Court states, "We have consistently recognized that the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the state and not to the laws of the

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United States. (Citations omitted). 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 has positively required by direct enactment that state law be preempted. Before a state law governing domestic relations will be overridden, it must do 'major damage' to 'clear and substantial' federal interests. *Rose*, *supra*, Page 625.

Appellant, in relying on 38 USC § 3107(a)(2) argued that the administrator of Veteran's Affairs has exclusive authority over all issues involving the disposition of military disability benefits. It was argued that, in cases involving payment of child support, the state courts' power to enforce its support order extends solely to income not derided from veteran's disability benefits. The United States, as amicus curiae, argued that, to collect child support in cases where it can only be paid from disability benefits, a claim for apportionment must first be filed with the administrator on behalf of the children." *Rose*, *supra*, Page 627. In response, the US Supreme Court stated, "This jurisdiction framework finds little support in the statute and implementing regulations… Nor is it clear that Congress envisioned the administrator making independent child support determination in conflict with existing court order. Neither mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on the court's ability to enforce such an order… Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes… that do contain support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the administrator's appointment power to displace a state court's power to enforce an order of child support. Thus we do not agree that the implicit preemption Appellant finds in § 3107(a)(2) is

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positively required by direct enactment, or that a state court's award of child support from Appellant's disability benefits does 'major damage' to any clear and substantial federal interest created by this statute." *Rose*, *supra*, citing *Hisguierdo*, Page 628.

In the instant action, Defendant-Appellee has argued that the Secretary of Veteran's Affairs and the Veteran's Administration have exclusive jurisdiction over all issues concerning veteran's benefits and that the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under the law that affects the provisions of benefits by the Secretary to veterans or the dependents or survivors of veterans. 38 USC 511(a). Defendant-Appellee's Response to Plaintiff-Appellant's Application for Leave to Appeal, Page 17.

38 USC § 511, like § 211(a) which was at issue in *Rose*, makes no reference to state court jurisdiction. In *Ryan, supra* the Appellant and the Solicitor General in *Rose* argued that the underlying purpose of federal statutes in the context of preemption cases is to achieve uniformity in the administration of veteran's benefits and to protect the administration from expensive and time-consuming litigation. The court in *Rose* noted:

> "The interest in uniform administration of veteran's benefits focuses, instead, on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disability and the application of the graduated benefit schedules. (Other references and citations deleted). These are the issues Congress deemed especially well-suited for administrative determination insulated from judicial review. Thus, even assuming that § 211(a) covers a contempt proceeding brought in state court against a disabled veteran to enforce an order of child support, that court is not reviewing the administrator's decision finding the veteran eligible for specific disability benefits." *Rose*, Page 630. Emphasis added.

The decisions in *Mansell* and *Howell* address the issue of preemption in the context of state court orders that, either directly or indirectly, treat waived retirement pay as divisible community property. In neither case did the Supreme Court conclude that the state courts, by

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violating the applicable provisions of the federal law, improperly exercised subject matter jurisdiction over the waived retirement pay.

In the instant case, the issue involved did not constitute a federal cause of action. The cause of action (a divorce) was properly before a state court of general jurisdiction. This was not a case involving an adjudication regarding eligibility for military benefits. The federal statutes governing veterans and military benefits do not, contrary to Defendant-Appellee's repeated assertions, provide a forum for the equitable division of disposable military benefits in the event of a divorce. In *Howell*, the court held, as previously indicated, that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, and take account of the reduction in value when it calculates or recalculates the need for spousal support. That language suggests that if the military spouse received $1,000.00 in retired pay, half of which was awarded to the non-military spouse, and then elected to receive $1,200.00 in military disability benefits post-divorce reducing the retirement benefit received by the non-military spouse to zero, the court could, in a subsequent proceeding, award the non-military spouse $500.00 a month in spousal support, and that such an order would not be preempted by federal law. This would be true even if the military spouse was required to pay spousal support out of his or her disability benefits. The trial court has exclusive jurisdiction over the issue of spousal support and could, pursuant to *Howell,* and the applicable federal statutes order that the spousal support be paid using military disability benefits, however the same are characterized.

In this case, the trial court was faced with a state law controversy over which it had subject matter jurisdiction, that involved, in part, the application of federal law. As the court held in *Arbuckle*, "State courts must apply federal law in deciding these claims" because only

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federal law governs the very narrow issue concerning inclusion of military disability benefits as part of the divisible marital property. The trial court's entry of the consent judgment of divorce, including the offset provision, was the erroneous exercise of jurisdiction which could only have been corrected by appeal or by the relief provided under MCR 2.612.

ARGUMENT III
Defendant-Appellee's Argument that the Federal Government has Exclusive, Comprehensive Administrative, Regulatory, and Judicial Authority over all Claims Regarding Military Benefits is Wrong as a Matter of Law

In *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 493; 697 NW2d 871 (2005), the Court held, "It has long been established that, so long as Congress has not provided for exclusive federal court jurisdiction, state courts may exercise subject matter jurisdiction over federal law claims whenever, by their own constitution, they are competent to take it." (Emphasis added). Defendant-Appellee asserts, "Moreover, contrary to Petitioner's assertions, there is, in fact, as separate and independent federal administrative and judicial forum for all claims concerning veterans' benefits. 38 USC § 511; 38 USC § 7251." (Defendant-Appellee's Response to Plaintiff-Appellant's Application for Leave to Appeal, Page 5). This assertion is not correct.

The Department of Veterans' Affairs (VA) administers the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans. 38 USC 301(b). The VA adjudicates benefits claims by resolving "all questions of law and fact necessary to a decision" whether the benefits will be awarded. 38 USC 511(a). As a general matter, "The VA has a two-step process for the adjudication of claims. *Henderson v. Shinseki*, 562 US 428, 431 (2011). Claims for benefits are first received and processed by a VA regional office, which renders an initial decision. A claimant who is dissatisfied with the regional office's decision may

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then seek de novo review by the Board of Veteran's Appeals, a component of the VA that makes the agency's final decisions. (See 38 USC 7101 and 7104). Judicial review of the VA's determinations regarding benefits is available only as specifically provided in Title 38 of the US Code. A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veteran's Claims (Veteran's Court). This is a court with exclusive jurisdiction to review the Board's decisions. 38 USC 7252(a) and 7266.

The function of the Department of Veterans' Affairs, the Board of Veteran's Appeals, and the Court of Appeals for Veteran's Claims is the adjudication of claims regarding the eligibility for veterans' benefits, based on standards and guidelines established under federal law. The applicable federal law states that state courts may not treat certain military benefits as disposable marital property. There is no federal forum for the adjudication of a claim for the equitable division of the benefits that are subject to division, or, as was the case in *Rose, supra* a determination regarding child support, or as noted in *Howell*, a determination regarding either the determination or redetermination of a claim for alimony/spousal support. Jurisdiction over these types of claims rests exclusively with state courts.

In this case the trial court did not assume jurisdiction over, and render a decision on an issue in which Congress has designated another forum for the resolution of such claims, i.e. the eligibility for military benefits. Had it done so, there would clearly have been the "want of jurisdiction" and any judgment containing such decision would be void and subject to direct, as well as collateral, attack. The court approved of an order containing an offset provision determined to be contrary to applicable federal law. This was an erroneous exercise of jurisdiction, at best. At most, it was a mistake of law, i.e. a ruling in violation of applicable federal law.

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In *Violette v. Smith & Nephew Dyonics, Inc.*, *supra* the defendant argued for the first time an appeal that the plaintiff's state law product's liability claims were preempted by certain provisions of a federal statute. Relying on *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986), the defendant argued that preemption is a jurisdictional matter which cannot be waived and may be raised at any time." *Violette*, page 11. Distinguishing between "choice of forum" and "choice of law" preemption, the court explained:

> [W]here Congress has designated another forum for the resolution of a certain class of disputes, such as the National Labor Relations Board in *Davis*, such designation deprives the courts of jurisdiction to decide those cases. Where, however, the question is whether state tort or federal statutory law controls, preemption is not jurisdictional and is subject to the ordinary rules of appellate adjudication, including timely presentment and waiver. [*Id*. at 11-12 (citation omitted).]

Justice Viviano, in his concurring opinion at page 7 notes, "The Michigan Court of Appeals correctly explained the two-part preemption inquiry as follows:

> Where preemption exists,… state courts will not always be prevented from acting. A litigant may still enforce rights pursuant to the Federal law in state courts unless the Constitution or Congress has, expressly or impliedly, given a Federal court exclusive jurisdiction over the subject matter. *Mondou v. New York, N H & H R Co.*, 223 US 1; 32 S Ct 169; 56 L Ed 327 (1912); *Claflin v. Houseman*, 93 US 130; 23 L Ed 833 (1876). See Hart and Wechsler, *The Federal Courts and The Federal System* (2d ed), pp 427-438. Thus, we must determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case, and, if it has, whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system. [*Marshall v. Consumer Power Co.*, 65 Mich App 237, 244-245; 237 NW2d 266 (1976).]

Defendant cites *Henry v. Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), for the proposition that federal preemption deprives state courts of subject-matter jurisdiction. In *Henry*, after observing that the defendants first raised the issue of preemption in the Court of Appeals, this Court stated that "preemption is a question of subject-matter jurisdiction" and that, "[a]s such, this Court must consider it." *Id.* at 287 n 82. Justice Viviano noted, "Although the Court's statement that "preemption is a question of subject-matter jurisdiction" was made

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without qualification, the above statements were supported by the following quotation from *David*, 476 US at 393: "A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." Thus, the Court's assertion was made in the context of *Garmon* preemption and was indisputably correct in that context since Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act (NLRA). And, even if the Court purported to make such a broad holding, it would be dicta since it was "not necessarily involved nor essential to determination of the case…" See *World Architects & Engineers v. Strat*, 474 Mich 233, 232 n 3; 713 NW2d 750 (2006) (quotation marks and citation omitted). Justice Viviano concluded, "For these reasons, *Henry* may not be properly read as supporting defendant's sweeping assertion that all types of preemption deprive the state courts of subject-matter jurisdiction."

Defendant and the Court of Appeals cite *Ryan v. Brunswick Corp*, 454 Mich 20, 40; 557 NW2d 541 (1997). This Court held that "summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) was proper." In reciting the applicable legal principles, the Court stated that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Id.* at 27. (However, the Court did not cite any authority whatsoever for this assertion). Nor did the Court address whether Congress had designated a federal forum for resolution of these types of disputes. This Court's preemption holding in *Ryan* was abrogated by *Sprietsma v. Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002), which held that the FBSA does not expressly or implicitly preempt state common-law claims. Justice Viviano, in his analysis, stated: In light of the ambiguous nature of the Court's holding (noted

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above), the lack of authority for it, and its abrogation by the United States Supreme Court, the jurisdictional assertion in *Ryan* does not carry much precedential weight. Finally, and perhaps most significantly, such a broad reading of this one statement in *Ryan* would conflict with the holdings and basic jurisdictional principles set for the in *Office Planning Group* and other cases finding that our state courts have concurrent jurisdiction over certain claims governed by federal law. It would also leave Michigan citizens without any forum to enforce federal laws when Congress has conferred exclusive jurisdiction upon state courts to enforce them.

Thus, contrary to the sweeping assertions repeatedly made by Defendant-Appellee, not all federal preemption deprives state courts of subject matter jurisdiction. Instead, state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Finally, Justice Viviano states, "Although two of our cases might have caused some confusion on this point (referring to *Henry, supra* and *Ryan, Supra*), I do not believe that they may fairly be read as supporting the demonstrably incorrect proposition of law for which Defendant cites them."

ARGUMENT IV
Federal Law Does Not Deprive State Courts of Subject Matter Jurisdiction Over the Type of Veterans' and Military Disability Benefits at Issue in this Case

Defendant-Appellee argues: "Also important to address in response to Petitioner's application is the misunderstanding concerning the proper orientation of Congress' exercise of its enumerated military powers in the area of family law." According the Defendant-Appellee, "The proper starting point is federal preemption applies unless Congress has lifted that preemption and granted the states the authority over the particular benefits at issue. This is clearly stated in *McCarty*, *Ridgway, Mansell* and *Howell*."

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In *Mansell v. Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), the United States Supreme Court addressed whether the USFSPA allows state courts to treat retirement pay waived by a retired service member in order to receive disability benefits as property divisible upon divorce. The Court rejected the civilian spouse's argument that the USFSPA only partially superseded *McCarty*, holding that "The Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veteran's disability benefits." Id. at 594-595.

Justice Viviano, in his concurring opinion, notes, "Importantly, in a footnote, the *Mansell* court discussed the state court's application of the doctrine of res judicata:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore property before us. [*Mansell*, 490 US at 586 n 5.]"

On remand in *Mansell*, the California Court of Appeal rejected the veteran spouse's argument that the "judgment was void for want of subject matter jurisdiction." *In re Marriage of Mansell*, 217 Cal App 3d 219, 227; 265 Cal Rptr 227 (1989). The California Court of Appeal characterized the *McCarty* holding as merely "that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction." *Id.* at 228. The United States Supreme Court subsequently denied the petition for certiorari. *Mansell v. Mansell*, 498 US 806 (1990).

Justice Viviano goes on to note, "One prominent commentator describes the denial of the second petition for certiorari as "one of the most important facts in all of the *Mansell* litigation," explaining as follows:

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> It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of res judicata was outside the scope of federal appellate jurisdiction; it refused to reverse *or even review on the merits* a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision – a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court's denial of review is a very strong statement that division of military benefits on a theory of res judicata is not prohibited by federal law.
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> * * *
>
> If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA *would* have been void. The Supreme Court's unanimous refusal to hear the case a second time, and its sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote 5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. [2 Turner, Equitable Distribution of Property (4th ed.), § 6:6, pp 54-55.]"

Shortly after *McCarty* was decided, the United States Supreme Court was presented with an issue similar to that in the present case. In *In re Marriage of Sheldon*, the California Court of Appeal declined to apply *McCarty* retroactively. *In re Marriage of Sheldon*, 124 Cal App 3d 371, 376-384; 177 Cal Rptr 380 (1981). The military spouse filed a petition for certiorari. See *Sheldon v. Sheldon*, 456 US 941 (1982). Specifically, one of the issues raised was:

> Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law? [Turner, § 6:6, p 49.]

The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Sheldon*, 456 US at 941. Unlike denial of a petition for certiorari, "[a] dismissal for want of a substantial federal question is an adjudication on the merits, and it carries the same precedential value as a full opinion." Turner, § 6:6, p 49, citing *Hicks v. Miranda*, 422 US 332, 344; 95 S Ct 2281; 45 L Ed 2d 223 (1975) (emphasis omitted). Therefore, according to the

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author, *Sheldon* "establish[es] that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits are not void for lack of subject matter jurisdiction." Turner, § 6:6, p 49 (emphasis omitted).

As the author explains, because *McCarty* is not retroactive and thus does not void final state court orders, military benefits can be divided by state courts under the law of res judicata:

> Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue – if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases – *Shelson* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final. [*Id*. at 50].

The author notes that "[a] strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only. *Id.* at 55. And, perhaps of even more relevance here, "[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata." *Id.* at § 6:9, p 72. The issue of res judicata was not presented in *Howell v. Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017).

Contrary to Defendant-Appellee's sweeping assertion and the inexplicable shift in thinking by the Court of Appeals, it is clear that not all federal preemption deprives state courts of subject matter jurisdiction.

ARGUMENT V
Direct v. Collateral Attack

Defendant-Appellee argues that since the trial court lacked subject matter jurisdiction over the military benefits at issue, the consent judgment could be attacked at any time, even after

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the time for an appeal has expired. The defect in the consent judgment was, as stated herein, a non-jurisdictional mistake of law by the trial court. Such defects cannot be challenged by collateral attack and may be reached only by some form of direct attack.

A direct attack, simply put, is an attempt to avoid or correct a judgment in a proceeding instituted for that purpose, either a motion for new trial, or appeal or a motion to vacate or set aside the judgment or a motion for relief from the judgment. MCR 2.612. An attack on a prior judgment will be deemed collateral if it fails to fit within a procedural category recognized in a jurisdiction as a form of direct attack.

A collateral attack has been defined as an attempt to avoid the effect of a judgment in some incidental proceeding not provided by law for the express purpose of attacking it. There are two categories of collateral attacks:

1. Where a successful plaintiff in the original proceeding attempts to enforce the judgment in a subsequent action and the defendant pleads the invalidity of the prior judgment.
2. Where an unsuccessful defendant in the original proceeding seeks to assert some claim of his or her own, but can only do so by avoiding the prior judgment.

Defendant-Appellee never appealed the consent judgment and never sought relief from the consent judgment in anyway. Defendant-Appellee appealed an order holding him in contempt that was entered over six years after the consent judgment was entered.

In this case, the consent judgment of divorce was entered essentially by stipulation of the parties on December 3, 2008. At the time of the final hearing it was acknowledged, on the record by counsel for both parties, that notwithstanding the offset provisions contained in the judgment applicable to the disposition of Defendant-Appellee's military disability benefits, the

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state of the law was that military disability benefits are not to be considered to be marital property. At the final hearing the court went at great lengths to make certain that the parties generally, and Defendant-Appellee specifically, understood the nature and extent of the agreement that was reached with respect to the disposition of Defendant-Appellee's military benefits.

Throughout the course of this matter Defendant-Appellee has asserted that he knew, almost from the time that the consent judgment was entered, that the terms concerning the disposition of his military benefits were preempted by federal law. Defendant-Appellee claims that he had to fight for his constitutional rights from the beginning. Yet he failed to seek relief from the consent judgment, either by motion or appeal.

On May 24, 2010 Plaintiff-Appellant filed a motion for an order to show cause because Defendant had failed to comply with the offset provision of the judgment. A hearing on the motion was held on September 30, 2010. In the interim between May 24, 2010 and September 30, 2010 Defendant-Appellee did not seek relief from the judgment. At the September 30, 2010 show cause hearing, the court acknowledged that a state court cannot divide military disability pay. Defendant-Appellee presented expert testimony and argument in support of that assertion. Following the September 30, 2010 hearing, the court entered an order directing Defendant-Appellee to make payments to Plaintiff-Appellant to make up the difference in the benefits that she had been receiving versus the benefits she began to receive after Defendant-Appellee elected to begin receiving combat-related disability compensation. That order was entered on October 8, 2010. Defendant-Appellee did not seek relief from the judgment and did not appeal or seek relief from the October 8, 2010 order.

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In the Spring of 2011, Plaintiff-Appellant filed another motion for an order to show cause requiring Defendant-Appellee to explain why he was not complying with the court's orders, specifically, the consent judgment of divorce entered on December 8, 2008 and the order entered on October 8, 2010. On June 27, 2014, Defendant-Appellee was before the court for a determination of whether he should, once again, be held in contempt for failing to obey court orders. At the hearing on June 27, 2014 Defendant-Appellee claimed that the judgment of divorce was entered in violation of federal law and was, therefore, unenforceable. At the conclusion of the June 27, 2014 hearing the court ordered Defendant-Appellee to begin paying $1,000.00 per month. That order was entered on July 28, 2014. Defendant-Appellee did not seek relief from, or appeal, the order entered on July 28, 2014. One last status conference was held on December 22, 2014. By that time Defendant-Appellee had appealed the order entered on November 6, 2014 holding him in contempt.

Plaintiff-Appellant had been, over an extended period of time, successful in proceedings brought to enforce the consent judgment and a subsequent court orders. Defendant-Appellee appealed the order holding him in contempt and argued, and has been arguing, that the order was invalid as was the consent judgment. This is, as noted by the Court of Appeals in two rulings, a collateral attack on the consent judgment. As Justice Viviano noted, "… defendant's assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment." Concurring Opinion, Page 4.

As stated in *Jackson City Bank & Trust v. Fredrick*, *supra* the judgment of a court of general jurisdiction with the parties before it, and with the power to grant or refuse relief in the case presented, though the judgment is, or contains a provision determined to be contrary to law,

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as expressed in the decision of the Supreme Court or the terms of a statute, is at most only an erroneous exercise of jurisdiction and as such is impregnable to assault in a collateral proceeding.

Contrary to the conclusion reached by the Court of Appeal in its July 30, 2020 Opinion, Defendant-Appellee's initial appeal (of the contempt order) was an improper collateral attack on the consent judgment and the same should have been dismissed.

ARGUMENT VI
Defendant-Appellee Failed to Seek Relief From the Applicable Provisions of the Consent Judgment Pursuant to MCR 2.612(C)(1)(a)

Defendant-Appellee has argued that the consent judgment was "void from inception". Defendant-Appellee has also stated that he was aware nearly from the outset that the offset provision of the consent judgment was a violation of his constitutional rights. Defendant-Appellee signed an Affidavit in Support of a Motion for Restitution filed in the trial court wherein he states:

> "That docket report alone [referring to the Docket Report from the Supreme Court of Michigan], outlining the legal battle I have been engaged in to remediate and vindicate my constitutional rights, is 13 pages long! This does not include the litigation I engaged in with this court [referring to the trial court] from 2007 through May of 2014, which included my arrest for being held in contempt of what has been decreed to have always been a void and unconstitutional order."

Defendant-Appellee's counsel, in support of a demand for restitution, argued, "Counter-Plaintiff has argued since 2008 that his constitutional rights and entitlements to his federal military disability pay were wrongfully appropriated from him in direct violation of preexisting preemptive federal law which voids out any attempt on the part of the state to take these benefits from him." Defendant-Appellee's Brief in Support of Motion for Restitution, Page 4. Defendant-Appellee referred to this as the, "… history" of what occurred after nearly 7 years of

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litigation in the trial court in which the Defendant-Appellee, "… implored the court to properly assess his rights under federal law." (Defendant-Appellee's Brief in Support of Motion for Restitution, Page 4. Emphasis added.) What Defendant-Appellee fails to mention in his account of the history of this case is the fact that in over "nearly 7 years of litigation" he never sought relief from the consent judgment by either filing a motion to vacate or set aside the judgment or to avail himself of the relief provided under MCR 2.612.

MCR 2.612(C)(1)(d) states, "On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds; the judgment is void. Subsection (2) states that for the grounds stated in subrule (d) the motion must be made within a reasonable time.

In *Laffin v. Laffin*, 280 Mich App 513; 760 NW2d 738 (2008) the trial court denied defendant's motion for relief from a consent judgment of divorce for procedural reasons. When defendant indicated at the hearing that she was requesting relief pursuant to MCR 2.612(C), the trial court held that the matter before it was not a case that fell within that rule. The Court of Appeals held that MCR 2.612(C)(1)(d) and (f) provide that a court may grant relief from a judgment where the judgment is void or for other reasons justifying such relief. At issue in *Laffin*, *supra* was a reciprocal alimony provision that was determined to be void. The Court stated that, "Because an unenforceable provision is void and is also a reason justifying relief from the operation of a judgment, relief was authorized under MCR 2.612(C)(1)(d)," The Court went on to note:

> "Although the motion here was brought approximately five years after the consent judgment was entered, it was not until February 2004 that the friend of the court notified the parties that plaintiff's prepaid child support had been exhausted. Plaintiff's motion to enforce the reciprocal alimony provision was granted shortly thereafter on April 28, 2004, and defendant filed her motion for relief from the

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> consent judgment on May 12, 2004. Defendant's motion was filed within a reasonable time under the circumstances." *Laflin, supra*, Page 743.

As previously stated, at a hearing held in the trial court on September 30, 2010, an expert witness, called by Defendant-Appellee testified that combat-related special compensation was not subject to division by a state court pursuant to federal law. At the September 30, 2010 hearing, Defendant-Appellee claimed that he told his attorney prior to the final hearing in December 2008 that he had received a determination letter from the military advising him that he was eligible for CRSC that he later claimed were "robbed" from him.

Defendant-Appellee, by his own admissions, had numerous opportunities to seek relief from the judgment pursuant to MCR 2.612, and yet failed to do so. It seems that the following maxim would be applicable here, "A party with knowledge of the existence of a judgment should be barred from asserting any defects, if he has had a reasonable opportunity to raise the defect in an appropriate proceeding." MCR 2.612 was enacted, in part, to provide litigants the opportunity to seek relief from a judgment that is void. There is no applicable caveat, i.e. relief must be sought within a reasonable time except in cases where the judgment is void for lack of subject matter jurisdiction, then relief may be sought at any time.

In this action, Defendant-Appellee never sought relief from the consent judgment that he claims was violative of his constitutional rights from the outset until he appealed an order holding him in contempt.

RELIEF REQUESTED

In its March 22, 2018 Opinion, the Court of Appeals, in its final analysis of then Appellant's argument, noted, "Finally, defendant poses arguments regarding alleged mistakes of fact by the trial court, along with purported fraud and unconscionable advantage, all tied to the procurement of the divorce judgment. These arguments are an improper and untimely attempt to

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relitigate the divorce action that was settled years ago, absent appeal, and the arguments are therefore rejected." March 22, 2020 Opinion and Order, Court of Appeals, Page 6.

The Court of Appeals July 30, 2020 Opinion/Order gives Defendant, and others that may be similarly situated, the ability to sit on their rights for a substantial period of time only to then seek relief to the Plaintiff-Appellant's detriment who had been receiving and depending on benefits that had been paid to her pursuant to a consent judgment. Plaintiff-Appellant now faces the possibility of having to pay Defendant-Appellee restitution.

Appellant respectfully requests, based on the arguments set forth herein, that this Court reverse the July 30, 2020 Order of the Court of Appeals and find that not all types of federal preemption deprive state courts of subject matter jurisdiction, and that Appellee's appeal of the trial court holding him in contempt was an improper collateral attack on the consent judgment of divorce.

Respectfully submitted by:

/s/ Adam L. Kruppstadt

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