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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff / Counter-Defendant / Appellant,

v.

SCT Docket No. 161892
PRIOR SCT Docket No.157705
COA Docket No. 324853
Circuit Court No. 07-15064-DM

RAY JAMES FOSTER

Defendant / Counter-Plaintiff / Appellee.

APPELLEE'S BRIEF ON APPEAL

*****FILED UNDER AO 2019-6*****

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DeBaun, *The Effects of Combat Exposure on the Military Divorce Rate*, Naval Postgraduate School, California (2012) 91

Dragich, Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 Am U L Rev 757 (1995)..... 73

Fazal, *Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise*, 39:1 International Security 95 (2014) 89

Finley, *Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan* (Cornell Univ. Press 2011) 91

Grove, The Structural Case for Vertical Maximalism, 95 Cornell L Rev 1 (2009)..... 77

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Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash L Rev 227 (1977) 15

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Zeber, Noel, Pugh, Copeland & Parchman, *Family Perceptions of Post-Deployment Healthcare Needs of Iraq/Afghanistan Military Personnel*, 7(3) Mental Health in Family Medicine 135-143 (2010) 90

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COUNTER-STATEMENT OF JURISDICTION

Under Article VI, § 4 of the Michigan Constitution, this Court may exercise jurisdiction over appeals from decisions of the Court of Appeals. See also MCL 600.212; MCL 600.215(3); MCL 600.232 and MCR 7.301(A)(2), (7) and MCR 7.302(C)(2)(b). As this case addresses the subject-matter jurisdiction and authority of Michigan courts vis-à-vis preemptive federal statutory law, the statement of jurisdiction is critical to defending the Court of Appeals' correct holding on remand from this Court's unanimous April 29, 2020 opinion.

"Without jurisdiction a court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 US (7 Wall) 506, 514; 19 L Ed 264 (1869). As jurisdictional defects may be raised at any time, even collaterally and after the time for appeal has passed, and a court must always, sua sponte, question its own authority and jurisdiction over a particular matter, see *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (emphasis added), citing *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965), Appellee

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respectfully submits that the jurisdiction of this Court does not extend into the federal sphere fully occupied by Congress' exercise of its enumerated powers over military affairs. *Ridgway v Ridgway*, 454 US 46, 54-55, 60-61; 102 S Ct 49; 70 L Ed 2d 39 (1981), citing *Free v Bland*, 369 US 663, 666; 82 S Ct 1089; 8 L Ed 2d 180 (1962) and *Gibbons v Ogden*, 9 Wheat 1, 210-211 (1824). "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id*. See also *Hillman v Maretta*, 569 US 483, 490-491; 133 S Ct 1943; 186 L Ed 2d 43 (2013) (same).

As the Court of Appeals' July 30, 2020 decision was correct as a matter of law, and this Court's unanimous opinion of April 29, 2020 was also correct in holding that 38 USC § 5301 applied to the 2008 consent judgment, making it "void from inception" to the extent it contravened extant, preexisting, and absolute preemptive federal law as determined by the Supreme Court in *Howell v Howell*, 137 S Ct 1400, 1403-1404, 1405-1406; 197 L Ed 2d 781 (2017), this Court's jurisdiction is limited by that federal law. In *Howell*, *supra*, citing and applying 38 USC § 5301, the Supreme Court explained that federal law concerning veterans' benefits "completely preempted" application of

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state law and this rule "*still applies*". See also *Ridgway*, *supra* (citing *McCarty v McCarty*, 453 US 210, 220-223; 101 S Ct 2728; 69 L Ed 2d 589 (1981), *Free*, *supra*, and *Gibbons*, *supra*, and stating that where Congress exercises its powers over military affairs, "[n]otwithstanding the limited application of federal law in the field of domestic relations *generally*…this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, *rights and expectancies established by federal law* against the operation of state law, or to prevent the *frustration and erosion* of congressional policy embodied in the federal rights.") (emphasis added). *Ridgway*, which issued the same term as *McCarty*, further explained the rule of absolute federal preemption when addressing Congress' exercise of its enumerated military powers. It instructs that "state family and family-property law" is "*not material* when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law *must prevail*." *Id*. at 54-55 (emphasis added) (citing *Free*, *supra* and *Gibbons*, *supra*). This principle of absolute federal preemption was restated in 2013 in *Hillman*, 569 US at 490-496 and again in *Howell*, *supra* at 1404.

Therefore, the jurisdiction of this Court is limited by this prevailing rule of absolute federal preemption over this subject matter, but even

more by the statute's explicit *voiding* of "any legal or equitable" order or consent judgment that would require Appellee to dispossess himself of his benefits "due or to become due" and whether "before or after receipt". 38 USC § 5301(a)(1), (3)(A), (3)(C).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Did the Court of Appeals err by concluding that this Court's unanimous opinion that 38 USC § 5301 preempted state law and prohibits state courts from approving or otherwise sanctioning a consent agreement wherein Appellee agreed to dispossess himself of his restricted veterans' disability pay means that the state court lacked subject matter jurisdiction and Appellee could collaterally attack that part of the 2008 judgment requiring him to dispossess himself of the restricted disability pay he had been awarded *before* the judgment?

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COUNTER-STATEMENT OF THE CASE

As acknowledged by this Court in its original opinion, Appellee became eligible for his federally protected disability benefits in 2007. *Foster v Foster (After Second Remand)*, 505 Mich 151, 159, n 3; 949 NW2d 102 (2020).[1] As further confirmed, 38 USC § 5301, the federal statute that protects these benefits from "any legal or equitable process whatever," was in effect at the time of the trial court's 2008 judgment, as was the principle of absolute federal preemption established by the Supreme Court in its 1981 decision in *McCarty* and its 1989 decision in *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989). *Id*. at 170, nn 51 and 52.

This Court unanimously agreed that federal law preempted state law concerning the division of Appellee's veteran's disability benefits in state court divorce proceedings. *Foster*, 505 Mich at 170-171. Citing *Howell*, 137 S Ct at 1405, the Court stated:

> [F]ederal law completely pre-empts the States from treating waived military retirement pay as divisible community property. From this, the *Howell* Court broadly

[1] The facts of Appellee's military service and status of his disability and the procedural history of this case are more fully explored in this Court's April 2020 opinion. *Foster v Foster*, 505 Mich 151, 155-161; 949 NW2d 102 (2020). Appellant did not file an appendix.

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> held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits." *Id*. at 167.

This Court continued:

> [I]t makes no difference whether a military veteran waives retirement pay postjudgment or prejudgment as part of an overall divorce settlement. Disability pay cannot become divisible marital property through the use of an order requiring the veteran to "reimburse" or "indemnify" the spouse, rather than an order dividing a portion of waived retirement pay outright. *Id*. at 167-168.

Importantly, the Court ruled that the 2008 consent judgment in which Appellee agreed to use his disability benefits to pay Appellant was an impermissible assignment under 38 USC § 5301(a)(3). *Id*. at 173. With regard to this provision, the Court ruled:

> We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required [Appellee] to reimburse [Appellant] for the reduction in the amount payable to her due to his election to receive [combat-related special compensation] CRSC. *Id*. at 156.

The Court remanded to the Court of Appeals for it to "discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or [Appellee's] ability to challenge the terms of the consent judgment outside of direct appeal." *Id*. On June 29, 2020, Appellee filed a motion for rehearing asking the Court, inter alia, to address the

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scope of its remand as to a bond and collateral lien that had been issued pending the appeal. The Court denied the motion on July 24, 2020. On July 30, 2020, the Court of Appeals issued its opinion ruling as follows:

> State courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable. And an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked. Moreover, subject matter jurisdiction cannot be granted by implied or express stipulation of the litigants. Accordingly, in the instant case, [Appellee] did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption. *Foster v Foster (On Second Remand)*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, dated July 30, 2020 (Docket No. 324853) (Foster III), p 2 (cleaned up).

The Court of Appeals remanded to the trial court. *Id*. at 3. Appellee filed a motion for restitution of the payments from his restricted disability pay that he had been compelled to make under threat of contempt pursuant to the consent judgment which was, per the terms of the § 5301, "void from its inception" and therefore beyond the trial court's jurisdiction or authority to enforce. The trial court awarded Appellee restitution for the payments he has made since the appeal, but denied his request for attorneys' fees and costs.

Appellant filed an appeal of the trial court's decision and Appellee cross appealed. The Court of Appeals has ordered the appeal and cross appeal to be held in abeyance. COA Docket No. 355654, Order of February 10, 2021.

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INTRODUCTION

This case concerns the effect on the trial court's further proceedings after this Court's unanimous opinion acknowledging that under *Howell*, *supra*, federal law completely preempts state family law concerning disposition of veterans' disability benefits and 38 USC § 5301 applies to prohibit the terms of the 2008 consent judgment in which Appellee agreed to forever dispossess himself these benefits. Appellant and the Family Law Section (FLS) distinguish this Court's jurisprudence concerning federal preemption and its effect on subject-matter jurisdiction. In this attempt, the parties are aided by Justice Viviano's concurrence in the April 2020 opinion, wherein he raised additional concerns regarding applicability of this rule to this case, as well as other arguments. *Foster (After Second Remand)*, 505 Mich at 176-195 (VIVIANO, J, concurring).

The opposition's arguments can be split into two basic categories. First, the parties argue that the federal preemption in this case is different than federal preemption in cases where Michigan courts have found subject matter jurisdiction lacking. In support of this distinction, the parties assert that for there to be a lack of jurisdiction on the basis

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of preemption, there must exist a separate and independent federal forum with exclusive jurisdiction and authority over the regulated matter. See Appellant's Brief, pp. 11-12, 15. See also 505 Mich at 188 (VIVIANO, J, concurring and stating "state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue.").

Second, the opposition broadly argues that subject matter jurisdiction is simply a general jurisdiction over the *type* of case. As the argument goes, once the state court acquires jurisdiction over the parties and the proceedings, which it certainly did in this case, it had authority and jurisdiction to consider whether federal law preempted state law. However errant its ruling was in that regard, the opposition contends, Appellee was required to timely challenge it on direct appeal

In this same vein, the parties rely on a single footnote in *Mansell*, 481 US at 586, n 5, and decades old post-appeal histories in that case as well as another California case, *In re Marriage of Sheldon*, 124 Cal App 3d 371; 177 Cal Rptr 380 (1981), as "binding precedent" for the proposition that the doctrine of res judicata bars Appellee's collateral attack on the 2008 consent judgment and prevents him from voiding his

obligations under that agreement, which this Court has already unanimously ruled was impermissible under 38 USC § 5301. *Foster (After Second Remand)*, 501 Mich at 156.

Finally, relying largely on Michigan case law, the opposition implies that if Appellee can successfully nullify the consent judgment, the trial court should be able to consider whether alimony can be awarded as a substitute for the former spouse's lost interest, despite the parties' mutual waiver of spousal support under principles of state law. See, e.g., Appellee's Brief, pp. 9-11; FLS Amicus Brief, pp. 10-13.

In support of affirming the Court of Appeals' July 30, 2020 ruling, Appellee provides the following counter-arguments.

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COUNTER-ARGUMENTS

I. STATE COURTS LACK JURISDICTION AND AUTHORITY TO ISSUE ORDERS AND JUDGMENTS THAT CONTRAVENE EXISTING FEDERAL LAW PROHIBITING DIVISION OF FEDERAL VETERANS' BENEFITS UNLESS CONGRESS ALLOWS IT AND A STATE COURT RULING THAT DOES SO WITHOUT EXPLICIT CONGRESSIONAL AUTHORITY IS VOID AB INITIO

A. Congress' Plenary Power Over Military Compensation and Benefits Means that State Courts Do Not Have Jurisdiction or Authority to Issue Binding Rulings on Matters Not Explicitly Reserved by the State for Consideration

Appellant broadly claims that state courts are not *always* deprived of subject-matter jurisdiction when principles of federal preemption apply. Appellant's Brief, p. 15. Appellee disagrees.

"[Only] the Supreme Court possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *United States v Hudson & Goodwin,* 11 US (7 Cranch) 32, 33; 3L. Ed. 259 (1812).

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It follows that Congress may exclude the states from jurisdiction where it exercises its delegated powers under the Constitution. Where Congress exercises its plenary enumerated powers over a particular subject, state court judgments are considered "nullities and vulnerable collaterally" to the extent that they contravene the federal law concerning that subject. *Kalb v Feuerstein*, 308 US 433, 438-39; 60 S Ct 343; 84 L Ed 370, 374 (1940). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439.

The Constitution grants Congress plenary and exclusive power over the payment and disposition of military benefits to servicemembers, veterans, and their dependents. *Tarble's Case*, 80 US 397, 408; 20 L Ed 597 (1871); *United States v Oregon*, 366 US 643, 648-649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Johnson v Robison*, 415 US 361, 376, 385; 94 S Ct 1160; 39 L Ed 2d 389 (1974); *McCarty*, 453 US at 232-233, *inter alia*. Congress has exercised legislative authority in these premises since the earliest days of the Republic. *Hayburn's Case*, 2 US (Dall) 409; 1 L Ed 436 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash L Rev 227,

228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L Rev 1081, 1084 (2010).

Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded it greater deference. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981). In *McCarty*, *supra*, the Court noted that the historical and legal basis for disallowing state courts to treat military benefits as disposable or divisible assets was federal supremacy, "which generally means that a state court lacks *subject matter jurisdiction* over uniquely federal programs, specifically military compensation schemes, unless Congress specifically confers such authority." Kirchner, Division of Military Retired Pay, 43 Fam L Q 367, 371 (2009-2010) (emphasis added), accord *Howell*, 137 S Ct at 1404, citing *Mansell*, 490 US at 588, 589.

Therefore, it is an overstatement to claim that a state court lacks jurisdiction *only when* "Congress has given exclusive jurisdiction to a federal forum." *Foster*, 505 Mich at 181 (VIVIANO, concurring); Appellant's Brief, p. 15. Congress can limit the authority of courts in a variety of ways that restricts them from errantly adjudicating matters

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delegated to the national government. *Kalb* 308 US at 438 (exclusive jurisdiction over bankruptcy), citing *Hines v Lowrey*, 305 US 85, 90-91; 59 S Ct 31; 83 L Ed 56 (1938) (exclusive jurisdiction over military claims, benefits and compensation); and *Davis v Weschler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (HOLMES, J.) (personal injury claims established by federal law cannot be thwarted by state law concerning "final decisions" and the state cannot use venue or jurisdiction to defeat the assertion of a federal right even upon collateral attack); *Hines v Davidowitz*, 312 US 52, 68; 61 S Ct 399; 85 L Ed 581 (1941) (Congress' power to regulate registration of immigrants was plenary and state did not have concurrent power to legislate and whatever power the state had in this area of the law is "subordinate to supreme national law."). See also *Henderson v Shinseki*, 562 US 428, 436, 438; 131 S Ct 1197; 179 L Ed 2d 159 (2011) (stating "Congress is free to attach the conditions that go with the jurisdictional label…[and] Congress…need not use magic words in order to speak clearly on this point"). In fact, Congress has "consistently precluded judicial review of veterans' benefits determinations" in a variety of ways. See *Lynch v United States*, 292 US 571, 587; 54 S Ct 840; 78 L Ed 1434 (1934); *Larrabee ex rel Jones v Derwinski*, 968 F2d 1497, 1499 (CA 2, 1992);

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Veterans for Common Sense v Shinseki, 678 F3d 1013, 1020 (CA 9, 2012) (en banc).

Lack of jurisdiction is the general rule. In *Davidowitz*, *supra*, the Court noted that it has consistently recognized Congress' full plenary authority in statutes passed pursuant to its enumerated Article I powers. The Court explained: "No state can add to or take from *the force and effect* of…such statute[s]" because the Supremacy Clause forbids it. As to the "final" and preclusive effect of a state court judgment, the United States Supreme Court has stated, simply:

> The state courts may deal with that as they think proper in local matters, but they *cannot treat it as defeating a plain assertion of federal right*. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court *cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds*. *Davis v Wechsler*, 263 US 22, 24; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added) (internal citations omitted).

This principle was reiterated by the Court in *Kalb*, 308 US at 440, n 12, where the Court, citing *Davis*, *supra*, inter alia, stated "[t]hat a state court before which a proceeding is competently initiated may – by operation of supreme federal law – *lose jurisdiction* to proceed to a

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judgment *unassailable on collateral attack* is not a concept unknown to our federal system." (emphasis added).

There, the Court cited *Hines v Lowrey*, 305 US 85, 88-90, 91; 59 S Ct 31; 83 L Ed 56 (1938), a case addressing Congress' power to pass statutes protecting a disabled and incapacitated veterans' benefits and compensation as against a state court order allowing fees for legal services to be charged against the funds in excess of what the federal statute allowed. The Court ruled that the state had no authority to award benefits *beyond that* authorized by the federal statute. In support of its decision, the Court reasoned that the federal statute was a "valid exercise of congressional power," "binding on the citizens and courts of the several states," and even though the court had jurisdiction over the veteran, it did not have authority to award a fee in violation of the statute. *Id*. at 90-91.

None of these cases found that the state courts lacked jurisdiction to rule on matters governed by preemptive federal law based only on the existence of a separate federal forum. Indeed, the existence of the latter is merely a *consequence* of the former preexisting state of things. States have no authority, save what Congress explicitly surrenders in those matters of national law in which Congress has been delegated

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enumerated powers. That a state court may *lose* subject matter jurisdiction to issue a judgment or to approve a decree preempted by federal law and expose that judgment to collateral challenge is but a necessary consequence of the Supremacy Clause, confirmed by the Tenth Amendment, through which the states acknowledged surrender of certain of their sovereign powers to the national government. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 404-406; 4 L Ed 579 (1819). Though *limited* in its powers, the federal government "is *supreme within its sphere* of action." *Id*. at 405 (emphasis added). See also *United States v Comstock*, 560 US 126, 135-136, 143-144; 130 S Ct 1949; 176 L Ed 2d 878 (2010), citing *New York v United* States, 505 US 144, 155; 112 S Ct 2408; 120 L Ed 2d 120 (1992) and noting that while the Tenth Amendment ensures the States have all powers *not delegated* to the United States by the Constitution, it immediately follows with the complimentary disclaimer that the State retains *no sovereign authority* in those powers so delegated.

Given the unbroken line of cases from the United States Supreme Court regarding military compensation and benefits wherein the Court has concluded that state family and family-property law is "*not material* when there is a conflict with a valid federal law, for the Framers of our

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Constitution provided that the federal law *must prevail*" and that "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to *clearly conflicting* federal enactments" subject matter jurisdiction in state courts is lacking *unless* Congress actually *allows* the state authority concerning these matters. *Ridgway*, 454 US at 55; *McCarty*, 453 US at 220. Congress must *grant* the state authority and jurisdiction and even where it does so, that grant is *precise* and *limited*. *Howell*, 137 S Ct at 1404; *Mansell*, 490 US at 588, 589.

Of course, in this case there is a federal statute that actually *affirmatively* prevents the state from invading the funds at issue because it prohibits them from exercising *any legal or equitable power* whatever over the subject matter, and it further voids from inception any agreements or consent judgments purporting to do so. 38 USC § 5301(a)(1) and (a)(3)(A) and (C); *Howell*, 137 S Ct at 1405; *Foster (After Second Remand)*, 505 Mich at 172-173. While decisions from the Supreme Court are sufficient to establish this jurisdictionally limiting principle, where Congress has not only withheld authority, but has affirmatively acted to *restrict* and *limit* the state's authority *and* its jurisdiction, there can be no equivocation. Under the auspices of its

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plenary power over military benefits, Congress has explicitly and affirmatively prohibited state courts from exercising "any legal or equitable process whatever" over the benefits "due or to become due" and "either before or after [their] receipt" and render "wholly void" any contrary disposition of the benefits it appropriates for the sole use and enjoyment of the beneficiary. See 38 USC § 5301(a)(1) and (3). Accord *United States v Hall*, 98 US 343, 346-356; 25 L Ed 180 (1878) (canvassing statutory protections afforded to veterans). The statute applies to *all* state court actions that might interfere with the enjoyment and use of the fund by the veteran beneficiary. See *Wissner v Wissner*, 338 US 655, 659-660; 70 S Ct 398; 94 L Ed 424 (1950) (anti-attachment statute applicable to military life insurance benefits prohibited the state court from forcing named beneficiary to indemnify deceased veteran's spouse and such court orders were "in flat conflict with the exemption provision" which like 38 USC § 5301 here applied to "any legal or equitable process whatever); *McCarty*, 453 US at 228-229, nn 22 and 23 (stating that the anti-attachment provision equivalent to 38 USC § 5301 prohibited attaching military benefits to satisfy a property settlement whether directly or indirectly through a court order, citing *Buchanan v Alexander*, 45 US 20, 20; 11 L Ed 857 (1846), and

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noting that the anti-attachment provisions are not to protect the government from liability (as many have argued), but rather to protect the funds of the government which are specifically appropriated by Congress using its enumerated constitutional powers in the advancement of national interests.). "[I]f such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *Buchanan*, *supra*.

This Court's conclusion that § 5301 applied in this case and the extensive jurisprudence from the United States Supreme Court interpreting this and similar provisions, as well as other state cases, make clear that it removes jurisdictional authority from state courts to order a redistribution of these benefits or to divert them in a manner contrary to their intended purpose. See, e.g., *Hall*, *supra* (predecessor statutes protecting veterans' benefits from legal process and assignment render conflicting instruments or orders *wholly void*); *Wissner v Wissner*, 338 US at 659 (state court order to indemnify widow as opposed to named beneficiary in military servicemember's life insurance policy was void); *Porter v Aetna Cas and Surety Co*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962) (funds protected by 38 USC § 3101 (now § 5301) are considered "inviolate" whether in the

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hands of the government or the beneficiary and provision is liberally construed to protect veteran's interests); *McCarty*, 453 US at 228-229; nn 22 and 23 (statute protecting military benefits from attachment applies equally to state court's equitable attempt to offset the former spouse's lost interest and the statutory protection does more than simply protect the government from burdensome garnishment suits, but actually protects the interests of the government by insuring that the federally appropriated funds are put to their intended use); *Ridgway*, 454 US at 60-63 (statute "prohibits, in the broadest terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary'"); and *Howell*, 137 S Ct at 1405 (under § 5301 the state "cannot 'vest' that which (under governing federal law) *they lack the authority to give*.") (emphasis added). See also, *Youngbluth v Youngbluth*, 188 Vt 53; 6 A 3d 677 (2010) (§ 5301 jurisdictionally bars state courts from dividing veterans' disability benefits and *Mansell* "makes it perfectly clear that the state trial courts have *no jurisdiction over disability benefits* received by a veteran and courts *may not do indirectly what it cannot do directly*", citing *King v King,* 149 Mich App 495, 386 NW 2d 562 (1986)).

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In *Porter*, *supra*, the Court ruled that § 3101 (now § 5301) was "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries," that these benefits "*should remain inviolate*," and thus diversion by "*any legal or equitable process*" is forbidden. *Id*. (emphasis added). In *Howell*, 137 S Ct at 1405, the Court, for the first time, applied § 5301 to veterans' disability benefits in state court divorce proceedings and ruled that under this provision states could not "vest" these benefits in anyone other than the beneficiary.[2] In its April 2020 opinion this Court ruled that § 5301 applied in this case as well. The statute acts to remove the sovereign authority and jurisdiction from the state even further by prohibiting it to act, and thus, the state's power, i.e., its jurisdiction, is not concurrent with that of the federal government in this circumstance and must yield. *Davidowitz*, 312 US at 68-69. The state is *not vested* with the power to violate federal law and even though a state court may

[2] *No case* from the United States Supreme Court before *Howell* applied § 5301 directly to the issue of a state's authority over veteran's disability benefits. *Mansell*, 490 US at 587, n 6. Thus, as further explained herein, reliance on post-appeal dismissals and denials of petitions for certiorari in cases that did not even consider § 5301 as *binding precedent* for the proposition that res judicata or collateral estoppel can defeat operation of this provision, which unequivocally removes jurisdiction and authority from the state courts over veterans' benefits and actually voids from inception any attempts to dispossess the beneficiary of those benefits is *specious*, at best.

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proceed in a competently initiated case, it may also "by operation of supreme federal law – lose *jurisdiction* to proceed to a judgment *unassailable on collateral attack*." *Kalb*, 308 US at 440, nn 11 and 12 (emphasis added). It *loses* authority to proceed once it purports to encroach upon the inviolate fund. *Howell*, *supra* at 1405; *Porter*, *supra* at 161-162.

Even Justice Viviano recognizes that the state's sovereignty is concurrent with that of the federal government "*subject only to limitations* imposed by the Supremacy Clause." *Foster*, 505 Mich at 181 (VIVIANO, J. concurring and citing *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013)) (emphasis added). Therefore, at least in the context of the absolute federal preemption in the area of Congress' exercise of its military benefits and compensation system, the state cannot forever insulate its past errors or omissions from collateral attack.

B. Congress Has Created an Exclusive, Comprehensive, Regulatory and Judicial Authority Over All Claims Regarding Military Benefits to the Exclusion of All Other Courts

Appellant next claims that the federal government does not have "exclusive, comprehensive, regulatory and judicial authority over all claims regarding military benefits." Appellant's Brief, p. 24. The FLS

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and Justice Viviano also make this argument. FLS Brief, p. 10; *Foster (After Second Remand)*, 505 Mich at 181 (VIVIANO, J. concurring and citing 5 CJS Courts, § 272). As the argument goes, federal preemption only removes subject matter jurisdiction from the state where there is an "exclusive" federal forum. Appellant claims that "[i]n citing 38 USC § 511 [Appellee] references the existence of a 'comprehensive administrative, regulatory, and judicial apparatus that has been established by Congress to address all claims regarding military benefits and their division among veterans and their dependents exclusive of any other person, agency or court' and '[t]his is yet another…overly broad and unsubstantiated assertions.' Appellant's Brief, pp. 7-8. Once again, Appellee disagrees.

Actually, Congress *has* vested *exclusive* jurisdiction in the Secretary of Veterans Affairs over *all claims* for a veteran's disability benefits whether those claims are made by or for the veteran or by or for dependents and family members. See 38 USC § 511; 38 USC § 5307 (describing the process of requesting an apportionment of the veterans' disability benefits where it is alleged that the veteran is not sufficiently fulfilling his or her duties to support dependents). With the passage of the Veterans Judicial Review Act of 1988 (VJRA), 102 Stat. 4105

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(1988) (codified, as amended, in various sections of 38 USC), Congress also created an Article I (not Article III) court to review appeals from all such decisions. 38 USC § 511(a); 38 USC § 7104; 38 USC § 7251; and 38 USC § 7252.[3]

Where Congress has vested in a federal agency primary and exclusive jurisdiction to "decide *all questions of law or fact* necessary to *a* decision [by the head of that agency] under *a* law that *affects the provision of benefits*…to veterans *or* the *dependents* or *survivors* of veterans" and has by its act made that "decision…*final* and *conclusive*" and withdraws this power from "any other official or *by any court*, whether by an action in the nature of mandamus or otherwise," said act is the supreme law of the land which all courts (state and federal) must observe. *Kalb*, *supra* at 438-439. See 38 USC § 511(a). "The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except [an Agency and an Article I court over the disposition of federally appropriated veterans' benefits are] for Congress alone." *Kalb*, *supra* at 439; *Henderson*, 562 US at 436.

[3] The Federal Circuit Court of Appeals is the only Article III court with appellate review authority over the decisions of the Court of Appeals for Veterans Claims. *Shinseki v Sanders*, 556 US 396, 400-401; 129 S Ct 1696; 173 L Ed 2d 532 (2009) (citing 38 USC § 7292).

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Section 511(a) of Title 38 provides absolute limitations on state courts. The provision plainly states that the "Secretary *shall* decide *all questions of law and fact* necessary to a decision by the Secretary under a law that *affects the provision* of benefits by the Secretary to veterans *or the dependents or survivors* of veterans" and "the decision of the Secretary as to *any such question shall be final* and *conclusive* and may not be reviewed by *any other official* or *by any court*, whether by an action in the nature of mandamus or otherwise." 38 USC § 511 (first and second sentence). Section 7104 provides that all questions subject to a decision by the Secretary under § 511 are subject to appeal to the Secretary and final decisions shall be made by a Board of Veterans' Appeals. Section 7251 established "under Article I of the Constitution" a court of record to be known as the United States Court of Appeals for Veterans Claims" and under 38 USC § 7252 that court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals". Appeals can only be made to the Federal Circuit Court of Appeals. 38 USC § 7292. See also *Sanders*, 556 US at 400-401.

It should be noted that *all* statutes concerning veterans are to be *liberally construed* to favor the veteran and the Court has "long applied the canon that provisions for benefits to members of the Armed

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Services are to be construed in the beneficiaries' favor." *Henderson*, 562 US at 440, 441 (citing cases). There, the Court stated "[t]he solicitude of Congress for veterans is of long standing" and "that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that 'place a thumb on the scale in the veteran's favor.'" *Id*. at 440 (citations omitted).

In addition to this interpretive principle, the plain language of this statutory provisions removing *all jurisdiction* from *any other court* over *all questions of law and fact* with respect to *all claims* for a veterans' benefits by the veteran *and* claims by dependents could not be clearer or more expansive. 38 USC § 511(a) (first and second sentence). This provision reflects the reality of the total and absolute preemption of state law in this area *unless* Congress *explicitly grants authority to the state* to exercise jurisdiction and authority over particular military benefits at issue, see *Mansell*, 490 US at 588, 589; *Howell*, 137 S Ct at 1404. A state simply may not interfere with the disposition and distribution of benefits to a disabled veteran and his or her family members without Congressional authorization.

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Accordingly, under 38 USC § 511, any state court decision that sanctions or orders a disposition of a disabled veterans' benefits, even one forcing the veteran to part with benefits already awarded by the VA is, under the statute, an extra-jurisdictional act that unconstitutionally encroaches upon the federal realm. When the VA pays an initial claim for disability benefits, there is an amount for each dependent. 38 USC § 1115. If the dependent or dependent's guardian believes that the veteran is not fulfilling his or her duties to support dependents out of those disability benefits, the mechanism for seeking division beyond that which the veteran is already providing is the apportionment process under 38 USC § 5307 and its accompanying regulations.

Under this statute, VA may apportion benefits to a competent veteran's spouse, children or dependents "if the veteran is not residing with his or her spouse, . . . and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support." 38 CFR § 3.450(a)(1)(ii). Those benefits may be "specially apportioned" to the spouse of a veteran, "[w]ithout regard to any other provision regarding apportionment[,] where hardship is shown to exist." 38 CFR § 3.451. Special apportionment is awarded "on the basis of the facts in the individual case as long as it does not cause undue hardship to the

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other persons in interest." *Id*. See also *Hall v Brown*, 5 Vet App 294, 295 (1993).

This is process is limited to funds that are otherwise already excluded from being considered available or disposable assets or income. Of course, states have authority where Congress has given it. Up to 50 percent of "disposable" retired pay under the provision at issue in this case, the Uniformed Services Former Spouses Protection Act (USFSPA), 10 USC § 1408, may be divisible as "property." A portion of disability *pension* (not VA disability pay) may be also be counted as income for purposes of satisfying a veteran's alimony or child support obligations under the Child Support Enforcement Act (CSEA), 42 USC § 659(h)(1)(A)(ii). Since both of these federal allowances apply to those veterans who are eligible for retirement only, there is a provision to ensure that the retired veteran is fully credited for each of the court orders that might be imposed, i.e., property division, child support, and alimony, and, in certain cases where there are multiple state support orders, the distributions authorized ensure that there will be no overlap in the obligations and awards are capped to prevent total depletion of the retired veteran's pension. See 10 USC § 1408(d)(1), (d)(5), (e)(1), (e)(1) through (6).

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However, if there are no funds available under these allowances (either because the retired veteran is 100 percent disabled and receives no disposable retired pay or pension (the case here) or simply never attained the years in service necessary to be eligible for retirement and is greater than 70 percent disabled, these are pure VA disability funds, and they are excluded from available income for state court support orders by 42 USC § 659(h)(1)(B)(iii). The dependent can request an apportionment of these otherwise excluded VA disability benefits under 38 USC § 5307. This further "apportionment" of the veteran's restricted disability pay may be awarded, but only after the VA (not a state court) conducts an intensive review process assessing, inter alia, the needs of the veteran, the custodial arrangement of the parties vis-à-vis the dependents, and the status of the dependents. See generally 38 USC § 5307; 38 CFR § 3.450 et seq. The dependents or the dependent's guardian must prove that the veteran is *not* fulfilling his or her support obligations. 38 CFR § 3.450(a)(1)(ii). The VA's priority is to first ensure that the veteran will not be prejudiced or suffer hardship if his or her appropriated disability benefits are not further divided. This is a highly regulated and specific administrative process that allows the VA to maintain utmost control over the disposition of the federally

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appropriated dollars. If the state could upset this process, the federal government would lose control of the appropriated funds and the VA would be unable to perform its vital delegated function, a concern that was directly expressed by the Court in *McCarty*, 453 US at 229, n 23, citing *Buchanan v Alexander*, 45 US 20, 20; 11 L Ed 857 (1846).

Notably, 38 USC § 211 (1970) (now § 511) was explicitly *changed* after the United States Supreme Court's decision in *Rose v Rose*, 481 US 619, 641; 107 S Ct 2029; 95 L Ed 2d 599 (1987), to address any ambiguity regarding exclusivity of the VA's jurisdiction vis-à-vis state courts. Speaking to the state's ostensibly "concurrent" jurisdiction with the federal agency under the statute as it read at that time, Justice Scalia stated in a concurring opinion that "[i]t would be extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants can be overridden by a state official" and he criticized the Court's interpretation § 211, which, at the time did not "explicitly exclude *state*-court jurisdiction, as it [did] federal." *Rose*, 418 US at 641 (SCALIA, J., concurring) (emphasis in original).

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In the VJRA, Congress expanded the provision precluding judicial review, formerly § 211.[4] Whereas § 211 said "[t]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision," § 511, as amended, provides that the VA Secretary *first* "*shall decide all questions of law and fact* necessary to a decision that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans [and] the decision of the Secretary as to *any such question* shall be final and conclusive and *may not be reviewed by any other official or by any court*, whether by an action in the nature of mandamus or otherwise." 38 USC § 511(a) (first and second sentences) (emphasis added).

The first significant change shows that the decision by the Secretary on all questions of law or fact pertaining to claims for benefits by the veteran and claims for benefits by the dependents is preeminent as to all others and shall first be determined by the Secretary. Whether the

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[4] Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991).

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decision occurs as an initial determination of disability benefits owed to the veteran or as to a claim for those benefits made by the dependent through the apportionment process, it is the Secretary that has primary and exclusive jurisdiction to do this. Further, *no tribunal* may review or second guess this federally appropriated distribution.

With this change, "Congress intended to broaden the scope of section 211 and limit outside court intervention in the VA decisionmaking process." *Veterans for Common Sense*, *supra* at 1022, citing HR Rep No 100-963, at 27, 1988 USCCAN at 5809 and *Larrabee,* 968 F.2d at 1501. The VJRA thereby considerably expanded the preclusive effect of a decision on judicial review. Indeed, according to the plain language of § 511, *any* judicial intervention is totally precluded. An Article III court does not even become involved in the process until an appeal is taken from the Court of Appeals of Veterans Claims the Article I tribunal created by Congress in the VJRA after *Rose*. Moreover, while § 511 is subject to four exceptions, none of these mention state court intervention in family law matters. It is safe to say that Congress occupied the entire field. This was stated by the Court in the context of federal employee's benefits in 2013 and the Court referred back to *Ridgway*, supra and *McCarty*, *supra* as

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exemplars of this total field preemption. *Hillman*, 569 US at 490-491. Finally, the Court's 2017 decision in *Howell*, while acknowledging that Congress has in certain limited and precise ways allowed the states to divide certain veterans' benefits, reiterated the absolute preemption principle directly to military compensation and benefits. *Howell*, 137 S Ct at 1404. "*McCarty* with its rule of federal preemption, *still applies*." *Id*. (emphasis added).

After *Rose*, *supra*, Congress expressly disqualified *any* and *all courts*, not just "Courts of the United States" (as § 211 had provided). This change was not just happenstance or afterthought. In removing the phrase "any court of the United States" and replacing it with "*any court*", Congress directly *and immediately* responded to Justice Scalia's criticism of § 211's ambiguity in this regard. *Rose*, 418 US at 641 (SCALIA, J., concurring). No court is at liberty to *narrow* the scope of this federal provision, especially in light of the sweeping changes made by Congress in the VJRA just after *Rose*, its direct change to the language in § 511, and the liberal interpretation mandated for all statutes protective of veterans' rights. *Lottery Case*, 188 US 321, 353; 23 S Ct 321; 47 L Ed 492 (1903) (Congress has plenary power concerning those enumerated in the Constitution and has "large

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discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective."). See also *Mansell*, 490 US at 594; *Howell*, 137 S Ct at 1404.

Not only did the amendment to § 511 remove any semblance of concurrent jurisdiction but the VJRA, in partial response to *Rose* and also to flood of litigation in state and federal courts related to claims by veterans, dependents and former spouses, created a separate Article I court to review appeals with respect to all disputes concerning claims for these benefits. The VJRA created an Article I tribunal as part of a unique administrative review scheme for *all* decisions adverse to veterans.[5] *Veterans for Common Sense*, 678 F 3d at 1021-1023. See also discussion at pp 30-33, *supra*.

Thus, contrary to Appellant's criticism, "Congress *has* conferred exclusive jurisdiction over such claims to the Veterans Court and the Federal Circuit." *Veterans for Common Sense*, *supra*, citing 38 USC §§ 511(b)(4), 7252(a), and 7292(c). "[T]hese provisions demonstrate

[5] Article I Courts have "special expertise [that] guides it in making complex determinations in a specialized area of the law." *Shinseki v Sanders*, 556 U.S. 396, 412; 129 S Ct 1696; 173 L Ed 2d 532 (2009).

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that Congress was quite serious about limiting…jurisdiction over *anything* dealing with the provision of veterans' benefits." *Veterans for Common Sense*, 678 F 3d at 1023 (emphasis added). Clearly, any *adjudication* of *any* state law claims "would necessitate a consideration of issues of law and fact involving the decision to *reduce* benefits, a review specifically precluded by § 511(a)." *Id*. (emphasis added).

Not only would this prohibit state court action that interferes with an initial benefits determination by seeking to divide VA disability benefits as property (which is what occurred here), see 10 USC § 1408 and 10 USC § 1413a(g), but it would also prohibit consideration of these benefits as income for alimony under 42 USC § 659(h)(1)(B)(iii) (excluding Title 38 VA disability and disability pay administered by the Secretary under Title 10, i.e., CRSC, as available for garnishment or attachment to satisfy state court support orders).[6]

[6] CRSC benefits under 10 USC 1413a are authorized by the Secretary of Veterans Affairs (VA) to be paid to former servicemembers for their service-connected disabilities incurred during combat and wartime service. *Adams v United States*, 126 Fed Cl 645, 647-648 (2016) (citing 10 USC § 1413a(e) and stating CRSC benefits are based on a "combat-related disability" that is "compensable *under the laws administered by the Secretary of Veterans Affairs*," which are the benefits protected by 38 USC § 5301) (emphasis added).

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The VA's decision as to a distribution of these federally appropriated funds is established by its decision on the initial claim. These are funds appropriated pursuant to Congress' enumerated military powers and intended for a specific purpose. *McCarty*, 453 US at 229, n 23 (citing *Buchanan*, 45 US at 20). Any state court *order* or *judgment* that would *reduce* the benefits available to the veteran involves "a consideration of issues of law and fact involving the decision to *reduce* benefits, a review specifically precluded by § 511(a)." *Veterans for Common Sense*, *supra*. Giving the state control without regulation would frustrate Congress' intended distribution. *McCarty*, *supra*. The only *exceptions* are those provisions of federal law allowing states to *count* or *consider* certain military benefits as divisible assets or income for purposes of marital property divisions, alimony, and child support. See 10 USC § 1408(a)(4) (defining disposable retired pay) and 10 USC § 1408(c) (*granting* the state authority to treat up to 50 percent of the disposable retired pay as divisible property in state court divorce proceedings); 42 USC § 659(a), (h)(1)(A)(ii)(V), (h)(1)(B)(iii) (*granting* the state authority to count and attach as "income" available for child support and alimony a *portion* of disability *pension* waived to receive military retired pay that is paid by

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Defense Finance and Accounting Service (DFAS), but excluding from that definition VA disability benefits and pay administered by the Secretary of and paid by the VA). See also pp 30-33, *supra*.

In keeping with the absolute federal preemption of the state's jurisdiction in this particular subject matter and complimenting the exclusive jurisdiction over all claims for benefits by veterans and by their dependent and liberal construction applied to statutes protective of veterans' rights, these exceptions are "both precise and limited." *Mansell*, 490 US at 588, 589; *Howell*, 137 S Ct at 1404. Moreover, as an additional protection, 38 USC § 5301 erected an affirmative restriction over all non-disposable, non-divisible VA disability benefits to guard against depletion by "*any legal or equitable process whatever*," when "due or to become due," and "either before or after receipt." Consistent with the historical interpretation of these provisions as having absolute nullifying effect, § 5301 goes further so as to explicitly "void from inception" orders or agreements in which the veteran beneficiary voluntarily attempts to dispossess himself of these funds. See, e.g., *Hall*, 98 US at 356 (statute renders "wholly void" attempts to deplete the veteran's benefits); *Porter*, 370 US at 160 (it has been the policy of Congress since the 1870's to protect veterans'

benefits and § 3101 (now §5301) liberally construed to effectuate that purpose).

As this Court held in its unanimous opinion in April 2020, not only does this preexisting preemptive federal law prohibit the state from exercising its equitable authority to order indemnification to force the veteran to make up the former spouse's lost property share, overruling *Megee v Carmine*, 290 Mich App 551;802 NW2d 669 (2010), but 38 USC § 5301 applies to nullify the consent judgment wherein Appellee voluntarily agreed to dispossess himself of these personal entitlements. *Foster (After Second Remand)*, 505 Mich at 173-174.

The *only* case from the United States Supreme Court that ever ostensibly gave state courts concurrent jurisdiction with the VA over benefits that are provided to veterans and to their families was *Rose*, an ambiguous and ill-defined concurrent and overlapping jurisdiction, which was immediately abrogated by Congress' passage of the VJRA and the amendments to 38 USC § 511. These changes removed any notions of concurrent jurisdiction and created an entirely *closed* administrative review system for the processing, payment and review of claims for benefits provided to veterans and to their dependents.

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Therefore, Congress has given exclusive jurisdiction to a federal agency over all questions of law and fact concerning claims for veterans' disability benefits by both veterans and their dependents. The noted exceptions are those precise and limited allowances to the states with respect to property division of disposable retired pay under the USFSPA and the disability pension under the CSEA. The state simply has no jurisdiction or authority to contradict what the VA has established is a proper distribution of Appellee's benefits.

II. STATE COURT JURISDICTION ONCE ACQUIRED DOES NOT EXTEND TO ORDERS OR JUDGMENTS THAT VIOLATE PREEMPTIVE FEDERAL LAW AND SUCH ORDERS OR JUDGMENTS ARE SUBJECT TO COLLATERAL ATTACK AT ANY TIME

A. Michigan Jurisprudence on Subject Matter Jurisdiction Requires the State Court to Have Authority Over the Issue in Question to Avoid Collateral Attack of the Judgment

Concerning the secondary argument that the trial court had subject-matter jurisdiction and Appellee's failure to timely appeal the consent judgment was barred, the opposition over-generalizes Michigan's long-standing three-pronged inquiry into jurisdiction. This simplification has led some courts to dispense with the third prong, to wit, to issue an order that can be defended from collateral attack, the rendering court must have the jurisdiction and authority to actually rule on the issue.

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Of course, a state court has subject matter jurisdiction over divorce proceedings. However, its ruling cannot extend to something that is preempted by positive federal law. Preemption removes the sovereign authority of the state to act in excess of its constitutional authority and in direct contravention of positive federal law enacted pursuant to Congress' enumerated powers. *In re Tarble's Case*, 80 US 397, 406-409; 20 L Ed 597 (1871); *Lottery Case*, 188 US at 347 (the "sovereignty of Congress, though limited to specific objects, is plenary as to those objects."). This is particularly true for matters concerning Congress' exercise of its military powers under the Constitution, which is the precise power Congress uses when it provides compensation and benefits to the nation's military servicemembers and veterans. No greater deference has been given by the courts than to the exercise by Congress of this power. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981), citing US Const, Art I, § 8 cls 12-14.

The states explicitly surrendered their sovereign authority over all matters concerning the military when then signed the Constitution. This is an inescapable historical fact embodied in the most absolute principles of the Constitution concerning the delegation of power to the

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federal government and the cession thereof by the state – the Necessary and Proper Clause and the Supremacy Clause are activated when addressing the authority and jurisdiction of the federal government vis-à-vis the state in matters concerning the exercise of Congress' enumerated military powers. *In re Tarble's Case*, *supra* at 406-409. To be sure, the Tenth Amendment ensures the States have all powers *not delegated* to the United States by the Constitution, but it immediately follows with the complimentary disclaimer that the State retains *no sovereign authority* in those powers so delegated. *United States v Comstock*, 560 US 126, 135-136, 143-144; 130 S Ct 1949; 176 L Ed 2d 878 (2010), citing *New York v United* States, 505 US 144, 155; 112 S Ct 2408; 120 L Ed 2d 120 (1992).

Addressing Congress' enumerated military powers, the Court in *Tarble's Case* stated:

> The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or

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> laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States.
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> The Constitution…was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, *that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities. And the judicial power conferred extends to all cases arising under the Constitution*, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions…. *Tarble's Case*, 80 US at 406-407 (emphasis added).

See also *Free v Bland*, 369 US at 666 (citing *Gibbons*, 9 Wheat at 210-211 and stating that the "relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail" and "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."). The Court reasoned that if the state could frustrate the federal law through the "simple expedient" of requiring the beneficiary to reimburse the one

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claiming under state law, "the State has interfered *directly* with a legitimate exercise of the power of the Federal Government…." *Id*. at 669 (emphasis added). See also *Wissner v Wissner*, 338 US 655; 70 S Ct 398; 94 L Ed 424 (1950) (same reasoning applied to state's attempt to order indemnity for estranged spouse from military member's life insurance benefits where decedent designated his parents as beneficiaries).

Where federal pre-emption applies to bar a state court's actions, a reviewing court must address the preemptive effect of the federal law on the lower court's jurisdiction because no court has jurisdiction and therefore authority to enter orders contrary to the federal mandate or in excess of its allowances. *Ridgway*, 454 US at 54-55; *McCarty*, 453 US at 219-220 and n 12. *A priori* such orders are "void, and therefore unenforceable." *McCarty*, *supra*, citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 US 282, 290; 42 S Ct 106; 66 L Ed 239 (1921) and *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 440-441; 99 S Ct 1813; 60 L Ed 2d 336 (1979). Such orders "frustrate[] the deliberate purpose of Congress [and] *cannot stand*." *Ridgway*, *supra* at 55 (emphasis added).

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This Court has similarly ruled that where federal law preempts state law under the Supremacy Clause it "invalidates" state law that interferes with the federal law. *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014) (citing *Maryland v Louisiana*, 451 US 725, 746; 1091 S Ct 2114; 68 L Ed 2d 576 (1981). In such situations, "the state law is 'without effect.'" *Id*. (emphasis added). In other words, it is *void*. Accord *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997) (in a product liability matter "[s]tate courts are deprived of subject matter jurisdiction where the principles of federal preemption apply") (emphasis added), overruled on other grounds in *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002).

This is why "the propriety of permitting collateral attacks [of federally pre-empted judgments] is premised upon the issue of subject-matter jurisdiction." *In re Waite*, 188 Mich App 189, 196; 468 NW2d 912 (1991). "[C]ourts…can only redress wrongs *within their jurisdiction*." *Cameron v Adams*, 31 Mich 426, 429 (1875) (CAMPBELL, J.) (emphasis added). The term jurisdiction refers *both* to the authority a court has to hear and determine a case *and the power of the court to act*. *Waite*, 188 Mich App at 196-197, citing *State Highway Comm'r v Gulf Oil Corp,* 377 Mich 309, 312-313; 140 NW2d

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500 (1966). When a court is without jurisdiction of the subject matter, its subsequent acts are of no force and validity; they are void. *In re Hague,* 412 Mich 532, 544; 315 NW2d 524 (1982); *Fox v Bd of Regents of Univ of Michigan,* 375 Mich 238, 242; 134 NW2d 146 (1965). Thus, a judgment or order entered without jurisdiction may be challenged collaterally as well as directly. *Shane v Hackney,* 341 Mich 91; 67 NW2d 256 (1954); *Attorney General v Ambassador Ins Co,* 166 Mich App 687, 696; 421 NW2d 271 (1988). Such a challenge can be raised at any time, even on appeal, and even after a case is concluded. *Henry v Laborers' Local 1191*, 495 Mich 260, 287, n 82; 848 NW2d 130 (2014). Defects in jurisdiction cannot be waived. *Travelers v Detroit Edison*, 465 Mich 185, 204; 631 NW2d 733 (2001) (citing *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992) and stating "[a] court either has, or does not have, subject-matter jurisdiction over a particular case.").

As a preeminent commentator noted "[t]here are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person *and the power or authority to render the particular judgment*." 1 Freeman, Judgments, § 226, pp 444-445 (5th ed 1925) (emphasis added). "It is well settled by the

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authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered *though the court may have had jurisdiction over the subject matter and the parties*." *Id*., § 354, p 733 (emphasis added). If a judgment is, in part, beyond the power of the court to render, it is void as to the excess. *Ex parte Rowland*, 104 US 604, 612; 26 L Ed 861, 864 (1881) ("[I]f the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements."). See also, Freeman, *supra*, § 226, p 443 ("[T]he court may strike from the judgment *any portion of it which is wholly void*.") (emphasis added). "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v United States*, 91 US 21, 27; 23 L Ed 193, 195 (1875). See also *Barney v Barney*, 216 Mich 224, 228; 184 NW 860 (1921) and *Koepke v Dyer*, 80 Mich 311, 312; 45 NW 143 (1890) (the latter cited in Freeman, *supra*, § 324, pp 648-649 (discussing the severability of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)).

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As noted, Michigan adheres to these three jurisdictional elements. Thus, Michigan law accords with the susceptibility to collateral attack of judgments rendered on matters which are excess of the court's authority. Relying upon United States Supreme Court authority on the very issue, this Court stated:

> It is a general rule that the judgment of a court having jurisdiction of the *subject-matter* and of the parties is, unless appealed from, final and conclusive. By jurisdiction is meant the authority which the court has to hear and determine a case. Jurisdiction lies at the foundation of all legal adjudications. The court must have [1] cognizance of the class of cases to which the one to be adjudicated belongs; [2] it must have jurisdiction of the parties, and [3] *the question decided must be within the issue*. *Ward v Hunter Machine Co*, 263 Mich 445, 449; 248 NW 864 (1933) (POTTER, J.) (emphasis added), citing *Reynolds v Stockton*, 140 US 254; 11 S Ct 773; 35 L Ed 464 (1891).

In a case issued the very same term, Justice Potter, again, further explained:

> Jurisdiction, in its fullest sense, is not restricted to the subject-matter and the parties. If the court *lacks jurisdiction to render*, or *exceeds its jurisdiction in rendering*, the *particular judgment in the particular case*, such judgment is subject to collateral attack, *even though the court had jurisdiction of the parties and of the subject-matter*. The supreme court of the United States, the ultimate authority, has so ruled in *Windsor* v. *McVeigh,* 93 U.S. 274; *Ex parte Rowland,* 104 U.S. 604; *Ex parte Lange,* 18 Wall. (85 U.S.) 163.
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> [I]t is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, *and does not transcend, in the extent or character of its judgment, the law which is applicable to it*.

Driver v Union Industrial Trust & Savings Bank, 264 Mich 42, 50-51; 249 NW 459 (1933) (citing cases, including *Windsor*, *supra*, *Ex parte Rowland*, 104 US 604, 612; 26 L Ed 861, 864 (1881), and *Ex parte Lange*, 85 US 163, 176-178, 21 L Ed 872 (1874)). While *Driver* was an evenly split decision, the ruling of the court was that the probate court had *statutory jurisdiction* to decide the matter and a *procedural irregularity* in the failure to appoint a guardian *ad litem* did not void the judgment and subject it to later collateral attack. The case did not involve the state court's authority to pass upon an issue of controlling federal law. Of course, under the enunciated rule of subject-matter jurisdiction in Michigan, the state would have no *more authority* to extend a decision over prevailing and preemptive federal law than it would do under state law.

Later cases in Michigan confirm the view expressed in both *Ward* and *Driver* concerning the efficacy of state court orders entered in excess of their authority. *Bowie v Arder*, 441 Mich at 54, citing *Ward*, *supra*. This principle is followed where preemptive federal law

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controls the particular issues. State courts do not have jurisdiction, i.e., authority, to incorrectly adjudicate those issues. *Beek*, 495 Mich at 10, citing *Maryland v Louisiana*, 451 US at 746. In such situations, "state law is 'without effect.'" *Id*.

Regarding the exposure of such judgments to collateral attack, the Supreme Court has stated: "The judgments…would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority…." *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876). In an earlier case, the Court stated of such judgments:

> [T]hey…form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings…. [T]he rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States. *Lessee of Hickey v Stewart*, 44 US (3 How) 750, 762; 11 L Ed 814, 819 (1845). See also *In re Sawyer*, 124 US 200, 221-222; 8 S Ct 482; 31 L Ed 402, 409 (1888); Freeman, *supra*, § 322, pp 643-645.

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This Court has stated its agreement with the limitations on a lower court's authority and jurisdiction over a particular subject and the inevitable consequence of a ruling made with respect to that subject which exceeds or is otherwise beyond the court's province. *Ward*, 263 Mich at 449; *Driver*, 264 Mich at 51; *Bowie*, 441 Mich at 56.

This element of jurisdiction must be present for a court to render a judgment unassailable on collateral attack. Any state court order or judgment that exceeds the authority of the state court would be in excess of its jurisdiction and simply void ab initio. As the Supreme Court has stated "[t]hat a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v Feuerstein*, 308 at 440, n 12. "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ)

(emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and subject to collateral attack. *Kalb*, *supra*.

"[S]tate courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept *as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds*." *Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added).

The Court has expressed this view in the context of Congress' exercise of its enumerated military powers. Where a state court fails to honor federal rights and duties, the United States Supreme Court has "power over the state court to correct them *to the extent that they incorrectly adjudge federal rights*." *Ridgway*, 454 US at 55 (emphasis added), citing *Herb v Pitcairn*, 324 US 117, 125-26; 65 S Ct 459; 89 L Ed 789 (1945). Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id*.

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Michigan follows, as it must. "[W]here congress have exercised a power over a particular subject given them by the Constitution, it is not competent for [the State] to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared as by what it has expressed" *Petranek v Minneapolis, S P& SS M R Co*, 240 Mich 655, 660; 216 NW 467 (1927), citing *Houston v Moore*, 18 US 1; 5 L Ed 19 (1820). In such cases, the "power of the State *ceases to exist*." *Id*. (emphasis added), quoting *Erie R Co v New York*, 233 US 671, 681; 34 S Ct 756; 58 L Ed 1149 (1914). Justice Cooley observed that the Supremacy Clause requires "[a] State law [to] yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision." Cooley, Constitutional Law (1880), p 32.

A state court that "transcend[s] the limits of its authority" in rendering a judgment issues a void decree. *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876). See also *Driver*, *supra*. Such a decree can neither be consented to (as the federal statute expressly provides here in the form of 38 USC § 5301(a)(3)), nor can it serve as the basis for a subsequent finding of contempt. *In re Estate of Fraser*, 288 Mich

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392, 394; 285 NW 1 (1939); *Bowie*, 441 Mich at 57. See also Cooley, Constitutional Limitations (7th Ed) (1903), pp 575-576, stating:

> If [the court] assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and the *rights of property cannot be divested by means of them…. [C]onsent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law*.
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> [W]here a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, *notwithstanding he may once have consented to its action*, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, *or by any other formal or informal action*. This right he may avail himself of *at any stage of the case*; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, *but a total want of power to act at all*…. [T]here can be no waiver of rights by laches in a case where consent would be altogether nugatory. (emphasis added).

With respect to the absolute federal preemption of state law in the area of military affairs, Michigan courts are not "empower[ed] to act upon subjects which are not submitted to [their] determination and judgment *by law*." Cooley, *supra*. "[A] court at all times is required to question

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sua sponte its own jurisdiction (whether over a person, the subject matter of an action, or *the limits on the relief it may afford*)." *Straus*, 459 Mich at 532 (emphasis added).

In the instant case, the Court of Appeals correctly analyzed what is simply restated Michigan law. Federal preemption goes to subject-matter jurisdiction because where 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. *Beek*, 495 Mich at 10 citing *Maryland*, 451 US at 746. "[S]tate law is '*without effect*.'" *Id*. (emphasis added).

Congress left *no room* for the states to supplement the federal law and state law is *void* to the extent that it conflicts with the federal scheme or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Maryland*, 451 US at 746-747, citing *Hines v Davidowitz*, 312 US 52, 62-63, 67; 61 S Ct 399; 85 L Ed 581 (1941). Military compensation, pension and disability benefits falls under the enumerated military powers of the Constitution. See, e.g., *United States v. Oregon*, 366 US 643, 648-649; 81 S Ct 1278; 6 L Ed 2d 575 (1961). The state *ceded* its sovereign authority over all

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military matters when it assented to join the national government and it is bound by the powers thereby delegated. *McCulloch v Maryland*, 17 US 316, 404, 404-406; 4 L Ed 59 (1819). Though *limited* in its powers, the federal government "is *supreme within its sphere* of action." *Id*. at 405 (emphasis added). Accord *Tarble's Case*, *supra* at 406-409.

A perfect example of proper application of these principles is found in *Ryan v Ryan*, 600 NW2d 739; 257 Neb 682 (Neb 1999). There, the Supreme Court of Nebraska, even without the benefit of *Howell*, ruled that federal preemption concerning military compensation went to the subject matter jurisdiction of the trial court and even though it had jurisdiction over the parties and the proceeding, its authority did not *extend* into the occupied federal sphere and its judgment was void and subject to collateral attack. *Id*. at 744. That part of the judgment that was preempted by federal law was void and severable. *Id*. at 745-746.

States may only exercise jurisdiction and authority over those matters that have been granted to them by Congress. If the rule were otherwise, then 50 states could have 50 different rules under the federal Constitution, a situation which would be "truly deplorable". *Martin v*

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Hunter's Lessee, 14 US 304, 348; 4 L Ed 97 (1816) (emphasis added) (STORY, J.). If the states "could make *alternative* distributions outside the clear procedure Congress established" it would transform the narrow exceptions granted by Congress to the states concerning military benefits "into a general license for state law to override" it. *Hillman*, *supra* at 496.

The general delegation to Congress of enumerated powers and the concomitant cession of those powers by the States removes the state's authority over such matters. A decision to the contrary must be subject to collateral attack. This is simply an application of the three-pronged approach to jurisdiction adhered to by this Court.

B. There is No Binding Supreme Court Precedent for the Proposition that State Law Concerning Res Judicata and Collateral Estoppel Apply Where Preemptive Federal Law Expressed in a Federal Statute Limits the State's Authority and Actually Voids from Inception Any Violations

Secondary to this argument the challenging parties rely on post-appellate history in a California case from 1981, *In re Marriage of Sheldon*, 124 Cal App 3d 371 (1981), *petition dismissed* 456 US 941; 102 S Ct 2002; 72 L Ed 2d 462 (1982) and a footnote in *Mansell v Mansell*, 490 US 581, 587, n 5; 109 S Ct 2023; 104 L Ed 2d 675 (1989), as binding precedent applicable to this case.

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In *Mansell*, the veteran filed a motion four years after the settlement to modify the decree on the basis of *McCarty*. 490 US at 585-586. The veteran argued that the USFSPA was unconstitutional to the extent it overruled any aspect of *McCarty's* absolute preemption rule and, in any event, the USFSPA did not authorize the state court to "add back" or "count" the waived retired portion as a lost property interest of the former spouse. The Supreme Court ruled that *McCarty's* rule of absolute preemption still applied and only Congress could grant the states authority to divide military benefits. Since the state court was dealing only with the waived portion of military retirement pay and attempting to credit the former spouse's share of community property by that amount the Supreme Court's decision was limited only to its holding that the state could not equitably adjust the veteran's obligation to add back the value of the waived portion of his previously disposable, and therefore divisible, retired pay. The Court declined to address the veteran's and solicitor general's argument that 38 USC § 5301 prohibited the states from forcing the veteran to use his disability pay to make up the lost portion. 490 US at 587, n 6 ("Because we decide that the [USFSPA] precludes States from treating as community property retirement pay waived to receive veterans' disability benefits,

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we need not decide whether the anti-attachment clause, § 3101(a) [now § 5301(a)], independently protects such pay.").

In a footnote, the Supreme Court said it was not exercising federal question jurisdiction over California's decision to reopen the judgment below upon the former servicemember's challenge, stating "[w]hether 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." 490 US at 586, n 5. However, since the California court had reopened the case to reach the federal question, the Supreme Court exercised jurisdiction over the disposition of that federal question. *Id*.

The Supreme Court ultimately held that state courts could not count the waived portion of a servicemember's retirement pay as a valuation of the former spouse's interest in otherwise disposable and divisible property in divorce proceedings. On remand, the California Court of Appeals rejected the veteran's argument that the 1979 pre-*McCarty* judgment (which violated *McCarty's* preemption principle) was void for want of subject matter jurisdiction and refused to apply the new rule of law enunciated by the United States Supreme Court retroactively. *In*

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re Marriage of Mansell, 217 Cal App 3d 219, 225-226 (1989). Carefully distinguishing cases where a judgment that is *void on the face* can be collaterally attacked, the court simply held that the 1979 judgment imposing a division of the veteran's retirement pay was not void and the trial court did not abuse its discretion in affirming. *Id*. The Supreme Court denied a second petition for certiorari. 498 US 806; 111 S Ct 237; 112 L Ed 2d 197 (1990). Denial of cert is *not* a decision on the merits. *Shaw v Delta Air Lines*, 463 US 85, 94; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

The state law issue in *Sheldon* also concerned the retroactivity of *McCarty*, *supra*, and whether it was applicable to cases not final on appeal as of the date *McCarty* was filed. See *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 379; 177 Cal Rptr 380 (1981). *McCarty* was construed by the California Court of Appeals as a new rule of law in the state, precluding state courts from counting *any* military benefits as divisible community property upon divorce. The underlying case had been decided on June 8, 1981. *Id*. at 376. The parties agreed that the full value of the couple's primary residence would go to the former spouse and the full value of the former servicemember's retirement would go to him. The former servicemember did not contest the

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valuation of his pension rights as a community property asset. *Id*. at 375-376.

After the Supreme Court decided *McCarty*, the former servicemember filed a petition for rehearing arguing *McCarty* compelled the court to reverse the interlocutory judgment and remand for a new division of the community property and recharacterization of his pension rights as his separate property. *Id*. at 376.

The Court stressed it was limiting its answer to the "narrow issue" and held (1) the principle enunciated by the Supreme Court which governs the retroactivity of high court decisions mandate *McCarty* not be accorded full retroactivity; and (2) *McCarty* should not be applied to cases not final on appeal unless the military spouse requested the trial court reserve jurisdiction on the character of the property interest in the pension or timely raised and briefed the federal preemption issue. *Id*. at 375. The court affirmed the decision of the trial court. It held that *McCarty* would not apply retroactively to the state law issue concerning the valuation of community property in California. It also held that *McCarty* would not be applied to cases that were not final on appeal unless the former servicemember had preserved the issue.

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The former servicemember filed a petition for certiorari in the United States Supreme Court. The Court denied for lack of a substantial federal question. 456 US 941 (1982). At that time, the Court had to either take the case on the merits or dismiss it. 28 USC § 1257 (1970). The burden on the Court's docket led it to interpret dismissals of appeals (as opposed to denials of certiorari) as decisions on the merits of the case, ostensibly functioning as binding precedent for lower courts. See Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 Brooklyn L. Rev. 111, 156 (Fall 2017). The statutory jurisdiction of the Supreme Court changed in 1988 to make such cases subject to certiorari review only. *See* Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (codified as amended at 28 U.S.C. § 1257 (2012)).

The argument advanced from this that the dismissal of the certiorari petition in *Sheldon v Sheldon*, 456 US 941 (1982), unequivocally stands as precedent for the proposition that state courts have subject matter jurisdiction to divide (albeit errantly) veteran's benefits "outside the scope of the USFSPA" and that such decisions are not void for lack of subject matter jurisdiction even where principles of federal preemption apply. Appellant's Brief, p. 30.

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However, critically omitted from this argument is that in both of these cases the state courts were addressing the *retroactivity* of substantive federal law enunciated by the Supreme Court which also established a new rule of law. A corollary of this question of retroactivity was whether res judicata barred collateral attacks on judgments ostensibly preempted by the new substantive federal law.

So, even before discussing "summary dismissals" and their standing as "binding precedent" in Supreme Court practice, it is important to point out what the Court was *not addressing* in *Sheldon* or *Mansell*. Neither case concerned application of preexisting jurisprudence and positive federal law, to wit, 38 USC § 5301, the latter of which prohibits states from using any legal or equitable process to dispossess veterans of disability benefits and which voids from inception any agreements or assignments based on such agreements purporting to do so. The Supreme Court in *Howell* ruled that 38 USC § 5301 applies to directly prohibit state courts from vesting veterans' benefits. This Court also concluded that the consent judgment entered into by Appellee contained the impermissible assignment under 38 USC § 5301. This statute was never at issue or considered in *McCarty*, *In re Marriage of Sheldon*, 124 Cal App 3d 371, 378; 177 Cal Rptr 380 (1981), or

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Mansell. Indeed, *Mansell* expressly declined to consider it. *Mansell*, 490 US at 587, n 6.

As the Supreme Court noted in *McCarty* when assessing its "federal question" jurisdiction, appeal is proper where an appellant does not "simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the…[rule or law] was void, and therefore unenforceable." See *McCarty*, 453 US at 219-20, and n 12, citing *Dahnke-Walker Milling Co v Bondurant*, 257 US 282; 42 S Ct 106; 66 L Ed 239 (1921) and *Japan Line, Ltd v County of Los Angeles*, 441 US 434, 440-41; 99 S Ct 1813; 60 L Ed 2d 336 (1979).

Critically for this case, the *preemptive federal rule of law* is the federal statute, which this Court has already concluded applies. This was not the issue addressed or resolved by the Supreme Court's summary dismissal in *Sheldon* – whether California's state law of res judicata would bar the raising of a *newly enunciated judicial opinion* (*McCarty*) to invalidate a *pre-McCarty* consent judgment that was not timely appealed. The state court in *Sheldon* and *Mansell* simply did not address the question of whether res judicata or collateral estoppel would

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bar a challenge to a consent judgment that a federal statute, as interpreted and applied by the Court in *Howell* and as already unanimously applied by this Court in April 2020, expressly prohibits and voids from inception. 38 USC § 5301(a)(1) and (3); *Howell*, 137 S Ct at 1405; *Foster (After Second Remand)*, 505 Mich at 171.

Here, the state court is faced with a federal statute enacted pursuant to Congress' enumerated military powers; a statute which has been in existence in one form or another since at least the 1870's; which the Supreme Court has said must be liberally construed in the veteran's favor and has interpreted to mean that the benefits it protects are to "remain inviolate" for the veteran's "maintenance and support"; and which applies to and voids out any order or agreement that would force the veteran to dispossess himself of these benefits.

Neither principles of collateral estoppel or res judicata would apply to something that is, by statute, null and void from its inception. The applicable federal statute, 38 USC § 5301(a)(3) actually says that agreements and assignments concerning veterans' benefits protected by this provision are impermissible and void from their inception. "The *nullity of any act*, inconsistent with the constitution, is produced by the

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declaration that the constitution is the supreme law." *Gibbons v Ogden*, 22 US 1, 210-211; 6 L Ed 23 (1824) (emphasis added). Where the "word 'void' is the mandate of the statute, it means *the ultimate* of legal nullity." *Zaher v Miotke*, 300 Mich App 132, 145; 832 NW2d 266 (2013) (emphasis added).

Appellant's challenge to the Court of Appeals' ruling on the basis of a "summary dismissal" by the United States Supreme Court in 1982 refusing to hear an appeal for lack of a substantial federal question where the direct application of a dispositive federal statute in the underlying state case was not even at issue is already highly suspect. In light of the history concerning attributing *binding precedent* to summary dismissals by the Supreme Court, and subsequent criticism, explained *infra*, it is a dangerous doctrine to rely on to preclude vindication of federal rights and entitlements, especially when those rights are positively protected from any legal and equitable process by a federal statute which voids from inception any agreements or assignments of the interests guaranteed by those rights. The subsequent appellate histories in *Sheldon* and *Mansell* are simply not applicable.

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From the start, this concept of binding precedent being gleaned from the Supreme Court's dismissal of a certiorari petition nearly 30 years ago in cases that *did not* have the same specific underlying issues is a nonstarter. Even if we were to get past this fundamental obstacle, there is a plethora of problems that await concerning whether "summary dismissals" by the United States Supreme Court can ever be considered as "binding" for *anything* and upon *any court but* the United States Supreme Court itself.

However, because of the way in which this "rule" has been consistently advanced by practitioners to deprive veterans of their statutory entitlements, additional deconstruction is in order. This "rule" originated when the Court was required to hear the merits of cases appealed from state courts raising federal issues. The statement comes from Justice Brennan in an evenly split memorandum opinion in *Ohio ex rel Eaton v Price*, 360 US 246; 79 S Ct 978; 3 L Ed 2d 1200 (1959). Justice Brennan, who voted to note probable jurisdiction, filed a separate memorandum. Justices Frankfurter, Clark, Harlan and Whittaker (4 justices) filed a separate memorandum to affirm. Mr. Justice Clark, who voted against noting probable jurisdiction, also filed a separate memorandum. Justice Stewart recused himself because the

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case came from the Ohio Supreme Court "where his father then served." *Id.* at 249.

From its very inception, the bold statement was announced with an equal measure of caution and concern. "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case, and public expression of views on the merits of a case by a Justice before argument and decision *may well be misunderstood*." *Id*. at 247-48 (emphasis added). "[T]he usual practice in judicial adjudication in this country, where hearings are held, is that judgment follow, and *not precede* them." *Id*. at 248 (emphasis added). "Public respect for the judiciary might well suffer if any basis were given for an assumption, however wrong in fact, that this were not so." *Id*. Justice Brennan continued:

> A precedent which appears to some Justices, upon the preliminary consideration given a jurisdictional statement, to be completely controlling may not appear to be so to other Justices. Plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations. *Id*.

This rule, already significantly handicapped at nascence, was once again mentioned in *Hicks v Miranda*, 422 US 332, 343-44; 95 S Ct 2281; 45 L Ed 2d 223 (1975), an extremely controversial case in its

own right. See, e.g., *Wilson v Ake*, 354 F Supp 1298, 1304-1305 (MD Fla 2005) (explaining the negative effects the rule on modern civil rights cases due to the Court's summary dismissal in *Baker v Nelson*, 291 Minn 310; 191 NW2d 185 (1971), appeal dismissed, 409 US 810; 34 L Ed2d 65; 93 S Ct 37 (1972), after more than 30 years of evolution in civil rights and societal views on the legality of same sex marriages).

The Supreme Court has noted that ascertaining the reach and content of its summary actions present its own problems. Lower courts may have difficulty determining the "holding" of a summary disposition; indeed, the Court has noted that such decisions are often "somewhat opaque." *Gibson v Berryhill*, 411 US 564, 576; 93 S Ct 1689; 36 L Ed 2d 488 (1973). As the Court observed, its "cursory consideration" of an issue in cases decided by summary disposition "does not foreclose the opportunity to consider [it] more fully" at some later point. *Mass Bd of Retirement v Murgia*, 427 US 307, 309, n 1; 96 S Ct 2562; 49 L Ed 2d 520 (1976). Indeed, "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari v Steinberg*, 419 US 379, 392; 95 S Ct 533; 42 L Ed 2d 521 (1975) (BURGER, CJ, concurring). The Court has acknowledged that

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summary actions "have less precedential value than an opinion on the merits." *Ill State Bd of Elections v Socialist Workers Party*, 440 US 173, 180-81; 99 S Ct 983; 59 L Ed 2d 230 (1979). They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v Confederated Bands & Tribes of Yakima Indian Nation*, 439 US 463, 477, n 20; 99 S Ct 740; 58 L Ed 2d 740 (1979). There, the Court stated:

> Summary dismissals are, of course, to be taken as rulings on the merits in the sense that they rejected the specific challenges presented in the statement of jurisdiction and left undisturbed the judgment appealed from. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits." *Id*.

As controversial rule was in its application to and consequences on cases of significant public interest, it has also been the subject of endless attacks by academics, practitioners and courts. Summary dispositions contributed to the difficulty of finding the law by providing insufficient information about what the Court *actually* decided. These dispositions stated only the dismissal and provided no information

about the facts or the reasoning on which that decision was grounded. In Supreme Court practice, summary affirmances upheld the judgment but not necessarily the reasoning by which it was reached. When courts affirm or reverse without opinions, they create law that researchers cannot find. See, e.g., Dragich, Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 Am U L Rev 757, 787 (1995). Also, since the Court does not even accord summary dispositions the same precedential weight as decisions rendered by full opinion after plenary consideration, "one can safely assume that the matter has not yet been completely put to rest." Watkins, Lawyer Advertising, the Electronic Media, and the First Amendment, 49 Ark. L. Rev. 739, 763-764 (1997).

As past "academic and practical" treatment of the issue in this case makes perfectly clear, rather than exploring the valuable analytical considerations of Supreme Court opinions and legislative treatment of the subject matter to obtain judicious guidance, practitioners and courts alike are lulled into complacent reliance on cursory practice notes and conclusory statements on websites and circulars that project and manipulate convenient "meaning" from a nearly undiscernible and

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archaic concept that, for obvious reasons, was abandoned long ago. See pp 64-65, *supra*.

Even worse, by mischaracterizing or ignoring what actually transpired in the lower courts, lawyers can offer intelligent sounding pretextual excuses to urge avoidance of the important underlying federal question. Indeed, the Supreme Court itself was not beyond criticism for using the rule to avoid wading too far into controversial waters or remaining neutral at times when the public could have benefitted from clarity. For example, operating under the past rule in *Baker v Nelson*, *supra*, the Court summarily upheld a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to Minnesota's one-man/one-woman marriage law. Whether or not the Court agreed with the state court's decision it did not really say; it avoided the issue by summarily dismissing the appeal as not raising a substantial federal question. This brought little satisfaction to many of the stakeholders.

Since then, the Court has distanced itself considerably from the once rigid application of the rule. For example, the Court has treated the *rule* as applying only to "the specific challenges presented in the statement

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of jurisdiction," not to additional questions that "merely lurk in the record." *Cooper Indus v Aviall Servs*, 543 US 157, 170; 125 S Ct 577; 160 L Ed 2d 548, 562 (2004). Therefore, without searching review of the underlying issues, a blanket statement that the Supreme Court has already substantively ruled on an issue is *specious* at best. Used as a weapon, the rule can be irresponsibly wielded by those with motives to suppress the ability of state and federal courts to deal with significant issue of public policy and substantial legal developments in an area of law.

In *Colo Springs Amusements, Ltd v Rizzo*, 428 US 913, 919-20; 96 S Ct 3228; 49 L Ed 2d 1222 (1976), Justice Brennan, who ostensibly stoked the original controversy in *Price*, and perhaps to suppress the resulting conflagration, lamented the ambiguity of summary dismissals noting that different Justices may have had differing grounds for deciding to dispose of the case, with no real way to discern their rationale. *Id.* Problems were also posed by the scope of summary dismissals. Justice Brennan cited a case in which a Circuit Court relied on a Supreme Court summary dismissal even though the issue before the Circuit Court had not been raised at all in the jurisdictional statement. *Id*. at 920, n 6. Justice Brennan also observed that there was

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a danger that a court relying on a summary disposition might "attach[] too much weight to dicta or overbroad language contained in opinions from which the appeals were taken and resolved summarily." *Id.* There was also the danger, he concluded, that courts interpreting summary dispositions would construe them inconsistently with doctrines that the Court had previously announced. *Id*. at 921.

Law in many areas, especially when derived at the Supreme Court level, can evolve dramatically over several years (or decades). Given the Court's limited capacity to address such significant issues, it is no wonder that little confidence is reposed in this doctrine, especially as it was announced by an evenly divided court with substantially differing views in a case of extreme controversy ultimately resulting in a split opinion as to the substantive issue. Weisbuch, Winner-Take-All as a Collective Action Problem, 35 J L & Politics 67, 68-69 and nn 8 through 11 (Summer 2019) (citing *Hicks*, *supra*; *Mandel v Bradley*, 432 US 173, 176; 97 S Ct 2238; 53 L Ed 2d 199 (1977), and *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983) and stating that summary dispositions approve or reject lower court *holdings*, not *reasoning*, such that any potentially dispositive factors could differentiate decades old cases from "modern challenges" and

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explaining how election law had "evolved significantly" since an earlier case in which summary disposition had been relied on.

Notably, the Court has previously emphasized the impact of its capacity constraints on the lower federal and state courts. The Court explained that under the old rule, it was "impossible … to give plenary consideration [to] all the mandatory appeals it received," and it therefore had to "dispose of many cases summarily, often without written opinion." This approach, however, was a "generally unsatisfactory" solution to its workload concerns because of the effect of such decisions on the lower courts. Such terse rulings "often provided uncertain guidelines for the courts that [were] bound to follow them and, not surprisingly, … sometimes created more confusion than they [sought] to resolve." Grove, The Structural Case for Vertical Maximalism, 95 Cornell L Rev 1, 52-53 and n 280 (2009).

The fact that the Supreme Court has intimated that only it can say whether a prior summary dismissal is precedential is telling. Can *any* other court narrow or expand "precedent" based upon the Court's intermittent signals? Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo L J 921, 967-968, nn 228-235 (2016) (noting the ability of lower courts to narrowly "interpret" Supreme

Court precedent but cautioning that "the Court's precedent on vertical precedent is itself ambiguous and so may be susceptible to legitimate limitations).

Ultimately, whatever one thinks of this *rule* it does not apply here. Neither *Sheldon* nor *Mansell* applied 38 USC § 5301 to the question of a state court's authority and jurisdiction. *Howell* did. It ruled that under this provision, state courts could not *vest* benefits in anyone other than the beneficiary and had no authority over their disposition in state court proceedings without congressional assent. *Howell*, 137 S Ct at 1404, 1405. None of the cases cited by Appellant address the direct effect of 38 USC § 5301 on the state court's powers. *McGinn v McGinn*, 126 Mich App 689, 690; 337 NW2d 632 (1983) addressed the validity of a 1976 judgment after *McCarty*. Appellant's Brief, pp. 12-13. Submitted in 1982, and like many other cases at this time, the court did not have the benefit of significant Supreme Court jurisprudence on the USFSPA, nor did it consider 38 USC § 5301's sweeping jurisdictional reach and limitations. Moreover, while acknowledging the USFSPA, the Court specifically stated that it was not applying *McCarty* because the underlying judgment was issued prior to its decisional date. *McGinn*, 126 Mich App at 691.

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As this Court acknowledged the statute applied here to prohibit the consent judgment in this case. Such assignments are considered void from their inception. 38 USC § 5301(a)(3)(A) and (C). That ruling is now law of the case. It would therefore be an issue of first impression for this Court to consider whether the state law of res judicata escapes the sweeping breadth of 38 USC § 5301, with its mandated liberal interpretation and its express voiding of the assignment in this particular case, as acknowledged by the Court's April 2020 ruling.

Only the Supreme Court of the United States could legitimately address the clear application of this federal provision by *agreeing* with a state court ruling that res judicata bars its sweeping effect. *Lottery Case*, 188 US at 353. Any inferior court that would so conclude would be usurping the will of Congress and thereby directly violating the supremacy clause by narrowing the broad sweep of § 5301.

Indeed, the Court has already declared in *Howell* that the state has *no authority* to vest these benefits in anyone other than the beneficiary under this provision. *Howell*, *supra* at 1405. That would be at least an implied directive that a final state court judgment that does so is always subject to attack. The Supreme Court has stated that once it "has

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spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Nitro-Lift Technologies, LLC v Howard*, 133 S Ct 500; 184 L Ed 2d 328 (2012) (*per curiam*) (quoting *Rivers v Roadway Express Inc*, 511 US 298, 312; 114 S Ct 1510, 128 L Ed 2d 274 (1994) (internal quotation marks omitted)). See also *James v City of Boise*, 136 S Ct 685, 686; 193 L Ed 2d 694 (2016).

To propagate the illusion that the Court's 1982 dismissal in *Sheldon* and its footnote in *Mansell* serves as binding precedent in this case where the underlying issue is governed by a federal statute voiding from inception any state court action on the subject, fresh Supreme Court precedent applying that statute, Congressional overhaul removing concurrent jurisdiction from the state over all claims related to veterans' disability pay, and nearly 3 decades of high-tempo combat deployments for our nation's military would be unbecoming of this Court.

III. EVEN IF THE COURT RULES THAT THE STATE COURT RETAINED SUBJECT MATTER JURISDICTION AND HAD AUTHORITY TO ENTER A JUDGMENT THAT WAS PREEMPTED BY FEDERAL LAW THE STATE COURT COULD NEVER ENFORCE AN AGREEMENT DEEMED VOID FROM ITS INCEPTION

In *Howell*, the Supreme Court actually ruled that state courts were deprived of jurisdiction by 38 USC § 5301 to *vest* any future interest in

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the restricted disability benefits. *Howell*, 137 S Ct at 1405. It also ruled that the statute applied to all disability pay (not just the waived amount), thus directly answering the question left open in *Mansell* concerning the applicability § 5301. See *Mansell*, 490 US at 587, n 6.

An instrument "void from its inception" is treated as if it never existed. *Compton v Joseph Lepak, DDS, PC*, 154 Mich App 360, 371-372; 397 NW2d 311 (1986). Likewise, a statute that renders a contract clearly unenforceable from inception cannot become enforceable by later legislative or judicial act. *Id*. Where the "word 'void' is the mandate of the statute, it means *the ultimate* of legal nullity." *Zaher v Miotke*, 300 Mich App 132, 145; 832 NW2d 266 (2013) (emphasis added).

Where a statute specifically inhibits an act, it is error for the court to do the thing prohibited. Where the statute goes even further to render any such act *void* from inception, it implies the broadest form of nullification of any act taken (knowingly or unknowingly) in contravention. The decree is *void* on its face, and can be challenged at any time.

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Section 5301 says "[a]ny agreement that is prohibited under subparagraph (A)…is void from its inception." This provision is to be construed liberally in the veteran's favor to maintain the benefits it protects as "inviolate". *Porter*, 350 US at 161-162.

This Court's unanimous opinion on April 29, 2020 ruled that the consent judgment in this case was an impermissible agreement under this provision, 38 USC § 5301(a)(3)(A). 505 Mich at 172-173. Accordingly, it was *void from its inception* and no court's jurisdiction could ever extend to make good that which was always a nullity.

Thus, in a sense, the question of res judicata and collateral estoppel is not relevant because the state could never retroactively validate a void agreement. Where a prior judgment is void ab initio it is not even necessary for the court to examine whether the rendering court had subject matter jurisdiction. Appellant does not appear to acknowledge that the statute voids out the assignment, and thus, there is no need to consider whether it can be collaterally attacked. It is "without effect". *Beek*, 495 Mich at 10, citing *Maryland*, 451 US at 746 and *Gibbons v Ogden*, 22 US 1, 211; 6 L Ed 2d 23 (1824). This is a separate and independent basis for upholding the Court of Appeals' ruling.

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IV. APPELLANT WOULD NOT BE ENTITLED TO ALIMONY BECAUSE UNDER FEDERAL LAW NONE OF APPELLEE'S SPECIFIC VETERAN'S DISABILITY PAY CAN BE USED AS INCOME FOR PURPOSES OF CALCULATING ALIMONY

Appellant argues that state courts have subject matter jurisdiction over domestic relations matters, and "based on the decision in *Howell* and the federal statutes cited above" they may consider the extent and amount of a servicemember's benefits (regardless of their classification) in calculating and awarding child support and spousal support. Appellant's Brief, pp. 11-12. The FLS also indicates that this Court might remand for the trial court to consider whether it can readjust the parties' obligations and order Appellee to pay alimony in substitution for the VA disability to which Appellant is not entitled. This was also a prominent question at oral argument preceding this Court's April 2020 opinion. Appellee takes the opportunity to address it again.

As noted by this Court in its April 2020 opinion and as extensively laid out in the Appellee's appeal pleadings in this case commencing in 2014, Appellee waived any rights he had to spousal support; waived any rights he had in any of the parties marital property; allowed Appellant to keep the marital home; and waived any interest he would

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have had in Appellant's own civilian retirement pension from her full-time job as a registered nurse. Nonetheless, he "agreed" to the property settlement in which he was to dispossess himself of up to 50 percent of his VA disability pay if he stopped receiving his "disposable" military retired pay.

Congress has *withheld* authority of state courts over *all* federal veteran's benefits except in limited circumstances that are not at all applicable to the instant case. Respondent's federal disability pay is *not* considered to be "disposable retired pay" for the purposes of property division in state court proceedings, which is the only type of pay over which states have been granted *precise* and *limited* authority by Congress. See 10 USC § 1408; 10 USC § 1413a(g); *Howell v Howell*, 137 S Ct 1400, 1404, 1405; 197 L Ed 2d 781 (2017); *Mansell v Mansell*, 490 US 581, 588-589; 109 S Ct 2023; 104 L Ed 2d 675 (1989). Further, 38 USC § 5301 prohibits the state from entering any order ("legal or equitable") with respect to these benefits.

Contrary to the assertion by the Family Law Section in its amicus brief, *Howell* only recognized that *at the beginning* of a divorce the parties might agree that a substitute amount of *legally available*

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compensation could augment a decrease in the former spouse's share of disposable retired pay. *Howell*, 137 S Ct at 1406, citing 10 U.S.C. §1408(e)(6) and *Rose*, 481 US at 630-634. This says nothing about post-judgment machinations seeking to redistribute assets and repurpose the federal benefits in a manner contrary to federal law.

As the Court in *Howell* made clear, preemptive federal law is the rule and must still be adhered to. *Rose*, to the extent it is still viable, only stands for the proposition that state courts may hold a disabled veteran in contempt for a failure to pay child support because, at that time, the Court reasoned that disabled veterans had an obligation to support their *dependents* and the state had concurrent jurisdiction over claims by *dependents* for veterans' benefits. In 1988, through the VJRA, Congress removed concurrent jurisdiction from state courts over such claims when it comes to the restricted VA disability pay. See pp 25-42, *supra*.

But, more to the point. *Rose* has never been extended by the Supreme Court to allow a state to order disabled veterns to pay *alimony* from these benefits. Nor could it have. Former spouses are not and never have been defined or qualified *dependents* according to the VA.

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Federal law must still be adhered to in the consideration of the question at the beginning of a divorce or at any time thereafter. *Howell's* pronouncement regarding *Rose* and alimony means no more than this. Nor could it. Congress has fully addressed the question.

As explained *infra* at pages 30 to 33, there is a limited exception in the CSEA, 42 U.S.C. § 659(h)(1)(A)(ii)(V) to "count" as "income", i.e., remuneration for employment, a disability "pension" payment that is a partial disability received in lieu of waived retired pay – that is "income" that can be counted by the state towards an alimony obligation. However, 42 U.S.C. § 659(h)(1)(B)(iii) excludes from that consideration Title 38 VA disability pay paid to a 100 percent totally and permanently disabled veteran.

The absolute principle of federal preemption that the *Howell* Court reiterated from its 1981 decision in *McCarty* "still applies" to prohibit states from exercising jurisdiction over benefits *unless* Congress allows it. *Howell*, supra at 1404. Appellee's particular disability benefits are not now and never have been considered a divisible asset or income by federal law, whether as property or as available for an alimony award.

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Appellant is not entitled to any of Appellee's VA disability benefits because they are not disposable retired pay under USFSPA, 10 USC § 1408, they are not garnishable "income" under CSEA, 42 USC § 659, and they are jurisdictionally protected from all legal and equitable powers of the state by § 5301. Congress has simply not given the states authority to sequester or otherwise count these particular disability benefits as available assets or income.

CONCLUSION

There is a presumption that Congress' exercise of its power in the premises of Article I, § 8 are constitutionally appropriate, supreme, and employed to execute a delegated power. *Comstock*, 560 US at 135. The assertion that a state court order that is preempted by federal law is in excess of the state court's jurisdiction to the extent that it violates that federal law and thus is void and subject to collateral attack is not a novel concept. Judgments of the sort are both erroneous *and* void, not simply legal error that must be addressed on direct appeal or through a motion for relief from judgment under MCR 2.612. Jurisdiction over issues concerning veterans' benefits lies exclusively within Congress' federal authority *unless* that jurisdiction has been expressly granted to the

states. Here, not only has it not been granted, but it has been expressly limited and removed. 38 USC § 511; 38 USC § 5301.

No substantive or procedural rules of laches or res judicata marshaled by the State could legitimize, after the fact, an obligation that the Constitution deprives the State of the power to impose. And, under the Supremacy Clause state collateral review courts have no greater power than the Supreme Court of the United States to mandate that an obligation continue where federal law, exercised under the auspices of Congress' enumerated powers, voids the obligation from its inception. In adjudicating claims under its collateral review procedures a state may not deny a controlling right asserted under the Constitution, assuming the claim is properly presented in the case. *Martin*, 14 US at 348. Rather, it has a "duty to grant the relief that federal law requires." *Yates v Aiken*, 484 US 211, 218; 108 S Ct 534; 98 L Ed 2d 546 (1988).

Aside from development in the law strengthening Congress' resolve to protect veterans by way of its enactment of the VJRA and the Supreme Court's recent jurisprudence further clarifying the scope of federal preemption in this area, the Court should be made aware of what has occurred in this country in the decades since *McCarty* and *Mansell*.

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The 1989 *Mansell* decision was the last case to address these important issues before *Howell* in 2017. In the interim three decades, this nation has been at war or in a continuous combat operational stance in one theatre or another. Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's and culminating in full-scale military involvement in Iraq and Afghanistan).

There are now between 4.5 and 5 million disabled veterans.[7] As of May 2019 this number is increasing by 117 percent.[8] Seventy percent of this number are greater than 70 percent disabled. See US Census Bureau, Facts for Features. See also VA, National Center for Veterans Analysis and Statistics, What's New.[9]

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, *Dead*

[7] https://www.va.gov/vetdata/docs/Quickfacts/SCD_trends_FINAL_2018.pdf

[8] www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL_2018.PDF

[9] www.va.gov/vetdata/veteran_population.asp

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Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. This progress comes with a price. Physical injuries in these situations are understandably horrific. *Id*. See also Kriner & Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 Univ. of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, *Family Perceptions of Post-Deployment Healthcare Needs of Iraq/Afghanistan Military Personnel*, 7(3) Mental Health in Family Medicine 135-143 (2010). Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, *Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses*, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., *War and the Family*, 11(2) Stress Medicine 131-137 (1995). Such conditions are exacerbated when

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returning veterans must face stress in their families caused by their absence.

Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. See DeBaun, *The Effects of Combat Exposure on the Military Divorce Rate*, Naval Postgraduate School, California (2012). Families, already stretched by the extraordinary burdens and sacrifices of national service, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. See generally, Finley, *Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan* (Cornell Univ. Press 2011).

Finally, an estimated 17 to 22 veterans commit suicide every day and the number may actually be much higher.[10] The stressors faced by

[10] www.militarytimes.com/news/pentagon-congress/2019/10/09/new-veteran-suicide-numbers-raise-concerns-among-experts-hoping-for-positive-news/

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the disabled veteran and his or her family are only exacerbated when they are involved in a state court proceeding involving whether or not and to what extent the state court may actually control the disposition of that veteran's benefits, which are supposed to be used to compensate that veteran for his or her service-connected disabilities and which are all too often his or her only means of subsistence. While this subset of the disabled veteran population might be a small percentage of the total, the consequences of these situations are inevitably magnified and extremely stressful upon this group. They need every protection the law affords.

After the foregoing discussion of the relative position of the state vis-à-vis the national government in the area of military affairs, it should be evident that the former lacks the authority and jurisdiction to pass upon matters that have been ceded to the latter by the Constitution. This is especially true in the face of a federal statute that voids from inception any such attempt on the part of the state; a statute that this Court has unanimously acknowledged applies directly to the subject matter of this case and which the United States Supreme Court says must be liberally construed in the beneficiary's favor and that the funds it protects are *inviolate*. See 38 USC § 5301 and *Porter*, 370 US at 162.

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Not only has there been significant doctrinal development and clarification in the law since *Mansell*, and thirty years of significant military engagements by our nation's servicemembers, but the precise federal statute that Appellee has claimed from the beginning rendered the agreement he entered into void as a matter of law has now been interpreted as such and applied by both the United States Supreme Court and this Court. Can the state deny the applicability of this statute on the basis that because it had subject matter jurisdiction over the state court divorce proceedings collateral review of a judgment entered in excess of the courts' authority under that statute can be allowed to stand? Does the denial of a petition for certiorari in 1982 concerning an issue that was not even then before the Court, nor at issue in the underlying state proceedings, stands as precedent to deny Appellee of his rights?

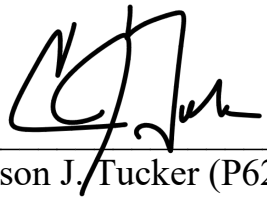
The act of a state court in excess of its constitutional authority is simply void ab initio and may be challenged at any time. The state cannot escape this reality by reanimating an agreement that was void from its inception and could never be recognized under federal law. Nor can the state insulate itself by invoking its general authority to pass judgment upon ordinary issues touching upon ordinary matters of state

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law, because those matters, unlike the one before the Court, are not themselves removed from its sovereign authority and in excess of its jurisdiction. Moreover, the state cannot simply make up the former spouse's lost portion by allowing alimony to be considered where none of the funds available are considered income by the federal government.

For the foregoing reasons, Appellee requests this Court affirm the Court of Appeals' July 30, 2020 Opinion.

Respectfully submitted by:



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CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 19,069 words (as identified by the Microsoft Word "word count" function) and was prepared using proportional font and typeface, Times New Roman / 14 point.