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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Petitioner,

v.

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

RAY JAMES FOSTER

Defendant/Respondent.

RESPONDENT'S ANSWER TO PETITIONER'S APPLICATION FOR LEAVE TO APPEAL (AFTER SECOND REMAND)

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

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RECEIVED by MSC 9/21/2020 8:29:15 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTER-STATEMENT OF JURISDICTION 1

INTRODUCTION 7

COUNTER-ARGUMENTS 10

I. CONGRESS RETAINS PRIMARY AND EXCLUSIVE JURISDICTION AND AUTHORITY OVER ALL VETERANS' DISABILITY BENEFITS ..... **Error! Bookmark not defined.**

A. Federal Law Always Preempted State Law Concerning Federal Military Benefits ..... **Error! Bookmark not defined.**

B. Congress Gave the Secretary of Veterans Affairs Primary and Exclusive Jurisdiction Over All Claims for Benefits 17

C. Congress Has Created an Exclusive, Separate and Independent Federal Judicial Body to Review All Decisions Concerning Veterans' Benefits 19

II. RES JUDICATA DOES NOT APPLY IF A STATE COURT LACKS CONSTITUTIONAL JURISDICTION TO RULE UPON AN ISSUE GOVERNED BY FEDERAL LAW – FEDERAL LAW PROTECTING VETERANS' DISABILITY BENEFITS REMOVES ANY LEGAL OR EQUITABLE POWERS FROM STATE COURTS TO DECIDE HOW SUCH BENEFITS SHOULD BE DIVIDED 29

CONCLUSION AND RELIEF REQUESTED 67

RECEIVED by MSC 9/21/2020 8:29:15 PM

TABLE OF AUTHORITIES

Cases

Anderson v Celebrezze,
460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983) 59

Baker v Nelson,
291 Minn 310; 191 NW2d 185 (1971) 54, 56

Betty v Brooks & Perkins,
446 Mich 270; 521 NW2d 518 (1994) 11

Bigelow v Forrest,
76 US 339; 19 L Ed 696 (1869) 37, 42

Boone v Lightner,
319 US 561; 63 S Ct 1223; 87 L Ed 1587 (1943) 47

Bowie v Arder,
441 Mich 23; 490 NW2d 568 (1992) 2, 3, 15

Buchanan v Alexander,
45 US 20; 11 L Ed 857 (1846) 44

Colorado Springs Amusement Ltd v Rizzo,
428 US 913; 96 S Ct 3228; 49 L Ed 2d 1222 (1976) 58

Compton v Joseph Lepak, DDS, PC,
154 Mich App 360; 397 NW2d 311 (1986) 18, 33

Cooper Indus v Aviall Servs,
543 US 157; 125 S Ct 577; 160 L Ed 2d 548 (2004) 57

Davis v Wechsler,
263 US 22; 44 S Ct 13; 68 L Ed 143 (1923) 21

Driver v Union Indus Trust & Savings Bank,
264 Mich 42; 249 NW 459 (1933) ..... passim

Ex Parte Lange,
85 US 163; 21 L Ed 872 (1873) ..... passim

Ex Parte Rowland,
104 US 604; 26 L Ed 861 (1881) ..... passim

RECEIVED by MSC 9/21/2020 8:29:15 PM

Fishgold v Sullivan Drydock & Repair Corp,
328 US 275; 66 S Ct 1105; 90 L Ed 1230 (1946) 47

Foster v Foster,
___ Mich ___; ___ NW2d ___ ..... passim

Fox v Martin,
287 Mich 147; 283 NW 9 (1938) 46

Fox v Univ of Michigan Bd of Regents,
375 Mich 238; 134 NW2d 146 (1965) 1, 2, 46

Free v Bland,
369 US 663; 82 S Ct 1089; 8 L Ed 2d 180 (1962) 11, 62

Fusari v Steinberg,
419 US 379; 95 S Ct 533; 42 L Ed 2d 521 (1975) 56

Gibbons v Ogden,
22 US 1; 6 L Ed 23 (1824) 20, 34, 42, 62

Gibson v Berryhill,
411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973) 55

Henderson v Shinseki,
562 US 428; 131 S Ct 1197; 179 L Ed 2d 159 (2011) 23, 31, 47

Hicks v Miranda,
422 US 332; 95 S Ct 2281; 45 L Ed 2d 223 (1975) 54, 57, 59

Hines v Davidowitz,
312 US 52; 61 S Ct 399; 85 L Ed 581 (1941) 20

Hines v Lowrey,
305 US 85; 59 S Ct 31; 83 L Ed 56 (1938) 11, 21, 38

Howell v Howell,
137 S Ct 1400; 197 L Ed 2d 781 (2017) ..... passim

Illinois State Board of Elections v. Socialist Workers Party,
440 US 173; 99 S Ct 983; 59 L Ed 2d 230 (1979) 56

In re Estate of Fraser,
288 Mich 392; 285 NW 1 (1939) 3

RECEIVED by MSC 9/21/2020 8:29:15 PM

In re Marriage of Hapaniewski,
438 NE2d 466 (Ill App 1982).....32

In re Marriage of Sheldon,
124 Cal App 3d 371; 177 Cal Rptr 380 (1981).....49, 50, 51, 62

Jackson City Bank & Trust Co v Frederick,
271 Mich 538; 260 NW 908 (1935).....46

James v City of Boise,
136 S Ct 685; 193 L Ed 2d 694 (2016).....43

Kalb v Feurstein,
308 US 433; 60 S Ct 343; 84 L Ed 370 (1940).....21, 38

King v King,
149 Mich App 495, 386 NW 2d 562 (1986).....32, 35

Mandel v Bradley,
432 US 173; 97 S Ct 2238; 53 L Ed 2d 199 (1977).....59

Mansell v Mansell,
490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989).....passim

Marbury v Madison,
5 US 137; 2 L Ed 60 (1803).....20

Martin v Hunter's Lessee,
14 US 304; 4 L Ed 97 (1816).....5, 43, 44, 46

Maryland v Louisiana,
451 US 725; 1091 S Ct 2114; 68 L Ed 2d 576 (1981).....passim

Mass Bd of Retirement v Murgia,
427 US 307; 96 S Ct 2562; 49 L Ed 2d 520 (1976).....56

McCarty v McCarty,
453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981).....passim

McGinn v McGinn,
126 Mich App 689; 337 NW2d 632 (1983).....48

Megee v Carmine,
290 Mich App 551; 802 NW2d 669 (2010).....8

New York v United States,
505 US 144; 112 S Ct 2408; 120 L Ed 2d 120 (1992) 16

Nitro-Lift Technologies, LLC v Howard,
133 S Ct 500; 184 L Ed 2d 328 (2012) 43

Ohio ex rel Eaton v Price,
360 US 246; 79 S Ct 978; 3 L Ed 2d 1200 (1959) 52, 53, 58

Porter v Aetna Cas and Surety Co,
370 US 152; 82 S Ct 1231; 8 L Ed 2d 407 (1962) 31, 47

Ridgway v Ridgway,
454 US 46; 102 S Ct 49; 70 L Ed 2d 39 (1981) ..... passim

Rivers v Roadway Express Inc,
511 US 298; 114 S Ct 1510, 128 L Ed 2d 274 (1994) 43

Rose v Rose,
481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987) 24, 31

Ryan v Ryan,
257 Neb 682; 600 NW2d 739 (Neb 1999) 32, 35

Straus v Governor,
459 Mich 526; 592 NW2d 53 (1999) 1, 2, 4, 15

Ter Beek v City of Wyoming,
495 Mich 1; 846 NW2d 531 (2013) ..... passim

United States v Comstock,
560 US 126; 130 S Ct 1949; 176 L Ed 2d 878 (2010) 16

United States v Hall,
98 US 343; 25 L Ed 180 (1878) 11, 30, 45

United States v. Oregon,
366 US 643; 81 S Ct 1278; 6 L Ed 2d 575 (1961) 11, 47

Veterans for Common Sense v Shinseki,
678 F 3d 1013 (9th Cir 2012) 24

Washington v. Yakima Indian Nation,
439 US 463; 99 S Ct 740; 58 L Ed 2d 740 (1979) 56

Wilson v Ake,

RECEIVED by MSC 9/21/2020 8:29:15 PM

354 F Supp 1298 (MD Fla 2005) 54

Windsor v McVeigh,
93 US 274; 23 L Ed 914 (1876) ..... passim

Wissner v Wissner,
338 US 655; 70 S Ct 398; 94 L Ed 424 (1949) 11, 40

Yates v Aiken,
484 US 211; 108 S Ct 534; 98 L Ed 2d 546 (1988) 44, 46

Youngbluth v Youngbluth,
188 Vt 53; 6 A 3d 677 (2010) 32, 35

Zaher v Miotke,
300 Mich App 132; 832 NW2d 266 (2013) 19, 34

Statutes

10 USC § 1408 5

10 USC § 1413a 5

28 USC § 1257 51

38 USC § 211 (1970) 23, 24

38 USC § 511 ..... passim

38 USC § 5301 ..... passim

38 USC § 7251 ..... 5, 14, 22, 28

MCL 600.212 1

MCL 600.215 1

MCL 600.232 1

Other Authorities

U.S. Census Bureau, Facts for Features 64

DeBaun, *The Effects of Combat Exposure on the Military Divorce Rate*,
Naval Postgraduate School, California (2012) 65

RECEIVED by MSC 9/21/2020 8:29:15 PM

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).....55

Fazal, *Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise*, 39:1 International Security 95 (2014).....64

Finley, *Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan* (Cornell Univ. Press 2011).....66

Grove, *The Structural Case for Vertical Maximalism*, 95 Cornell L Rev 1 (2009).....60

Kriner & Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 Univ. of Memphis L. Rev. 545 (2016).....64

Melvin, *Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses*.....65

Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo L J 921 (2016).....61

Schwab, et al., *War and the Family*, 11(2) Stress Medicine 131-137 (1995).....65

Trauschweizer, 32 International Bibliography of Military History 1 (2012).....63

VA, National Center for Veterans Analysis and Statistics, What's New.....64

Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 Ark L Rev 739 (1997).....55

Weisbuch, *Winner-Take-All as a Collective Action Problem*, 35 J L & Politics 67 (Summer 2019).....59

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).....65

Rules

MCR 2.612.....16

MCR 7.301.....1

MCR 7.302.....1

RECEIVED by MSC 9/21/2020 8:29:15 PM

RECEIVED by MSC 9/21/2020 8:29:15 PM

Treatises

Cooley, Constitutional Limitations (7th Ed) (1903) 3

Constitutional Provisions

Mich Const, Art VI, § 4 1

US Const, amend X 16, 22

US Const, Art I, § 8 ..... 13, 16

Unpublished Opinions

Foster v Foster (On Second Remand), July 30, 2020 (Docket No. 324853)..... 9, 27

RECEIVED by MSC 9/21/2020 8:29:15 PM

COUNTER-STATEMENT OF JURISDICTION

Under Article VI, § 4 of the Michigan Constitution, this Court may exercise jurisdiction over applications for leave to appeal 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 jurisdictional defects may be raised at any time, even collaterally or 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), Respondent respectfully submits that here, as the Court of Appeals' July 30, 2020 decision on remand was correct as a matter of law, and this Court's unanimous opinion of April 29, 2020 was correct, the jurisdiction of the Court is limited by the prevailing rule of federal preemption.

At its core, the Court of Appeals' opinion as to the limited subject matter jurisdiction of the state trial court was correct because Michigan law has long held that three elements must be present for a Michigan court to exercise subject matter jurisdiction over a particular matter. To

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protect a judgment from collateral attack, a state court must have jurisdiction and authority over (1) the class of cases; (2) over the parties; and (3) over the issues. *Driver v Union Indus Trust & Savings Bank*, 264 Mich 42, 50-51; 249 NW 459 (1933) (POTTER, J.). When a court exceeds it jurisdiction or authority it acts without jurisdiction over the subject matter and those acts are void. As Justice Potter of this Court explained long ago, drawing on the decisions of the United States Supreme Court concerning same:

> 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 US 274; *Ex Parte Rowland*, 104 US 604; *Ex Parte Lange*, 18 Wall (85 US) 163.
>
> *Driver v Union Indus Trust & Savings Bank*, 264 Mich 42, 50-51; 249 NW 459 (1933) (POTTER, J.) (emphasis added) (some internal citations omitted).

Later cases in Michigan adhere to this three-pronged query concerning the exercise of proper jurisdiction and authority. See, e.g., *Straus*, 459 Mich at 532; *Fox*, 375 Mich at 242. See also *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992).

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Respondent has repeatedly explained that this *third* element of jurisdiction must be present for a court to render a judgment unassailable on collateral attack, citing to the absolute preemptive effect of federal law in this particular subject matter and the inability of a state court to render a judgment or order that is simply beyond its authority, in excess of its jurisdiction as a result, and therefore, simply void *ab initio*. 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). 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 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).

"[A] court at all times is required to question 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 law in Michigan – federal preemption goes to the subject matter jurisdiction of the state courts because where federal preemption applies, the federal government has retained its sovereign authority over the issue. The state court has no authority to exceed its constitutional jurisdiction in such matters. The delegated powers of the federal government have not been surrendered to the states. In such cases, the states may only exercise jurisdiction and authority over those

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matters that have been granted to it 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 Hunter's Lessee*, 14 US 304, 348; 4 L Ed 97 (1816) (emphasis added) (STORY, J.).

Congress has *withheld* authority of state courts over *all* federal veteran's benefits except in limited circumstances that are not applicable to the instant case. Respondent's federal disability pay is *not* considered to be "disposable retired pay", which, for the purposes of property division in state court proceedings, is the only federal benefit 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). Moreover, contrary to Petitioner's assertions, *there is*, in fact, a separate and independent *federal* administrative and judicial forum for *all claims* concerning veterans' benefits. 38 USC § 511; 38 USC § 7251. Thus, when it addressed whether these benefits could be disposed of by Respondent in this case, the state court had no authority to enforce the consent agreement or hold Respondent in contempt for a failure to abide

by it. Its jurisdiction to do so was lacking and that jurisdictional defect going to the subject matter of the issue runs through the entire case and must be recognized by this Court in assessing Petitioner's "statement of jurisdiction".

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INTRODUCTION

In its April 29, 2020 unanimous opinion, this Court held that federal law preempted state law concerning the division of Respondent's veteran's disability benefits in state court divorce proceedings. See *Foster v Foster*, ___ Mich ___; ___ NW2d ___ (issued April 29, 2020), Slip Op at 2. The Court ruled that the 2008 consent judgment in which Respondent agreed to use his disability benefits to pay Petitioner, his former spouse, was an impermissible assignment under federal law, 38 USC § 5301(a)(3). *Id*., Slip Op at 18. The Court stated:

> We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required [Respondent] to reimburse [Petitioner] for the reduction in the amount payable to her due to his election to receive [combat-related special compensation] CRSC. *Id*. at 2.

The Court noted that the Court of Appeals had not "discuss[ed] the effect of federal preemption on the trial court's subject-matter jurisdiction or [Respondent's] ability to challenge the terms of the consent judgment outside of direct appeal." *Id*. The Court therefore vacated that part of the Court of Appeals' opinion "agreeing with [Petitioner] that [Respondent] was engaging in an improper collateral attack and reverse[d] the balance of the Court of Appeals' opinion…."

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Id. Finally, the Court "overrule[d] the Court of Appeals' opinion in *Megee v Carmine*, [290 Mich App 551; 802 NW2d 669 (2010)] which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC." *Id*. at 2-3.

The Court remanded to the Court of Appeals for it to consider "the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal" and "address the effect of [this Court's] holdings on [Respondent's] ability to challenge the terms of the consent judgment." *Id*.

Respondent filed a motion for rehearing or clarification concerning the scope of the remand. On July 24, 2020, this Court denied that motion. Six days later, on July 30, 2020, the Court of Appeals issued its opinion. It ruled 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,

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> subject matter jurisdiction cannot be granted by implied or express stipulation of the litigants. Accordingly, in the instant case, [Respondent] did not engage in an improper collateral attack on the consent judgment and the trail 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), Slip Op. at 2 (internal citations and quotation marks omitted).

The court remanded to the trial court for further proceedings. *Id*. at 3.

By way of her application, Petitioner seeks leave to appeal the Court of Appeals' opinion. Petitioner argues that state courts are not deprived of subject-matter jurisdiction when principles of federal preemption apply. See Petitioner's Application for Leave to Appeal (ALTA) (After Second Remand), p. iv. Petitioner also contends that error in the exercise of a court's subject-matter jurisdiction cannot be collaterally attacked. *Id*. Petitioner makes two basic arguments in seeking what would be this Court's third time reviewing this case. First, Petitioner claims the Court of Appeals erred in concluding that state courts are deprived of subject matter jurisdiction when principles of federal preemption apply. Second, Petitioner claims the Court of Appeals erred in ruling that Respondent did not engage in an improper collateral attack on the judgment. Respondent submits the following in reply.

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COUNTER-ARGUMENTS

I. CONGRESS RETAINS PRIMARY AND EXCLUSIVE JURISDICTION AND AUTHORITY OVER ALL VETERANS' DISABILITY BENEFITS

A. Federal Law Always Preempted State Law Concerning Federal Military Benefits

Federal law controls the status of military and veterans' benefits and therefore preempts state law *unless* Congress says otherwise. *Howell*, 137 S. Ct. at 1404. See also *Mansell*, 490 US at 588, 589. In its April 29, 2020 opinion, this Court ruled that 38 USC § 5301 preempted state law to the extent that Respondent agreed to dispossess himself of his federal veterans' disability pay in direct contravention of that provision. That is, this Court held that the state court was preempted and without authority to adjudicate with respect to the veterans' benefits at issue in this case because federal law preempted state law on the issue and because the agreement Respondent made to divest himself of his federal disability pay was an "impermissible assignment" under a positive federal statute, 38 USC § 5301(a)(3). This decision was consistent, as it must be, with the Supreme Court's decision in *Howell*, *supra*, which held under § 5301 "[s]tate courts cannot 'vest' that which (under

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governing federal law) they have no authority to give." See *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994).

Contrary to what Petitioner claims on page 18 of her application, this rule of exclusive federal preemption has *always applied* in the context of the exercise by Congress of its enumerated powers over military affairs and there is ample authority from the United States Supreme Court to support it. See *United States v Hall*, 98 US 343, 346-356; 25 L Ed 180 (1878); *Hines v Lowrey*, 305 US 85, 90-91; 59 S Ct 31; 83 L Ed 56 (1938); *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1949); *United States v. Oregon*, 366 US 643, 648-649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Free v Bland*, 369 US 663, 666; 82 S Ct 1089; 8 L Ed 2d 180 (1962); *McCarty v McCarty*, 453 US 210, 220-223; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981); *Mansell*, 490 US at 587; *Howell*, 137 S Ct at 1404.

Thus, as the Supreme Court has recognized "a state divorce decree, like other law governing the economic aspects of domestic relations, must *give way* to clearly conflicting federal enactments." *Ridgway*, *supra* (emphasis added). *Howell* simply reconfirmed that "*McCarty*,

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with its rule of federal preemption, still applies." *Id*. at 1404. Indeed, in its April 29 opinion, this Court similarly recognized that federal law has *always applied* to preempt state courts from invading these premises. Slip Op at 16, n 51.

Where federal law unequivocally preempts state law, as it does here, state law is "without effect". *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2013), citing *Maryland v Louisiana*, 451 US 725, 746; 1091 S Ct 2114; 68 L Ed 2d 576 (1981). To say that in such cases state law is "without effect" *means* that the state court *lacks* the authority and the *constitutional* jurisdiction to encroach upon the sovereign realm of those federal powers that have been expressly delegated to and retained by the national government under Article I. "That principle is but a necessary consequence of the Supremacy Clause of our National Constitution." *Ridgway*, 454 US at 55.

Given the consistent statement by the Court that federal law has *always* preempted state law in this particular subject matter, and its equally consistent acknowledgement that in order for state law *not to be preempted* in this area, Congress must so provide, it is no surprise that when Congress does so, its "affirmative grant of authority", i.e., its

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vesting of constitutional jurisdiction, to state courts is both "precise" and "limited". *Mansell*, 490 US at 588, 589; *Howell*, 137 S Ct at 1404.

Finally, to close the point, the Supreme Court in *Howell* did, in fact, conclude that this absolute preemption applied to all military benefits *unless* Congress provides otherwise. See *Howell*, *supra* at 1406. Thus, contrary to Petitioner's assertion, Congress *does have total and absolute authority over the designation and provision of veteran's benefits* under Article I, Section 8…of the US Constitution." Petitioner's ALTA, p. 19 (internal citations omitted). This is an important point to understand because while a state court may make an erroneous interpretation of federal law, it can never order or enforce an obligation that Congress has never given it the power to impose. As explained herein, this is especially true where (1) a federal statute has by positive and affirmative language *explicitly prohibited* state courts from exercising *any legal or equitable power* over the issue, see 38 USC § 5301(a)(1), and (2) a comprehensive administrative, regulatory, and judicial apparatus has been established by Congress to address *all claims* regarding these benefits and their division among veterans and their dependents exclusive of *any other* person, agency or court. See 38 USC § 511(a) (Secretary of Veterans Affairs "shall decide all questions of

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law and fact" respecting claims for veterans' benefits and such decisions are final and conclusive as to any other court); 38 USC § 7251 (Article I Court established to address appeals of all such decisions).

Also important to address in response to Petitioner's application is the misunderstanding concerning the proper orientation of Congress's exercise of its enumerated military powers in the area of family law. The proper starting point is federal preemption applies *unless* Congress has lifted that preemption and *granted* the states the authority over the particular benefits at issue. This was clearly stated in *McCarty*, 453 US at 223-234 and nn 22 and 23; *Ridgway*, 454 US at 52-63 ; *Mansell*, 490 US at 589, 590; and *Howell* 137 S Ct at 1404. Petitioner frames the question as requiring Respondent to focus the analysis on "whether the federal statutes governing veterans' and military disability benefits deprive the state courts of subject-matter jurisdiction". See Petitioner's ALTA at 10. But, the fact is that it is not the federal statute that must specifically remove the state court's authority, but the federal statute that must grant it the authority in the first place. The state does not have preexisting authority. Otherwise, state compliance with the Supremacy Clause would be optional. This has never been the rule of law.

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Respondent makes the "sweeping assertion" that all federal preemption deprives the state courts of subject-matter jurisdiction because where federal preemption exists, the state must demonstrate that it has been given the *authority* to legislate or adjudicate, as the case may be, in the particular subject. If it cannot do this, its acts are "without effect". *Beek*, 495 Mich at 10, citing *Maryland*, 451 US at 746. Because the existence of subject-matter jurisdiction depends on a court's "authority" to rule upon the issue it seeks to adjudicate, its acts in excess of that authority or simply extra-jurisdictional, void, and of no force or effect. *Driver*, 264 Mich at 50-51; *Straus*, 459 Mich at 532; *Bowie*, 441 Mich at 39. This is the law of subject-matter jurisdiction supported by the United States Supreme Court and by this Court. *Driver*, *supra* at 50; *Windsor*, *supra*, *Ex parte Rowland*, 104 US at 612; *Ex parte Lange*, 85 US at 176-178. The tendency of state courts to over-simplify the subject matter jurisdiction issue and make it only a question of a state court's jurisdiction over the general subject-matter of the case, i.e., divorce, and the parties, i.e., personal jurisdiction, obfuscates the obvious – that a state court can only act upon that which has been *delegated* to it. Acts in excess are void.

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To be sure, the Tenth Amendment herds all those powers *not delegated* to the United States by the Constitution into the State's realm, but it immediately follows with the complimentary disclaimer that the State retains no sovereign authority in those powers so delegated. See *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).

There is a presumption that Congress's exercise of its power in the premises of Article I, § 8 are constitutionally appropriate, supreme, and employed to execute a delegated power. *Id*. 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. Even Petitioner's cited cases that correctly recognized that a state court is an adequate forum to address claims under federal law admit that the state is bound by the "limitations imposed by the Supremacy Clause." Petitioner's ALTA at 11-12. Jurisdiction over issues concerning veterans' benefits lies

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exclusively within Congress's federal authority *unless* that jurisdiction has been given over to the states.

B. Congress Gave the Secretary of Veterans Affairs Primary and Exclusive Jurisdiction Over All Claims for Benefits

Respondent does not have to convince this Court that the United States Supreme Court in two centuries of jurisprudence has jurisdictionally limited state courts in this subject because Congress itself has done so. In 1988, Congress reinforced what was already broad jurisdiction given to the Veterans Administration over all issues concerning veterans' benefits when it *expanded* the exclusive jurisdiction of the Secretary of Veterans Affairs over *all claims* for such benefits by veterans *and* dependents as to *any* court. Public Law 100-687, November 18, 1988, 38 USC § 511(a). This provision states: "The Secretary [of Veterans Affairs] 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*." (emphasis added). This provision continues, with exceptions not relevant here: "[T]he 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

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of mandamus or otherwise." (emphasis added). This provision clearly places the initial (that is, primary) jurisdiction and exclusive authority in the Secretary to decide any question of law or fact concerning the disability benefits paid to a disabled veteran. It also clearly excludes all other officials and courts from judicially reviewing such decisions. A state court that makes a ruling or issues a decree forcing a disabled veteran to part with benefits that the Secretary has already determined should go only to him or her would be directly and automatically contradicting 38 USC § 511(a). By definition, this would be an extra-jurisdictional act.

Moreover, as recognized by this Court and many others, both before and after *Howell*, 38 USC § 5301 affirmatively prohibits a state court from exercising *any* legal or equitable process over veterans' benefits. As this Court acknowledged in its April 29, 2020 opinion, the statute even prohibits the veteran from entering into a voluntary contractual agreement to dispossess himself of these benefits. If there is any doubt about the jurisdictional reach of this provision, the statute *voids* from inception any such agreements. A contract that is "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).

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Likewise, a statute that renders a contract clearly unenforceable from its 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).

C. Congress Has Created an Exclusive, Separate and Independent Federal Judicial Body to Review All Decisions Concerning Veterans' Benefits

Another dispositive factor Petitioner cites as somehow diminishing the importance of federal legislation benefitting veterans in the hierarchy of federal law passed pursuant to Congress's enumerated powers (even though there is no such ranking order or hierarchy), is the contention that subject-matter jurisdiction is lacking only where there is an "exclusive federal forum" or a designated "federal forum" for resolution of the types of claims or disputes at issue. Petitioner's ALTA at 11-14.

However, this statement itself is questionable. The genesis of jurisprudence explaining the *jurisdictional* limitations on state courts to make decisions beyond their constitutional authority because they are in contravention of Congress's enumerated powers admit of no such qualification.

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If a state court can ignore the effect of a federal statute, which by its plain language declares an act to be void from inception, and which, in any event, needs no such declaration because it is paramount, then the state can "subvert the very foundation of all written constitutions" and "declare that an act, which according to the principles and the theory of our government, *is entirely void*; is yet, in practice, completely obligatory." *Marbury v Madison*, 5 US 137, 178 2 L Ed 60 (1803) (emphasis added). "The *nullity of any act*, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law." *Gibbons v Ogden*, 22 US 1, 210-211; 6 L Ed 23 (1824) (emphasis added). Therefore, there is no necessity for an independent federal forum to declare the obvious.

In *Hines v Davidowitz*, 312 US 52, 62-63; 61 S Ct 399; 85 L Ed 581 (1941), the Court noted that it has consistently recognized Congress's 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:

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> 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 v Feurstein*, 308 US 433, 440, n 12; 60 S Ct 343; 84 L Ed 370 (1940), 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 judgment *unassailable on collateral attack* is not a concept unknown to our federal system." (emphasis added).

The Court there cited to *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56 (1938), a case addressing Congress's exercise of its enumerated military powers regarding veterans' benefits in support of the same principle. There, the Court came to the same conclusion regarding the payment of attorney fees from a veterans' disability benefits *beyond that* authorized by the statute. The act was void and could not be sanctioned or approved by the state court. None of these cases based the primary conclusion that a state court lacks jurisdiction

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to proceed over matters governed by federal supremacy on the existence of a federal forum; indeed, the existence of the latter is merely a *consequence* of the former state of things. That a state court may lose subject matter jurisdiction to issue a judgment or approve of a decree preempted by federal law is a natural consequence of the operative language of the Supremacy Clause, confirmed by the Tenth Amendment, through which the states affirmatively surrendered their sovereign power to bind those through the exercise of their inferior state functions and processes.

Nonetheless, if the existence of an exclusive federal forum is seen as the indicator rather than simply the consequence of a lack of jurisdiction in state courts over the subject matter, as already noted, Congress, in addition to giving the Veterans Administration primary and exclusive jurisdiction over all claims for benefits by veterans and dependents, created a separate Article I Court, the United States Court of Appeals for Veterans Claims, which is the exclusive judicial reviewing authority concerning *any* disposition of a claim for or the division of a veteran's benefits. See Public Law 100-687, November 18, 1988, 38 USC § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court

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of Appeals for Veterans Claims."). Prior to 1988, federal law did not give the Secretary initial (and therefore *primary*) jurisdiction to "decide all questions of law or fact" regarding veterans' benefits, and it limited the jurisdiction of the Veterans Administration over claims to such benefits to *federal* courts – "court[s] of the *United States*". See 38 USC § 211(a) (1970) (emphasis added). Placing the primary and initial decision over *all* questions of *law and fact* concerning the division of benefits to veterans *and* dependents within the exclusive jurisdiction of the executive agency created for that purpose and creating an internal and wholly "federal" court system for review of that agency's decisions, with a linear appellate track straight to the Supreme Court, was a change in the law designed to remove any doubts and uncertainties created by having multiple concurrent jurisdictional decision-making authorities and therefore multiple states addressing the diverse considerations necessary when considering a disabled veteran's needs for his or her own benefits and, consequently, any potential needs of his or her dependents. See, e.g., *Henderson v Shinseki*, 562 US 428, 441; 131 S Ct 1197; 179 L Ed 2d 159 (2011). As explained by one court, "[i]n order to dissuade the judiciary from ignoring 'the explicit language that Congress used in isolating decisions of the Administrator from judicial

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scrutiny,'…Congress overhauled both the internal review mechanism and § 211 in the [Veterans Judicial Review Act] VJRA. Pub. L. No. 100-687, 102 Stat. 4105." *Veterans for Common Sense v Shinseki*, 678 F 3d 1013, 1021 (9th Cir 2012), cert denied 568 US 1086 (2013).

Indeed, just before this momentous change, the Supreme Court predicated its necessity in a case involving the division of military disability benefits by and between veterans and dependents. In *Rose v Rose*, 481 US 619, 629-630; 107 S Ct 2029; 95 L Ed 2d 599 (1987), the Court noted that under 38 USC § 211, there was no definitive language that preempted the exercise of *state court* jurisdiction to enforce a veteran's obligation to use his disability pay for a child support obligation imposed by a state court. Afterwards, in 1988, Congress enacted the VJRA, made the Secretary the arbiter of all questions of law and fact, *and*, most importantly, removed the jurisdictional limitation as to only federal courts and included within the restriction *any court*. See 38 USC § 511(a). The language in 38 USC § 511 could not be more explicit.

As this Court acknowledged in its April 29, 2020 opinion, *nowhere* in federal law did Congress *ever* give authority, i.e., jurisdictional

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control, over the specific benefits provided by Congress's appropriations of federal monies under its enumerated military powers. Finally, as this Court further acknowledged in its unanimous opinion 38 USC § 5301 provides positive affirmation of these principles of retained primary jurisdiction and sovereign authority over these matters by erecting an unmistakable jurisdictional barrier that prohibits state courts from utilizing "*any legal or equitable process, whatever* whether before or after receipt" of these monies. 38 USC § 5301(a)(1) (emphasis added). *Any legal or equitable process* with respect to these benefits when they are in the hands of the government (i.e., before their receipt), or after their receipt by the veteran, of course precludes *any exercise of jurisdiction* over these funds. Finally, as the Court also acknowledged in its unanimous opinion, 38 USC § 5301(a)(3) even applies to prohibit the principles of private contract law from being used to get around the absolute prohibitions of federal law in this particular subject matter.

Respondent respectfully submits that *any* claim that might relate to or involve the disposition of a veterans' federal disability benefits necessarily affects a decision that has *already been made* by the VA Secretary concerning a claim for those benefits by the veteran and his or her dependents. The VA's decision as to how much of those benefits

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should be paid to the veteran and the reasons those payments are made cannot be interfered with or disrupted by a contrary ruling by any other person or court. 38 USC § 511(a). To be clear, any decision by a state court that would cause a diversion of these protected funds away from the federally designated beneficiary (usually the veteran) to any other person or entity would be an extra-jurisdictional act and in direct conflict with the provisions of 38 USC § 511, the VJRA and the anti-attachment provision, 38 USC § 5301.

So, to conclude that a state court is without *authority*, is to say that it has no jurisdiction, and here, that is constitutional jurisdiction, to issue a contrary ruling. See 38 USC § 511(a) (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" and stating that "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"). Unless Congress has actually given state courts authority over veterans' benefits, jurisdiction has been withheld. See *Howell v Howell*, 137 S Ct at 1404, citing *McCarty*, *supra* and *Mansell*, *supra*.

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As the Court of Appeals noted on the second remand by this Court, the general rule is that "[s]tate courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable." *Foster v Foster (On Second Remand)*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, issued July 30, 2020 (Docket No. 324853), Slip Op at 2-3. This is simply an acknowledgment that in the particular circumstances where federal law occupies the entire field of a subject matter, the state courts are "without authority" to interfere with the federal policy embodied in the statute and their acts are "without effect". *Beek*, *supra*.

Moreover, directly responding to Petitioner's recitation of Justice Viviano's general statement in his concurrence in this Court's unanimous opinion of April 29, 2020, there is, indeed, a congressionally designated federal forum for resolution of the class of disputes at issue. See Petitioner's ALTA, p 11. As a matter of primary *and* exclusive jurisdiction, the Secretary of Veterans Affairs "*shall decide* all questions of *law* and *fact* necessary to a decision by the Secretary under a law that affects the provision of benefits…to veterans or the dependents or survivors of veterans." 38 USC § 511(a). Congress then created an Article I Court to address appeals from such decisions,

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which, by the same subsection are deemed "final and conclusive" and unreviewable by "*any other official or by any court*." See also 38 USC § 7251. The rules for this forum's review of all such questions is also established by Congress. See 38 USC § 7261.

To say that a state court has any residual or concurrent jurisdiction to make a decision that these federal benefits which form the basis for and are in fact the result of a decision by the Secretary on the veteran's claim for benefits, which entails the veteran's specific disabilities and needs, would be to refuse to recognize the federal forum's primary and exclusive jurisdiction. In any event, the existence of an exclusive federal forum to deal with these specific and nuanced issues of the disposition of federal disability benefits, among the diverse and complex issues concerning dependents' rights, insurance, survivor's and dependent's benefits, living allowances, and other family-related issues is rather a consequence of the importance and supremacy of federal law in this area rather than any indicator that the state does or does not have subject matter jurisdiction. Any surrender of jurisdiction to the states in these matters would cause the precise disruptions in the federal plan that are supposed to be guarded against by Congress's delegated powers in these premises.

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II. RES JUDICATA DOES NOT APPLY IF A STATE COURT LACKS CONSTITUTIONAL JURISDICTION TO RULE UPON AN ISSUE GOVERNED BY FEDERAL LAW – FEDERAL LAW PROTECTING VETERANS' DISABILITY BENEFITS REMOVES ANY LEGAL OR EQUITABLE POWERS FROM STATE COURTS TO DECIDE HOW SUCH BENEFITS SHOULD BE DIVIDED

The second part of Petitioner's application attacks the Court of Appeals' conclusion that Respondent is allowed to collaterally attack the trial court's judgment and orders requiring him to have paid over his protected disability benefits. Petitioner claims that the federal law does not protect the disability benefits at issue. Petitioner also claims that the principle of res judicata applies even where federal law preempts state law.

The fact that res judicata does not apply to this issue and that Respondent is allowed to collaterally attack the trial court's judgment is not only rooted in the fact that states lack subject matter jurisdiction in these premises, but also in the fact that the states have always been prohibited by statute from using any legal or equitable process whatever to violate the federal mandate.

Veterans' benefits have been affirmatively protected from state legal and equitable process since at least the 1870's. *United States v Hall*,

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98 US 343, 349-355, 25 L Ed 180 (1878). Agreements to pay these benefits to a non-beneficiary have also been deemed by the federal statutes that preceded 38 USC § 5301 to be "wholly void" and subject to recovery in assumpsit. *Id*. (citing cases). The Court, in 1878, stated of canvassing the anti-attachment provisions in veterans' benefit legislation that "[t]hese diverse selections from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted *the exclusive use and benefit of the money appropriated and paid for that purpose*. *Id.* at 352 (emphasis added). Exclusive use and benefit cannot occur if Appellant is forever bound by an agreement which the statute says is void from inception.

Interpretation of these provisions has been consistently in favor of protecting them against all state authority and control. The United States Supreme Court has ruled that 38 USC § 5301 is to be interpreted *liberally* in favor of the beneficiary's rights and the benefits covered by this statute are inviolate. In *Porter v Aetna Cas and Surety Co*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962), the Court ruled that 38

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USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*" and thus diversion by "*any legal or equitable process*" is forbidden. *Id* (emphasis added). Accord, *Ridgway v Ridgway*, 454 US 46, 60-61; 102 S Ct 49; 70 L Ed 2d 39 (1981); *Rose v Rose*, 481 US 619, 630; 107 S Ct 2029; 95 L Ed 2d 599 (1987); and *Howell v Howell*, 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017). See also *Henderson v Shinseki*, 562 US 428, 441; 131 S Ct 1197; 179 L Ed 2d 159 (2011) (stating that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

More importantly, in the context of the division of "property" in state court divorce proceedings many state cases have ruled that state courts simply lack jurisdiction over veterans' disability benefits under 38 USC § 5301. See, e.g., *In re Marriage of Hapaniewski*, 438 NE2d 466, 469 (Ill App 1982) ("classification of a veteran's disability benefits as marital property would diminish the benefits that Congress has said should go the veteran and would cause an injury to Federal interests which is forbidden by the supremacy clause of the Federal Constitution" and "veterans' disability benefits are his nonmarital assets."); *Ryan v*

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Ryan, 257 Neb 682, 686-693; 600 NW2d 739 (Neb 1999) (court exceeded its jurisdiction to the extent that divorce judgment divided prohibited veterans' disability benefits and order was void and subject to collateral attack); *Youngbluth v Youngbluth*, 188 Vt 53; 6 A 3d 677 (2010) (38 USC § 5301 jurisdictionally barred state courts from dividing prohibited veterans' disability benefits as property and stating that *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, inter alia, *King v King,* 149 Mich App 495, 386 NW 2d 562 (1986)).

In its April 29, 2020 opinion this Court concluded, consistent with these other cases, that "federal law preempts state law such that the consent judgment [which contained the impermissible assignment of Appellant's veterans' disability benefits under 38 USC § 5301(a)(3)(A)] is unenforceable *to the extent it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC*." Slip Op at 2 (emphasis added). The Court also ruled that preemption *always applied*. *Id*. at 10.[1]

[1] The Court acknowledged: "*Mansell* [*v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989)] concluded that *McCarty* [*v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981)] had not been abrogated by the USFSPA, leaving in

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The Court of Appeals' conclusion was consistent with prevailing law. Since the consent agreement was "void from inception" as the federal statute states, then according to basic legal principles accepted in every jurisdiction, it was never valid, and thus, it can be challenged at any time, even after the time for appeal has passed. A contract that is "void from its inception" is treated as if it never existed. *Compton v Joseph Lepak, DDS, PC*, 154 Mich App 360, 371-72; 397 NW2d 311 (1986). Likewise, a statute that renders a contract clearly unenforceable from its 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). Indeed, the Supreme Court of the United States reiterated under 38 USC § 5301, "[s]tate courts cannot *vest* that which (under governing federal law) they *lack the authority to give*." *Howell*, 137 S Ct at 1405 (emphasis added). Put another way, state courts are without power, i.e., jurisdiction, to

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place the general rule that state-court authority over veterans' benefits is preempted by federal law." Later, the Court again explained that "*Mansell* concluded that *McCarty* had not been abrogated by the USFSPA, leaving in place the general rule that state-court authority over veterans' benefits is preempted by federal law." Slip Op at 10. Finally, the Court acknowledges that the Supreme Court's 2017 decision in *Howell*, *supra*, "reiterated its conclusion from *Mansell*, stating that 'federal law completely pre-empts the States from treating waived military retirement pay as divisible community property.'" *Id*. at 13.

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dispose of the federal benefit in a manner contrary to the statute. Indeed, the lack of authority in a state court to vest a future right to the benefits at issue is confirmed by the statute's language which renders any agreement to do so *void from inception*. The state's inability to adjudicate is absolute.

Petitioner does not appear to recognize that the statute absolutely 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).

An erroneous decision by a state court in applying preemptive federal law or its failure to apply that law correctly is an act that is in excess of the court's authority and jurisdiction. There are three elements of subject matter jurisdiction pertinent to the inquiry of whether a court has authority to enter a binding and unassailable judgment. Relevant to this case is the rule that when a court acts in excess of its authority in ruling on an issue of federal law or in authorizing a violation thereof, it loses its jurisdiction to proceed. Any order in excess of that jurisdictional authority is void. See, e.g., *Ryan v*

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Ryan, 257 Neb 682, 686-693; 600 NW2d 739 (Neb 1999) (court exceeded its jurisdiction to the extent that divorce judgment divided prohibited veterans' disability benefits and order was void and subject to collateral attack); *Youngbluth v Youngbluth*, 188 Vt 53; 6 A 3d 677 (2010) (38 USC § 5301 jurisdictionally barred state courts from dividing prohibited veterans' disability benefits as property and stating that *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, inter alia, *King v King,* 149 Mich App 495, 386 NW 2d 562 (1986)).

Preclusion of a claim on the basis of res judicata "is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it." *Windsor v McVeigh*, 93 US 274, 282-283 (1876). The Court stated: "The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." *Id*. at 282.

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This is a prevalent rule that has been adopted in Michigan by the Supreme Court citing United States Supreme Court decisions on the subject, which decisions have also been relied on by the Court concerning the preemptive rule regarding military benefits. "This meaning of jurisdiction is recognized by this court." *Driver v Union Industrial Trust & Savings Bank*, 264 Mich 42, 50; 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)). In *Driver*, this Court plainly stated the rule: "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." *Id.* In *Rowland*, *supra* at 612, the United States Supreme Court stated that a command "in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements." "Such is the settled rule of decision in this court." *Id.*, citing *Lange*, *supra*.

In terms of federal preemption and property rights the Court rendered void and subject to collateral attack a court's order to divest

heirs of property where a federal statute required the property to pass back to the heirs upon the condemnee's death. *Bigelow v Forrest*, 76 US 339, 351; 19 L Ed 696 (1869). The Court explained that "[d]oubtless a decree of a court, having *jurisdiction* to make the decree, cannot be impeached collaterally; but under the act of Congress, the District Court *had no power to order a sale* which should confer upon the purchase rights outlasting the life of French Forrest [the condemnee]." *Id*. (emphasis added). "Had it done so it would have *transcended its jurisdiction*." *Id*. The Court noted that collateral attack was not even an issue because that which purported to order what was in excess of the court's jurisdiction to give under the statute. *Id*. In *Lange*, 85 US at 178 the Court expounded upon the court's acting in excess of their jurisdiction and authority "in a case where it *had full jurisdiction* to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, *and something more*, and *this excess was held simply void*." (emphasis added).

In *Howell*, 137 S Ct at 1405 the Court again stated this with respect to state court orders attempting to vest rights to property in the benefits protected by 38 USC § 5301. "State courts cannot 'vest' that which

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(under governing federal law) they lack the authority to give. Cf. 38 USC § 5301(a)(1) (providing that disability benefits are generally nonassignable)." See also *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56 (1938) (a case stating the same principle and addressing Congress's exercise of its enumerated military powers to protect veterans' disability benefits from being subject to a fee *beyond that* authorized by the statute). Importantly, *Lowrey* was cited by the Court in *Kalb v Feurstein*, 308 US 433, 440, nn 11 and 12; 60 S Ct 343; 84 L Ed 370 (1940), which also followed the rule that a court cannot act in excess of the jurisdiction and authority conferred upon it by federal law. "That 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." *Id*. at n 12 (emphasis added).

This is the same rule followed by this Court. State courts simply cannot act in excess of their authority and jurisdiction. See *Driver*, 264 Mich at 51, which cites *Rowland*, *supra* and *Windsor*, *supra*. In any event, the statute at issue in this case automatically precludes judgments from becoming final because it "voids" from inception any offending assignments, which this Court has now ruled was present in the instant

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case. Slip Op at 18 and n 58, citing 38 USC § 5301(a)(3). Further, contrary to the speculation in Justice Viviano's concurrence, it is not *only* cases where Congress has created exclusive jurisdiction or tribunals to address particular claims that remove the "subject matter" from the state court to act where federal law preempts. The "labor cases" in Michigan cited by Appellant provide a starting point for the general statement of the jurisdictional rule in the context of federal preemption, noted above, that a state court that acts in excess of federal law exceeds its jurisdiction and loses its authority to proceed to a final and preclusive judgment as to the particular subject.

In fact, the cases from the United States Supreme Court provide a much broader statement in all cases where Congress has fully preempted the field, which, in the area of the exercise of its enumerated military powers, it has done so vis-à-vis state family and domestic law. See, inter alia, *Wissner v Wissner*, 388 US 655, 658-661; 70 S Ct 398; 94 L Ed 424 (1950) (where the state court ordered the diversion of future payments of a veteran's life insurance benefits to a former spouse (who was not the designated beneficiary) the Court said it was a seizure in "flat conflict" with the anti-assignment provision and of no effect per *McCulloch v Maryland*, 17 US 316, 400 (1819)); *McCarty v McCarty*,

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453 US 210, 223-234 and nn 22 and 23; 101 S Ct 2728; 69 L Ed 2d 589; (1981) (holding that the source of the military retirement and benefits system is Congress's enumerated military powers, Congress never authorized or required property division of military retired pay; that the anti-assignment provisions equivalent to 38 USC § 5301 prohibit attachment and cannot be avoided by offsetting awards or orders of indemnification because the former spouse does not receive the benefits; and "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member"; "the law of the State is not competent to do this") (internal quotations and citations omitted); *Ridgway v Ridgway*, 454 US 46, 52-63; 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981) (where federal statute directly contradicts and conflicts with the state court's disposition, the Supreme Court's authority extends "over state judgments *to the extent that* they incorrectly adjudge federal rights"; even in the area of family law the Court has protected under the Supremacy Clause the rights and expectancies established by federal law and in all such cases state law must yield; "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other"; interpreting an anti-assignment provision equivalent to 38 USC § 5301

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and stating that it "pre-empts all state law that stands in its way"; "[i]t protects the benefits from legal process '[notwithstanding] any other law…of any State'"; "[i]t prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy."); and *Howell*, 137 S Ct at 1404-1405 (directly applying 38 USC § 5301 and noting state courts cannot vest benefits in anyone other than the beneficiary because they do not have the authority to do so). This makes sense because the creation of a separate federal forum is but a consequence of the federal preemption that already exists. As stated earlier, it is not an indicator that state courts do not have subject matter jurisdiction to act – that fact is established by the nature of preemption under the Supremacy Clause. Indeed, as this Court has recently noted, state law is simply "without effect" when contrary to preemptive federal law. *Beek*, 495 Mich at 10; *Maryland*, 451 US at 746 *Gibbons*, 22 US at 211.

This is the same principle enunciated by the Supreme Court in *Bigelow*, *supra*, *Lange*, *supra*; *Windsor*, *supra*; and *Rowland*, *supra*. Orders and judgments contrary to federal law are beyond the authority of the state court and in excess of their constitutional jurisdiction and therefore void. This is equivalent to saying that such orders are "without

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effect". *Beek*, *supra*. Accord *Driver*, 264 Mich at 50, 51.

Maryland relied on the principles enunciated in *McCulloch*, *supra* and *Gibbons*, *supra*, commerce clause cases, both of which were also relied on in *McCarty* and *Ridgway* establishing the same absolute and exclusive federal preemption in the area of exercise by Congress of its enumerated military powers. As reiterated by the Court in *Mansell*, 490 US at 594-595 and Howell, 137 S Ct at 1404, and as acknowledged by this Court at page 10 of its April 29, 2020 opinion, this rule of absolute and exclusive federal preemption in this area "still applies". *Howell*, 137 S Ct at 1404.

In all such cases, the states have ceded to the national government their sovereign authority to act in excess of their jurisdiction. Thus, while they may exercise concurrent jurisdiction to decide, they may not contravene the supreme federal law by failing to apply it or by applying it erroneously. If they do either of these, they exceed their constitutional jurisdiction and are subject to collateral attack. To foreclose the vindication of the federal rights violated on the basis of error in the state court's decision completely upends the constitutional balance.

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The Supreme Court has stated that once it "has 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).

As Justice Story explained over 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be *truly deplorable*." *Martin v Hunter's Lessee*, 14 US 304, 348; 4 L Ed 97 (1816) (emphasis added).

The Court in *McCarty* said it quite plainly in the very context of Congress's exercise of its plenary authority in matters of the military powers of the national government: "[F]unds of the government are specifically appropriated to certain national objects, and if such

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appropriations may be *diverted* and *defeated by state process or otherwise*, the functions of the government may be suspended." *McCarty*, 453 US at 229, n 23 (emphasis added), quoting *Buchanan v Alexander*, 45 US 20; 11 L Ed 857 (1846). This is why under the Supremacy Clause states may not "decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.'" *Martin*, 14 US at 340-341. Where a state has not "placed any limit on the issues that it will entertain in collateral proceedings…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) (holding that even where the federal rule is not a new rule of law (as this Court has acknowledged in this case per *Howell*, reiterating the rule from *Mansell* and *McCarty*, see Slip Op at 10, 13, 16, and n 51), and, where the state supreme court considered the merits of the federal claims (as this Court has done with respect to the applicability of 38 USC § 5301), the state court cannot refuse to grant the relief that federal law requires). Here, that leads to a rather simple conclusion because the applicable statute removes the authority from state courts to exercise *any* legal or equitable power over the benefits at issue and voids from inception any impermissible

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agreement or assignment of collateral for such an agreement. Slip Op at 18; 38 USC § 5301(a)(1) and (a)(3). See also *Howell*, 137 S Ct at 1405, (citing § 5301 and stating that "state courts cannot vest that which they have no authority to give").

Thus, that state courts lose subject matter jurisdiction or exceed their constitutional jurisdiction in disposing of veterans' benefits in a manner that is expressly contrary to federal law, where such benefits have been provided by the Veterans Administration through the claims administration process, is not a surprising concept when the full scope of federal preemption in this area is considered. Again, this is especially significant when the statute protecting those benefits voids from inception any prohibited agreements or assignments. See 38 USC § 5301(a)(3)(A) and (C). See also *Hall v United States*, 98 US 343, 349-355, 25 L Ed 180 (1878) (citing cases holding any legal or equitable orders diverting veterans' benefits and agreements to do so "wholly void").

No substantive or procedural rule marshaled by the State could legitimize an obligation that the Constitution deprives the State of the power to impose. And, under the Supremacy Clause state collateral

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review courts have no greater power to mandate that an obligation continue where federal law exercised under the auspices of Congress's enumerated powers voids the obligation from 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. *Yates*, *supra*; *Martin*, *supra*.

The judgment of a court having no jurisdiction of the subject-matter or the parties, or the exercise of a power by the court not authorized by the statute is utterly null and void, and may be collaterally assailed. In *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 544; 260 NW 908 (1935), this Court said:

> When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. See also *Fox v Martin*, 287 Mich 147, 153; 283 NW 9 (1938).

In any event, under the interpretive principles applied by the Supreme Court to statutes providing for and protecting benefits for veterans, "*any legal or equitable process*" would include state law principles of res judicata that would act to foreclose the possibility of

collaterally challenging the void order. *Id*. See also *Henderson v Shinseki*, 562 US 428, 441; 131 S Ct 1197; 179 L Ed 2d 159 (2011) (stating that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Porter v Aetna Cas and Surety Co*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962) (stating 38 USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*" and thus diversion by "*any legal or equitable process*" is forbidden) (emphasis added); *Fishgold v Sullivan Drydock & Repair Corp*, 328 US 275, 285; 66 S Ct 1105; 90 L Ed 1230 (1946) ("legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v Lightner*, 319 US 561, 575; 63 S Ct 1223; 87 L Ed 1587 (1943) (federal statutes protecting servicemembers from discrimination by employers is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *United States v Oregon*, 366 US 643, 647; 81 S Ct 1278; 6 L Ed 2d 575, 578 (1961) (stating that "[t]he solicitude of Congress for veterans is of long standing.").

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As explained herein, these protective principles stems from the nature of the supremacy of federal law under the Constitution, not from any particular statutory withdrawal by Congress of jurisdiction from the state courts or a retention thereof by the latter.

The Petitioner's application skirts this issue in over-generalizing the rule that a state court may act in contravention of preemptive federal law and its judgment or order, even if erroneous could be insulated from collateral attack. Clearly, the Supreme Court of the United States has ruled the contrary in a multitude of situations, *not including* those in which the federal statute at issue creates a separate and independent adjudicative forum (even though, as noted, one does exist in the context of all claims concerning benefits paid to veterans and their dependents).

None of the state divorce cases cited by Petitioner address the direct effect of preemptive federal law, particularly the USFSPA and 38 USC § 5301, on the state court's powers. *McGinn v McGinn*, 126 Mich App 689, 690; 337 NW2d 632 (1983) was a case that arose between *McCarty* and the USFSPA, and dealt with a 1976 judgment. Like many cases during this time, the court did not have the benefit of jurisprudence on the USFSPA, nor did it consider 38 USC § 5301's sweeping

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jurisdictional reach and limitations on state courts. *Howell*, *supra*, did in fact address the question of the sanctity of contractual agreements and state court reliance thereon to avoid the clear directive of preexisting federal preemption. *Howell* clearly held that no type of agreement that is a violation of federal law can survive. This is especially true where, as here, this Court recognized that an express federal statute actually prohibits such contractual agreements and makes them void from their inception. See Slip Op. at 18, citing 38 USC § 5301(a)(3). The Supreme Court in *Howell* ruled that 38 USC § 5301 applies to prohibit state courts from vesting veterans' benefits. 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 *Mansell*.

Notwithstanding that § 5301 explicitly states that the agreement in this case was impermissible and void from inception, Petitioner's reliance on California case law from 1981, which ruled that a servicemember's challenge to an agreement to divest himself of protected benefits was res judicata and that this might foreclose the Court of Appeals in this case from a different outcome is highly suspect.

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The state law issue in *Sheldon* was whether the Supreme Court's decision in *McCarty*, *supra*, was "retroactive" and whether it was applicable to cases not final on appeal as of the date *McCarty* was filed. The California Court of Appeals 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.

McCarty, of course, recognized that state law was preempted because Congress occupied the entire field and overrode state family and domestic law. It precluded state courts from counting *any* military benefits as divisible upon divorce as property.

The underlying case in *Sheldon* had been decided on June 8, 1981. The court affirmed an offset – it awarded the full value of the couple's primary residence to the former spouse and it awarded the full value (all benefits) due to the former servicemember. The former

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servicemember did not contest the value of his pension rights as a community property asset.

On June 26, 1981 the Supreme Court decided *McCarty*. The former servicemember in *Sheldon* filed a petition for rehearing arguing *McCarty* compelled the court to reverse the interlocutory judgment and to remand for a new division of the community property and a recharacterization of his pension rights as his separate property. The Court was not addressing the application of a federal statute that prohibits any legal or equitable process from dividing disability benefits, and which voids from inception any agreements or assignments based on such agreements. In other words, the California Court only held that *McCarty* would not apply retroactively on the state law issues of the division between the parties of community property in which the military pension was included in the division of the party's assets. It also ruled that res judicata barred the late challenge.

The Supreme Court of the United States, which at that time had to either take the case on the merits or dismiss it, [2] denied for lack of a substantial federal question. 456 US 941 (1982). A challenge to the

[2] Prior to 1988, 28 USC § 1257(2) required the Court to hear cases from state courts on their merits.

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consent judgment in this case, which the Court has already concluded contained the impermissible assignment under 38 USC § 5301, on the basis of a "summary disposition" by the United States Supreme Court which refused to hear an appeal from California in 1981 for lack of a substantial federal question is significantly misinformed. In light of the history of "summary dispositions" by the Supreme Court and subsequent treatment of the issue, it is a dangerous doctrine to rely on to preclude vindication of constitutional rights, 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.

This "rule" regarding "summary disposition" on the merits by the United States Supreme Court apparently originated when the Supreme Court was *required* to hear the merits of cases appealed from state courts raising federal issues. See note 2, *supra*. The statement itself comes from Justice Brennan in a 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) voted against noting probable jurisdiction and filed separate

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memoranda. Mr. Justice Clark, who also voted against noting probable jurisdiction, also filed a separate memorandum. Justice Stewart recused himself because the case came from the Ohio Supreme Court "where his father then served." *Id.* at 249.

From its very inception, this bold statement on summary dispositions by the Supreme Court was announced by a single Justice with an equal measure of caution and concern. Justice Brennan warned: "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

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> precedents may appear inapplicable to varying fact situations. *Id*.

This "rule", already significantly handicapped from its nascence, was once again stated in *Hicks v Miranda*, 422 US 332, 343-344; 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 of the *Hicks* doctrine on modern civil rights cases due to the Supreme Court's summary disposition of an appeal 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). In any event, it is not at all clear that this "rule" of summary disposition has truly survived.

Some additional criticism of the *Hicks* doctrine is in order. Summary dispositions by way of a denial for lack of a substantial federal question contribute to the difficulty of finding the law by providing insufficient information about what the court actually believed or even decided. These dispositions state only a conclusion, and provide no information about the facts or the reasoning on which the decision is grounded.

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In Supreme Court practice, summary affirmances uphold the judgment but not necessarily the reasoning by which it was reached. The courts of appeals have characterized the import of their summary dispositions in similar terms. 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). Moreover, the Court has never accorded summary dispositions the same precedential weight as decisions rendered by full opinion after plenary consideration, and for that reason one can safely assume that the matter of their jurisprudential significance in pre-1988 cases 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).

The Supreme Court has noted that ascertaining the reach and content of summary actions may itself present issues of real substance. The Court, for example, has recognized that 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

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(1973). As the Court has 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). Moreover, "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). Thus, the Court has stated: "[S]ummary actions do not have the same authority in this Court as do decisions rendered after plenary consideration." *Illinois State Board of Elections v. Socialist Workers Party*, 440 US 173, 180-181; 99 S Ct 983; 59 L Ed 2d 230 (1979). They certainly 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. Yakima Indian Nation*, 439 US 463, 477, n 20; 99 S Ct 740; 58 L Ed 2d 740 (1979).

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Thus, as has been done for nearly three decades in the context of attempts to sequester "off limits" military disability pay, by mischaracterizing what has actually transpired lawyers are able to offer a pretextual excuse for why the question is controlled by "binding" Supreme Court precedent. For example, in *Baker v Nelson*, *supra*, the Supreme 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. *At the time*, but not now, see note 2, *supra*, Supreme Court rules provided for mandatory appeal of federal constitutional challenges to state laws, but if the Supreme Court agreed with the state court's judgment that the state law did not violate the Federal Constitution, it would frequently summarily dismiss the appeal as not raising a substantial federal question. That is what it did in *Baker*.

In any event, since *Baker*, the Court has treated the "*Hicks* rule" as applying only to "the specific challenges presented in the statement 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 (2004). Thus, without searching review of the underlying issues, the importance of a blanket statement that the

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Supreme Court has already substantively ruled on an issue is *specious* at best. This inauspicious "doctrine" can be easily manipulated by those with motives to suppress the ability of state and federal courts to deal with significant issue of public policy and legal developments that have occurred in the interim over many decades and among shifting public policy and changing factual circumstances.

In his dissenting statement from a denial of certiorari in *Colorado Springs Amusement Ltd v Rizzo*, 428 US 913; 96 S Ct 3228; 49 L Ed 2d 1222 (1976), Justice Brennan, who had cautiously announced the rule in *Price*, 360 US at 249, noted that summary dispositions are ambiguous because different Justices may have different, unspoken grounds for deciding to dispose of a case summarily. Justice Brennan also noted the problems posed by the scope of summary dispositions. As an example, he cited a case in which a circuit court relied on a Supreme Court summary disposition even though the issue before the circuit court had not been raised in the jurisdictional statement of the appeal summarily disposed of by the Court. *Id*. at 920, n 6. Justice Brennan also pointed out the 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

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resolved summarily in this Court." *Id*. There is also the risk, he concluded, that courts interpreting summary dispositions will interpret them inconsistently with the doctrines that the Court previously has 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 Supreme Court's limited capacity to address such significant issues, it is no wonder that little confidence is reposed in this doctrine that was enunciated by a divided court with substantially differing view in a case with an evenly split opinion on a subject of extreme controversy. 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 affirmances approve lower court *holdings*, not *reasoning*, such that any potentially dispositive factors could differentiate" decades old cases from "modern challenges" and noting how the subject of election law "has evolved significantly" since an earlier case that was disposed of on summary disposition.

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Notably, the Court has previously emphasized the impact of its capacity constraints on the lower federal and state courts. In rejecting the *Hicks* rule, the Court explained that under the pre-1988 rules, 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, the Court concluded, was a "generally unsatisfactory" solution to its workload concerns because of the apparently precedential 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) (citing *Hicks* and noting the criticism by the Court in its successive letters to Congress endorsing the 1988 reforms to the Court's appellate jurisdiction).

A concerted "academic" effort has been made to mash together the post-judgment occurrences in 1981 just after *McCarty* was issued at a time when the Supreme Court had to accept cases on the merits and a footnote in *Mansell*, 490 US at 586, n 5, that refers back to that "summary disposition", to make the blanket statement that the Supreme

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Court has unequivocally ruled on the issue of whether a state court would apply res judicata when faced with a violation of *statutory federal law* that *voids* from inception any assignment of veterans' benefits is at best a flimsy attempt to place superficial significance on a long-dead issue. Moreover, as noted, the federal statute, 38 USC § 5301, had not even been interpreted or applied in *McCarty* or *Mansell*, as it has now been by *Howell* and this Court. To continue to rely on this now defunct "summary disposition" principle as precedent when a federal statute clearly prohibits any legal or equitable process from being used to dispossess veterans of their disability benefits, and where *Howell* confirmed this statute applies to prevent state courts from exercising unauthorized jurisdiction over these monies, is truly little more than attractive window dressing in an otherwise empty store to the casual passerby. Unfortunately, the result is that it has provided a convenient, if not deceptive, way to get a quick answer to dismiss the violation of the substantive constitutional rights at stake. No more.

The fact that the Supreme Court has intimated that only it can say whether a prior summary dismissal is precedential is telling. Can *any* lower courts narrow precedent based upon these intermittent signals by the Supreme Court? Richard M. Re, *Narrowing Supreme Court*

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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 narrowing.").

To truly understand the subterfuge, one must address the doctrinal developments in the law since *Sheldon*. *McCarty has* been confirmed to have been the law all along – *McCarty* with its rule of absolute federal preemption "still applies." *Howell*, 137 S Ct at 1404. Federal law preempts all state law in this subject *unless* Congress says otherwise. *Id*., citing *Mansell*, 490 US at 589. *Ridgway*, which was issued the same term as *McCarty*, said that this preemption is absolute citing *Gibbons*, *supra* and *Free*, *supra*, and stating that its existence *voids* any state court orders that stands in its way. *Ridgway*, 454 US at 61. *Ridgway* applied the equivalent anti-assignment provision to 38 USC § 5301 and noted it voids out any state court orders. *Mansell*, which specifically reserved addressing 38 USC § 5301's applicability, nonetheless confirmed *McCarty's* and *Ridgway's* sweeping jurisdictional reach over the states in these matters saying Congressional intent and purpose does not even need to be consulted.

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Mansell, 490 US at 593, 594. Finally, as this Court recognized, *Howell* has gone a step further and actually applied § 5301 to all benefits and said simply that state courts have "no authority," meaning, *jurisdiction*, to vest these benefits in anyone other than the beneficiary.

Finally, 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. Not only has there been significant doctrinal development and clarification in the law, but the precise federal statute that Respondent has claimed from the beginning rendered the agreement he entered into void as a matter of law has been interpreted as such and applied by the United States Supreme Court. Can the state courts deny the applicability of this law on the basis that because it had subject matter jurisdiction over the state court divorce proceedings it precludes collateral review of any judgment entered that exceeded the courts' authority in sanctioning the illegal arrangement?

Aside from these "doctrinal developments" in the law, the Court should be reminded what has occurred in this country in the 40 years since *McCarty*. This nation has been at war in a continuous operational

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stance in one theatre or another for nearly 3 decades. Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). There are now four and a half million disabled veterans. Seventy percent of this number are greater than 70 percent disabled. See U.S. Census Bureau, Facts for Features. As of March 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New.[3] The number was well above 4.5 million as of May 2019 and the percentage is increasing by 117 percent.[4]

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*

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

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

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

Finally, it must be mentioned that an estimated 17 to 22 veterans commit suicide every day and the number may actually be much higher.[5] The stressors faced by the disabled veteran and his or her

[5] 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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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 the subset of the total disabled veteran population that faces state court proceedings of this nature might be a small percentage of the total disabled veteran population, the consequences of these situations are inevitably magnified and extremely stressful upon these particular veterans. They need every penny of their disability benefits now more than ever.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Respondent requests this Court deny Petitioner's Application for Leave to Appeal the Court of Appeals' July 30, 2020 Opinion On Second Remand.

Respectfully submitted by:



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CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 14,435 words (as identified by the Microsoft Word "word count" function) and was prepared using the proportional font and typeface Times New Roman / 14 point.