

Citing that part of *Gibbons v. Ogden*, 22 U.S. 1, 210-211 (1824), in which this Court declared the absolute nullity of any state action contrary to an enactment passed pursuant to Congress's delegated powers and *Free v. Bland*, 369 U.S. 663, 666 (1962), the Court said: "[the] relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway*, *supra* at 55.

This is because veterans benefits originate from Congress's enumerated "military powers". U.S. Const. Art. I, § 8, cls. 12-14. *United States v. Oregon*, 366 U.S. 643, 648-649 (1961); *McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981). See also *United States v. Comstock*, 560 U.S. 126, 147 (2010), citing *United States v. Hall*, 98 U.S. 343, 351 (1878) and stating that "the Necessary and Proper Clause, grants Congress the power, in furtherance of Art. I, § 8, cls. 11-14, to award 'pensions to the wounded and disabled' soldiers of the armed forces and their dependents." Congress's control over the subject is "plenary and exclusive" and "[i]t can determine, without question from any State authority, how the armies shall be raised,...the compensation...allowed, and the service...assigned." *Tarble's Case*, 80 U.S. 397, 405 (1871). In this particular subject, "[w]hensoever...any conflict arises between the enactments of the two sovereignties [the state and national government], or in the enforcement of their asserted authorities, those of the National government must have supremacy...." *Id.*

The Court has acknowledged Congress's powers in military affairs is "broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in general matters of the common defense, unless Congress itself cedes such authority, or exceeds its constitutional limitations in exercising it. *Rumsfeld v. Forum for Adad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Congress has been given no "greater deference than in the conduct and control of military affairs." *McCarty*, *supra* at 236, citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

Military or service-connected disability pay falls under these same powers. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017) (*McCarty* with its rule of federal preemption, still applies" and "the basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay (describing the federal interests in attracting and retaining military personnel.")).

The Court of Appeals indicated that it knew of no federal public policy that would vitiate the rule regarding res judicata. However, Petitioner has demonstrated in his pleadings to this Court that the applicable federal statute and the recent Supreme Court jurisprudence interpreting it is a very precise and limited federal expression of such policy. Moreover, its language applies to benefits that are to be paid in the future – meaning it applies to prohibit future diversion of the funds. Further, as pointed out, it directly forbids and prohibits contracts wherein the beneficiary agrees to dispossess himself or herself of these monies. That is, the statute expressly makes such agreements contrary to public policy as expressed in the federal legislation, proper. See 38 U.S.C. § 5301(a)(3)(A) and (C). Such agreements are void from their inception, meaning res judicata would never apply.

The Supreme Court in *Howell v. Howell*, 137 S. Ct. 1400 (2017), most recently stated that this provision prevents the state courts from allowing benefits to vest in anyone other than the beneficiary and it cited 38 U.S.C. § 5301 as the applicable statute.

As has been established by state courts across the country, *Howell*, expressly held that federal law nullified contractual agreements whether in community property states or elsewhere that purported to effectuate a depletion of these monies in the hand of the beneficiary veteran. Alabama, *Brown v. Brown*, 260 So. 3d 851, 857-858 (2018) (future contingency that former spouse might receive less by way of former servicemember's receipt of protected disability pay could not be remedied by forcing the former servicemember through agreement or otherwise to continue making payments on a property division that effectively required him to dispossess himself of the protected monies); Arizona, *In re Merrill (On Remand)*, Case No. 1991-092542 (March 7, 2018) (on remand from the United States Supreme Court, see 137 S. Ct. 2156 (2017), holding state courts cannot require indemnification for any financial losses resulting from one spouse's waiver of retired pay to receive veteran's disability pay (CRSC) and Arizona, per *Howell*, was prohibited from treating as community property any monies that federal law protected, repeating the Court's admonition in *Howell, supra* at 1405 that per 38 U.S.C. § 5301 "State courts cannot vest that which (under governing federal law) they lack authority to [give]"; California, *In re Marriage of Cassinelli (On Remand)*, 20 Cal. App. 5th 1267, 1274 (2018) (after remand from the United States Supreme Court, 138 S. Ct. 69 (2017) per *Howell*, the California Court of Appeals acknowledged that federal law prohibits the courts from compensating the former spouse due to the loss of an interest in the former servicemembers benefits and "the state lacked jurisdiction to treat" the CRSC as community

property); Colorado, *In re Marriage of Tozer*, 410 P.3d 835, 838 (2017) (military retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted); Indiana, *Edwards v. Edwards*, 132 N.E.3d 391 (Ind. App. 2019), transfer denied 138 N.E. 3d 957 (2019) (holding that *res judicata* barred the challenge to the prior agreement but that *Howell* required the trial court to modify it so that the veteran would not be required to continuing using his disability benefits to pay his former spouse in the future); Maryland, *Hurt v. Jones-Hurt*, 168 A.3d 992, 1001 (2017) (recognizing *Howell*'s effect was to preempt state law remedies where a spouse's marital award was reduced by a post-decree waiver of military retirement pay in favor of disability benefits); Kansas, *In re Babin*, 437 P.3d 985, 991 (Kan. Ct. App. 2019) (*Howell* "abrogate[ed] several cases dealing with property settlement agreements" and "endorsed *Mansell* [*v. Mansell*, 490 U.S. 581 (1989)] and its restriction on using a property settlement agreement to divide pay" and "overruled cases relying on the sanctity of contract to escape the federal preemption."); New Jersey, *Fattore v. Fattore*, 2019 N. J. Super. LEXIS 16 (N. J. App. 2019) (same); Michigan, *Foster v. Foster*, 505 Mich. 151, 172-173; 949 N.W.2d 102 (2020) (38 U.S.C. § 5301(a)(1) and (3)(A) barred agreements by the veteran to dispossess himself of his CRSC disability pay); *Foster v. Foster III*, ___ Mich. App. ___, 2020 Mich. App. LEXIS 4880 (2020) (applying the Michigan Supreme Court's application of 38 U.S.C. § 5301 and holding that federal preemption removed the subject matter jurisdiction of the court to the extent that the parties' agreement was one in which the veteran agreed to give up his federal disability pay (also CRSC) and holding that *res judicata* and principles of collateral estoppel did not bar the veteran's challenge to the 2008 judgment because it was void from its inception per the federal law); Minnesota, *Berberich v. Mattson*, 903 N.W.2d 233, 241 (2017) (*Howell* "makes clear that state courts 'cannot 'vest' that which (under governing federal law) they lack the authority to give" and "overruled [Minnesota] cases relying on the sanctity of contract to escape federal preemption"; "[s]imply put, state laws are preempted in this specific area."); Tennessee, *Roberts v. Roberts*, 2018 Tenn. App. LEXIS 195, *22 (Tenn. App. 2018) ("*Howell* casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefit other than disposable retired pay), accord with *Vlach v. Vlach*, 556 S.W.3d 219, 224-225 (2017) (same

rejecting both the contractual vested interest approach and the court-ordered reimbursement, diversion or forced indemnity approach).

Even before *Howell*, state courts had ruled that they were jurisdictionally precluded from treating veterans benefits protected by 38 U.S.C. § 5301 as divisible property. Illinois, *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 851-852 (Ill. App. 1982) (citing 38 U.S.C. § 3101 (renumbered as § 5301) and stating that this provision protects the benefit that Congress has said “should go to the veteran and would cause an injury to Federal interests which is forbidden by the supremacy clause”); Mississippi, *Mallard v. Burkart*, 95 So.3d 1264, 1270-1273 (Miss. 2012) (same citing cases); Nebraska, *Ryan v. Ryan*, 257 Neb. 682, 686-693; 600 N.W.2d 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 and therefore res judicata did not apply); Vermont, *Youngbluth v. Youngbluth*, 188 Vt. 53; 6 A.3d 677 (2010) (38 U.S.C. § 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 N.W.2d 562 (Mich. App. 1986)) (emphasis supplied).

Here, the Court of Appeals did not address the plain and unambiguous language of 38 U.S.C. § 5301(a)(3)(A) and (C), which prohibit such agreements and makes them *void* from their inception. A void agreement never existed and therefore res judicata would not bar a challenge to its prejudice. Moreover, as noted, this provision, as with all veterans’ benefits legislation, is to be liberally construed *in favor of the beneficiary*. *Porter, supra*. However the consent judgment might be construed, Petitioner could not have agreed, under federal law, to dispossess himself of his protected CRSC benefits. Any conclusion that he agreed to do this or that the state court could, through any equitable or legal doctrine like res judicata, enforce such an agreement would be prohibited by 38 U.S.C. § 5301’s sweeping prohibitions.

CONCLUSION

Given the importance to veterans of the disposition of their federally protected disability benefits in state court proceedings and the recent pronouncements of federal preemption applicable

thereto by the United States Supreme Court, Petitioner respectfully requests this Court grant this motion for rehearing and grant his petition for review of the lower court's decision.

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