No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

RAY J. FOSTER,

Petitioner,

v.

DEBORAH LYNN FOSTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CARSON J. TUCKER, JD, MSEL
Counsel of Record
LEX FORI, PLLC
DPT #3020
1250 W. 14 Mile Rd.
Troy, MI 48083-1030
(734) 887-9261
cjtucker@lexfori.org

QUESTIONS PRESENTED

1. May state law doctrines of judicial convenience, like res judicata and collateral estoppel, be raised against a preemptive federal statute, 38 U.S.C. § 5301, which voids from inception any and all agreements made by a disabled veteran to dispossess himself of his federally protected veterans' disability benefits?

2. Even if a state court may raise such state law doctrines, does a disabled veteran have a continuing obligation to use his restricted disability pay to satisfy such an agreement, where 38 U.S.C. § 5301 explicitly prohibits a state court from using any "legal or equitable" means whatever from forcing such a dispossession of the veteran's benefits, and applies to all such benefits "due or to become due" and "before or after receipt", and that same state court already ruled that 38 U.S.C. § 5301 applied to the very agreement at issue in this case?

PARTIES TO THE PROCEEDING

Petitioner, Sergeant First Class (retired), Ray James Foster, was the Defendant-Appellee below. Respondent, Deborah Lynn Foster was the Plaintiff-Appellant.

There are no corporate parties and no other parties to the proceedings.

CORPORATE DISCLOSURE

There are no corporate parties involved in this proceeding.

RELATED PROCEEDINGS

This case arises from the following prior proceedings:

Foster v. Foster, United States Supreme Court, Motion to Proceed as Veteran, denied on March 6, 2023, Docket No. 22M76;

Foster v. Foster, United States Supreme Court, Application for Extension of Time to File Petition, Granted on August 24, 2022, Docket No. 22A166;

Foster v. Foster, 509 Mich. 109, 115; 983 N.W.2d 373 (April 5, 2022) (*Foster II*) (Appendix (App.) 1a-22a), modified on remand at *Foster v. Foster*, 974 N.W.2d 185 (2022) (May 27, 2022) (*Foster III*) (App. 23a);

Foster v. Foster (On Second Remand), 2020 Mich. App. LEXIS 4880 (July 30, 2020) (App. 24a-27a);

Foster v. Foster, 505 Mich. 151; 949 N.W.2d 102 (April 29, 2020) (*Foster I*) (App. 28a-78a);

Foster v. Foster (On Remand), 2018 Mich. App. LEXIS 809 (March 22, 2018); and

Foster v. Foster, 2016 Mich. App. LEXIS 1850 (October 13, 2016).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ray James Foster, petitions for a Writ of Certiorari to the Michigan Supreme Court, which denied Petitioner's motion for a rehearing on May 27, 2022.

OPINIONS BELOW

On April 5, 2022, the Michigan Supreme Court issued an opinion holding that Petitioner was barred by state-law doctrines of res judicata and collateral estoppel from challenging a settlement agreement that the Court had already ruled was preempted by federal law and barred by 38 U.S.C. § 5301(a)(3). *Foster v. Foster*, ___N.W.3d___; 2022 Mich. LEXIS 734 (2022) (*Foster II*) (App. 1a-22a), modified on remand at *Foster v. Foster*, 974 N.W.2d 185 (2022) (*Foster III*) (App. 23a).

On Second Remand, the Michigan Court of Appeals ruled that Petitioner was not barred from challenging a 2008 judgment based on a settlement agreement that was preempted by federal law and void from inception per 38 U.S.C. § 5301. *Foster v. Foster*, No. 324853, 2020 Mich. App. LEXIS 4880 (Ct. App. July 30, 2020) (App. 24a-27a).

The Michigan Supreme Court issued its first opinion on April 29, 2020, unanimously holding that federal law preempted state law and that 38 U.S.C. § 5301(a)(3) prohibited the settlement agreement entered in 2008 in which Petitioner agreed to pay Respondent using his federal disability pay. *Foster v*

Foster, 505 Mich. 151, 171-173; 949 N.W.2d 102 (2020) (*Foster I*) (App. 28a-78a).

These decisions comprise the substantive rulings from which Petitioner seeks a writ of certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).

STATEMENT OF THE CASE

A. Introduction

Congress's authority over military benefits originates from its enumerated "military powers" under Article I, § 8, clauses 11 through 14 of the Constitution. In matters governing the compensation and benefits provided to veterans, the state has no sovereignty or jurisdiction without an express grant from Congress. See, respectively, *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022); *Howell*, 137 S. Ct. at 1404; *Mansell v. Mansell*, 490 U.S. 581, 588; 109 S. Ct. 2023 (1989). In fact, *unless* otherwise allowed by *federal* law, Congress affirmatively prohibits the state from using "*any* legal or equitable process whatever" to dispossess a veteran of these benefits. See 38 U.S.C. § 5301(a)(1), accord *Howell*, *supra* at 1405.

Even where Congress has granted permission to the states to consider veterans' benefits in state court proceedings, the grant is precise and limited. *Howell*, 137 S. Ct. at 1404; *Mansell*, 490 U.S. at 588 (Congress

must explicitly give the states jurisdiction over military benefits and when it does so the grant is precise and limited); 10 U.S.C. § 1408(a)(4) (state may consider only disposable retired pay as divisible property); 42 U.S.C. § 659(h)(1)(A)(ii)(V) (state may consider only partial *retirement* disability as "remuneration for employment", i.e., income, available for garnishment for child support and spousal support); 42 U.S.C. § 659(h)(1)(B)(iii) (excluding from the definition of income *all other* veterans' disability compensation).

Petitioner is a disabled veteran. He is 100 percent permanently and totally disabled. His only means of sustenance is his federal veterans' disability compensation.

These benefits are affirmatively protected from all legal and equitable process either before or after receipt. 38 U.S.C. § 5301(a)(1). There is no ambiguity in this provision. It *wholly voids* attempts by the state to exercise control over these restricted benefits. *United States v. Hall*, 98 U.S. 343, 346-57; 25 L. Ed. 180 (1878) (canvassing legislation applicable to military benefits); *Ridgway v. Ridgway*, 454 U.S. 46, 56; 102 S. Ct. 49; 70 L. Ed. 2d 39 (1981). This Court construes this provision liberally in favor of the veteran and regards these funds as "inviolate" and inaccessible to all state court process. *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962).

This Court recently reconfirmed that federal law preempts all state law concerning the disposition of veterans' disability benefits in state domestic

relations proceedings. *Howell*, 137 S. Ct. at 1404, 1406. There, the Court reiterated that Congress must affirmatively *grant* the state authority over such benefits, and when it does, that grant is precise and limited. *Id*. at 1404, citing *Mansell*, *supra*. The Court also stated that without this express statutory grant, 38 U.S.C. § 5301(a)(1) affirmatively prohibits state courts from exercising any authority or control over these benefits. *Id*. at 1405. Finally, the Court concluded that this prohibition applied to all disability pay because Congress's preemption had never been expressly lifted by federal legislation (the *exclusive means* by which a state court could ever have authority over veterans' disability benefits). *Id*. at 1406, citing *McCarty v. McCarty*, 453 U.S. 210, 232-235; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981). "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*" and therefore "*McCarty*, with its rule of federal pre-emption, *still applies*." *Howell*, 137 S. Ct. at 1404, 1406 (emphasis added).

Veterans disability benefits are those which Congress appropriated for disabled veterans under its enumerated powers without any grant of authority to the states to consider them as an available asset in state court proceedings. The state does not have *any* concurrent authority to sequester these funds and put them to a use different from their intended purpose. This Court's reiteration in *Howell* that federal law preempts all state law in this particular subject, *unless* Congress says otherwise remains intact. There is no *implied* exception to absolute federal preemption in this area. *Bennett v. Arkansas*, 485 U.S. 395, 398;

108 S. Ct. 1204; 99 L. Ed. 2d 455 (1988). See also *Hillman v. Maretta*, 569 U.S. 483, 490-91, 493-95, 496; 133 S. Ct. 1943; 186 L. Ed. 2d 43 (2013) (noting in the area of federal benefits, Congress has preempted the entire field even in the area of state family law and relying on several cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway*, 454 U.S. at 54-56 and *Wissner v. Wissner*, 338 U.S. 655; 70 S. Ct. 398; 94 L. Ed. 424 (1950)).

Finally, this Court recently reconfirmed the absolute surrender of sovereignty by the states over all federal authority concerning legislation passed pursuant to Congress' military powers. *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022). There, the Court reasoned that the very sovereign authority of the state over all matters pertaining to national defense and the armed forces was surrendered by the state in its agreement to join the federal system. "Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military." *Id*.

The Court went on to hold that in the realm of federal legislation governing military affairs, "the federal power is complete in itself, and the States consented to the exercise of that power – in its entirety – in the plan of the Convention" and "when the States entered the federal system, they renounced their right to interfere with national policy in this area." *Id*. (cleaned up). "The States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy." *Id*. at 2464.

Consistent with those preemption cases like *Howell*, *Hillman*, and *Ridgway*, *inter alia*, Congress' authority in this realm, carries with it "inherently the power to remedy state efforts to frustrate national aims; objections sounding in ordinary federalism principles were untenable." *Id*. at 2465, citing *Stewart v. Kahn*, 11 Wall 493, 507 (1871) (cleaned up).

While the holding in *Torres* provided a long-awaited answer to the question of whether a state could assert sovereign immunity in lawsuits filed by returning servicemembers alleging employment discrimination against state employers under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq., it stands as a complement to this Court's application of federal preemption under the Supremacy Clause concerning Congress's exercise of the same enumerated Article I Military Powers as against state efforts to thwart Congress' objectives and goals in passing legislation thereunder. *Id*. at 2460, 2463-64; citing Article I, § 8, cls. 1, 11-14.

This is no surprise. The concepts of state sovereignty and freedom to legislate or adjudicate in those areas not specifically reserved, i.e., enumerated, in Article I, are two sides of the same coin. Where Congress has exercised its Article I Military Powers, inherent structural waiver prevents the state from asserting sovereign immunity because Congress has provided a mechanism for the objectives of legislation passed pursuant to its enumerated powers to be realized by pursuit of a statutory civil action against the state. In *Torres*, we are instructed that the state cannot assert sovereign immunity where a returning

servicemember seeks to vindicate his pre-deployment employment rights and status as against his employer (the state of Texas) under the USERRA, an act passed pursuant to Congress' Article I Military Powers to benefit returning servicemembers. On the flip side, Article VI, clause 2, the Supremacy Clause, prohibits, i.e., *preempts*, the state from passing and enforcing laws or issuing judicial decisions that equally frustrate the same national interests underlying Congress's plenary powers in the premises.

Hence, in *Howell*, *supra*, and other cases addressing the USFSPA, state courts are prohibited from repurposing those federal benefits that Congress has provided, again under its Article I military powers, to incentivize, maintain, and support national service. As was stated in *McCarty*, 453 U.S. at 229, n. 23, quoting *Buchanan v. Alexander*, 4 How. 20 (1845), the funds of the government are appropriated for a specific purpose and if they may be diverted or redirected by state process or otherwise, the proper functioning of the government would cease.

Thus, to the extent the state cannot assert immunity if doing so interferes with a personal right conveyed by Congress' legislation under its Article I Military Powers because the state surrendered its sovereignty in this area, the state is preempted by those same powers from passing legislation or issuing judicial decisions (extra judicial acts) that interfere with veterans' federal rights and personal entitlements. In either case, the state's resistance results in the same frustration of Congress' goals in maintaining and building a federal military force and protecting national security. *McCarty*, supra.

Structural waiver of sovereignty occurred when the states consented to join the union in recognition of the enumerated and limited, but absolute powers reserved by the federal government under Article I, § 8. Preemption occurs because the states cannot legislate or adjudicate where Congress has acted affirmatively to pass legislation pursuant to and within the realm of those Article I powers. See also U.S. Const. Art. VI, cl. 2 (1789) (the Supremacy Clause).

Indeed, the USERRA, like the USFSPA, both of which provide military servicemembers and veterans with post-service benefits, is legislation intended to promote, maintain, and incentivize service to the nation and to ensure reintegration into civilian life; the former preserving a servicemember's right to return to civilian work without penalty, and the latter providing him or her (and family) benefits if he or she becomes disabled in the service of the country. *Torres*, *supra* at 2464-65 (explaining the importance of federal control and maintenance of national military); *Howell*, *supra* at 1406 ("the basic reasons *McCarty*, *supra*, 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).") (cleaned up).

Of course, if the state has no sovereign authority to assert immunity, a fortiori, it has no *jurisdiction* to render judicial decisions that conflict with prevailing federal legislation in the occupied field. See also, *Hillman v. Maretta*, 569 U.S. 483, 490-91, 493-95, 496;

133 S. Ct. 1943; 186 L .Ed. 2d 43 (2013) (noting that in the area of federal benefits Congress has preempted the entire field even in the area of state family law and relying on the cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway*, 454 U.S. at 54-56 and *Wissner v. Wissner*, 338 U.S. 655; 70 S. Ct. 398; 94 L. Ed. 424 (1950)).

In the instant case, after correctly ruling in its first opinion that federal law preempted all state law and 38 U.S.C. § 5301 prohibited consent agreements by veterans in which they agree to dispossess themselves of their federal disability benefits, the Court inexplicably ruled in a second opinion that Petitioner was barred by state doctrines of judicial convenience such as res judicata and collateral estoppel from challenging the effects of that federally prohibited agreement.

The Court used a sophistic argument about basic subject matter jurisdiction to escape the absolute effects of federal preemption. However, where federal preemption applies, the question of jurisdiction is irrelevant if, as this Court has held, the state has "*no authority*" in the premises to "vest" or otherwise control the disposition of federal benefits that are purposed by Congress to support disabled veterans and expressly protected from all "legal or equitable" powers of the state. See 38 U.S.C. § 5301(a)(1).

The Michigan Supreme Court's decision to force Petitioner to litigate his continuing rights in his federal disability benefits must be reversed if this Court expects the states to respect the Supremacy Clause of the United States Constitution.

B. Background

Petitioner spent over 20 years in service to our country, commencing his duty in the United States Army in 1985. See *Foster I*, 505 Mich at 157. He retired from the Army in September of 2007. *Id*. He was deployed to Iraq and Afghanistan where, as a platoon leader, he conducted daily foot patrols.

During two separate deployments, Petitioner suffered traumatic brain injuries, a broken back, and broken legs as a result of hostile enemy attacks. He also lost several of his fellow troops. As a result, in addition to his physical injuries, he has severe and often debilitating post-traumatic stress disorder (PTSD).

His injuries would ultimately result in his status as a combat-disabled veteran. He is 100 percent disabled and 100 percent unemployable.

As of October 2007, before the 2008 divorce judgment, he was designated as "service-connected" disabled and, because his injuries were incurred during combat, he was entitled to Combat Related Special Compensation (CRSC) under 10 U.S.C. § 1413a. *Foster I*, 505 Mich at 157 and 159, n 4. (noting that Petitioner suffered from his disabilities and was designated disabled as of October 2007).

In 2008, Petitioner and Respondent divorced. Because Petitioner was then receiving retired pay

from the military, Respondent began receiving a portion of Petitioner's retirement pay as allowed by federal law. 10 U.S.C. § 1408(a)(4) and (c) (USFSPA).

Even though Petitioner received a retroactive disability designation that incepted in 2007 (prior to the 2008 divorce judgment), disability benefits were not paid to him until 2010. At that point, the automatic share of Petitioner's *disposable* (and therefore legally *divisible*) military retirement pay that had been being automatically paid to Respondent under USFSPA ceased. *Foster I*, *supra* at 159.

Petitioner was no longer receiving such disposable pay from the federal government. Instead, he began receiving indivisible, and federally restricted, disability benefits under Title 10 and Title 38. See 10 U.S.C. § 1413a(g) (CRSC benefits are not disposable retirement benefits subject to division under 10 U.S.C. § 1408 (USFSPA)).

The Defense Finance and Accounting Agency (DFAS), the federal agency that previously made direct payments to Respondent of her allotted share of Petitioner's disposable retired pay, could no longer legally make payments to her because there was no longer any available disposable retired pay.

When DFAS stopped paying Respondent her share, she filed a contempt motion against Petitioner in the trial court seeking to have the court force him to abide by the illegal consent agreement he had signed in 2008 in which he agreed to use his disability pay to make up any difference in Respondent's loss of her share of Petitioner's military retirement pay.

In 2014, Petitioner was arrested and thrown in jail in Iron County, Michigan on a warrant for a failure to pay these illegal property division payments. The trial court issued an "appearance bond," which was unlawfully transformed into a "collateral bond" in which the trial court ordered Petitioner's elderly and ailing mother to have a lien placed on her home under that bond to force Petitioner to use his federal disability pay (the only income he has) to make payments towards the arrearage that had been calculated by the trial court.

Petitioner appealed the contempt ruling on December 2, 2014, challenging the trial court's disposition of the case with respect to the bond arrangement and the forced payment of his federal disability pay. Petitioner continued to use his disability pay to pay $1000 per month to Respondent pending the disposition of his appeal.

Petitioner cited 38 U.S.C. § 5301 and raised the issue concerning the voidness of the 2008 judgment under the statute. Throughout these pleadings, Petitioner also challenged the judgment as explicitly preempted by federal law and therefore void. *Id.*

On October 13, 2016, the Michigan Court of Appeals, following the case of *Megee v. Carmine*, 290 Mich. App, 551; 802 NW2d 669 (2010), rev'd by *Foster I*, 505 Mich. 151; 949 N.W.2d 102 (2020), ruled that the trial court was not preempted by federal law and was not therefore prohibited from issuing the contempt order to force Petitioner to use his disability pay to make up the difference of his former spouse's

lost share. *Foster v. Foster*, 2016 Mich. App. LEXIS 1850, Unpublished Opinion of the Michigan Court of Appeals, Docket No. 324853 (Decided October 13, 2016).

With respect to the applicability of 38 U.S.C. § 5301, the Court of Appeals reasoned that it was not applicable because it contained the statement "except to the extent specifically authorized by law." *Id*. Because the Michigan Court of Appeals had ruled in *Megee*, *supra*, that state courts could circumvent preemptive federal law and force veterans to part with disability pay that might otherwise be protected by 10 U.S.C. § 1408 and 38 U.S.C. § 5301, the Court reasoned that this was "*the law*" referred to in § 5301 which allowed state courts to ignore its otherwise sweeping prohibitions. *Id.*

Petitioner appealed to the Michigan Supreme Court in November of 2016. On December 2, 2016, this Court granted a petition for certiorari in the case of *Howell v. Howell*, 137 S. Ct. 1400; 197 L. Ed. 2d 781 (2017), to address the propriety of state court orders forcing veterans to dispossess themselves of their disability benefits by way of such means as were employed by the state court in this case. Undersigned counsel brought this to the attention of the Michigan Supreme Court by way of a supplemental authority statement filed on December 12, 2016.

Undersigned counsel then filed an *amicus curiae* brief *pro bono* in this Court on behalf of Veterans of Foreign Wars (VFW) and Operation Firing for Effect (OFFE), non-profit veterans' support and service organizations supporting the veteran petitioner in

Howell. On May 15, 2017, this Court *unanimously* followed the four main arguments made by undersigned counsel in support of full preemption of federal law over the states in these cases. *Howell v. Howell*, ___US___; 137 S. Ct. 1400; 197 L .Ed. 2d 781, 788 (2017).

First, the Court unanimously held that state courts were (and always have been) absolutely preempted by federal law from issuing orders that force veterans to part with their disability benefits to satisfy state court divorce awards dividing marital property. As urged by amici, the Court ruled that preexisting federal law and the Court's jurisprudence, particularly its 1989 decision in *Mansell v Mansell*, 490 U.S. 581, 588-592; 109 S. Ct. 2023; 104 L. Ed. 2d 675 (1989), demonstrated the absolute preemption of the state in terms of exercising *any authority* or *control* over these sequestered funds. *Howell*, 137 S. Ct. at 1303-1406. The Court ruled "federal law, as construed in *McCarty*, 'completely preempted the application of state community property law to military retirement pay'" and that only "Congress could 'overcome' this preemption 'by enacting an *affirmative grant of authority* giving the States the power to treat the military retirement pay as community property.'" *Id*. at 1404. The Court recognized that Congress had done so in the USFSPA, 10 U.S.C. § 1408, but only to a "limited extent"; the USFSPA "provided a 'precise and limited' grant of the power to divide federal military retirement pay." *Id*.

This was important clarification on the part of the Court because not only did it reaffirm that the states *never* had authority in this realm, but it solidified the

principle that in the premises of veterans' compensation and benefits, without explicit federal legislation *lifting* the total preemption in this area, the states cannot (and never could) "adjust" the equities occasioned by the operation of federal law and force veterans to dispossess themselves of their personal entitlements. See *Howell*, 137 S. Ct. at 1403. The states were always prohibited from not only dividing federal benefits, but also from issuing or approving of any orders or judgments, respectively, wherein the veteran was forced to make up the difference of the former spouse's lost share of the veteran's retirement pay.

Put simply, *before* the USFSPA the states had *no authority* over federal veterans' benefits in divorce proceedings (whether they were retirement benefits or disability benefits). The USFSPA only gave the state *a limited grant of authority* to allow the division of up to 50 percent of the disabled veterans *disposable retirement pay*. The federal government remained responsible to distribute the former spouse's share of these disposable benefits on the condition that the state court order was compliant with the limitations in the USFSPA. See 10 U.S.C. § 1408(a)(2), (a)(4)(A) and (c). *After* the USFSPA, the states only had authority to approve, via a federally approved state court order, a division of up to 50 percent of a former servicemember's *disposable retirement pay*. *Id*. The USFSPA *never* gave the states authority over any other federal veterans' benefits, and it certainly did not authorize the states to find ways to offset the federal distribution of veterans' benefits to the proper beneficiaries (in most cases, the veteran).

As urged by amici, this clarification was necessary because post-*McCarty* (post-1981), the states concluded that the previously "absolute" field preemption in this area had been abolished *in toto* by Congress' passage of the USFSPA, leaving the states free to come up with any number of concocted theories of equitable relief to "restore" a former spouse's "share" of what had previously been "divisible" in divorce proceedings, when he or she began receiving less or nothing of his or her prior share because the veteran had become entitled to restricted and *non-disposable*, and therefore *non-divisible* disability pay.

As undersigned instructed the Court, it's "pre-USFSPA jurisprudence, principally *McCarty v. McCarty*, 453 U.S. 210 (1981), continues to prohibit any consideration of such pay by state courts in the division of marital property. In other words, despite broad misstatements to the contrary, state courts never had pre-existing authority, equitable or otherwise, to divide veterans' benefits as marital property. Such ostensible authority asserted by state courts before the *McCarty* decision was simply ultra vires." As amici counseled the Court in *Howell*, "pre-*McCarty* preemption in this area was *never abrogated* by the USFSPA." Hence, the sweeping significance of the Court's statement in *Howell*: "*McCarty* 'completely preempted the application of state community property law to military retirement pay" and that "*McCarty* with its rule of federal preemption, *still applies*." *Howell*, 137 S. Ct. at 1403-04 (emphasis added).

Significantly, the Court also followed the suggestion of amici that not only is there absolute,

field preemption in this area of federal law, but state courts are *affirmatively* prohibited by positive federal law, namely, 38 U.S.C. § 5301, from dividing (via "*any* equitable or legal" means) veterans' disability benefits. Amici argued that 38 U.S.C. § 5301 imposes a jurisdictional limitation against present and future dedication of non-disposable funds. Citing § 5301, the Court in *Howell* unanimously ruled that "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Howell*, 137 S. Ct. at 1405. In this regard, the Court was directly addressing federal law's absolute prohibition on state courts from effectuating (whether through equity or approval of a consent decree) a future involuntary divestment of disability benefits that a veteran may receive post-divorce. See *Howell*, 137 S. Ct. at 1405-1406. Any state court orders, in whatever form, purporting to force an alternate distribution of a veteran's disability benefits without *federal authorization* are *ultra vires*, "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted." *Id*. at 1406.

Finally, and critically, the Court said that the absolute and total preemption of federal law in this area applied not only to military pensions and retirement pay, but also to all federally *designated disability benefits*. *Howell*, 137 S Ct at 1406. "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." *Id*. (describing the federal interests in attracting and retaining military personnel). And those reasons apply with equal force to a veteran's

postdivorce waiver to receive disability benefits to which he or she has become entitled." *Id*.

Howell effectively nullified what was at that time a fair majority of wayward state court rulings across the country, which had previously held, consistent with *Megee*, *supra*, that state courts could exercise power and control over these benefits notwithstanding federal preemption and, in this case, the express prohibitions of positive federal law, particularly, 38 U.S.C. § 5301. See 137 S. Ct. at 1404-05 (noting a split of authority in the states, with only a minority then holding that federal law preempts state law).

On November 15, 2017, the Michigan Supreme Court vacated the 2016 opinion of the Court of Appeals and remanded the case to the court of appeals instructing it to apply *Howell*. *Foster v. Foster*, 501 Mich. 917, 903 N.W.2d 189 (2017).

Despite the sweeping and unanimous ruling from this Court in *Howell*, the Michigan Court of Appeals stubbornly held fast to its original position. Applying *Megee*, *supra*, the Court ruled that state courts could circumvent federal law and force Petitioner to use his disability pay because no federal statute prohibited the state from using Combat Related Special Compensation (CRSC) under Title 10 – Petitioner's only form of income – to satisfy the 2008 consent judgment. *Foster v. Foster (On Remand)*, No. 324853, 2018 Mich. App. LEXIS 809 (Ct. App. Mar. 22, 2018).

Again, with the looming threat to his mother's home, which was being held under siege by the trial court's unlawful transformation of the appearance

bond (which was extinguished by operation of law upon Petitioner's appearance before the court in June of 2014 after his arrest), to a "contempt bond," Petitioner continued paying the $1000 per month and filed a second application to appeal to the Michigan Supreme Court.

On November 7, 2018, the Michigan Supreme Court granted the application. On April 20, 2020, the Court unanimously reversed the decision of the Court of Appeals. It overruled *Megee*. *Foster I*, 505 Mich. at 156, 174. Importantly, the Court applied 38 U.S.C. § 5301(a)(3) and ruled that the 2008 consent judgment constituted an agreement that was prohibited by 38 U.S.C. § 5301(a)(3). *Id*. at 172-173.

The Court remanded for the Court of Appeals to consider whether state common law doctrines of res judicata or collateral estoppel could be raised to prevent Petitioner's 2014 challenge to the terms of the 2008 consent judgment on the basis of federal preemption. *Id*. at 156.

In an opinion that was approximately one-and-a-half pages, the Michigan Court of Appeals, following decades of Michigan state case law on the subject, ruled that where principles of federal preemption apply, "[s]tate courts are deprived of subject-matter jurisdiction." *Foster v. Foster*, No. 324853, 2020 Mich. App. LEXIS 4880 (Ct. App. July 30, 2020) (App. 24a-27a). The Court held that since the consent judgment was preempted by federal law, as the Michigan Supreme Court acknowledged, Petitioner did not engage in an improper collateral attack and the trial court lacked subject matter jurisdiction to enforce the

consent judgment with respect to the offset provision due to the principle of federal preemption.

Respondent filed an application for leave to appeal that decision to the Michigan Supreme Court.[1] On December 23, 2020, the Michigan Supreme Court granted Respondent's application.

On April 5, 2022, the Michigan Supreme Court reversed the court of appeals July 30, 2020 decision. The Court held that the state common law doctrine of judicial convenience, res judicata, applies to judgments that divide military retirement and disability benefits, even if those judgments contravene pre-existing *and* preemptive federal law. The Court also held that there is no exclusive federal forum for dividing military disability benefits in divorce actions, as if this was somehow dispositive of Congress' supremacy over the states in the exercise of its military powers. The Court further held that federal preemption under 10 U.S.C. § 1408 (the USFSPA) and 38 U.S.C. § 5301 does not deprive Michigan state courts of subject matter jurisdiction

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[1] Petitioner filed a motion for restitution in the trial court, which awarded him the full, net amount of restitution. The trial court denied Petitioner's request for interest, costs, and attorneys fees. Respondent appealed that decision separately, but later abandoned it. *Foster v. Foster*, No. 355654, 2022 Mich. App. LEXIS 3791 (Ct. App. June 29, 2022). Petitioner filed a cross appeal seeking review of the trial court's decision denying him interest, costs, any attorney fees. That cross appeal remains pending. *Id*.

over a divorce action involving the division of marital property and the Court of Appeals erroneously concluded that the type of federal preemption at issue in this case deprived state courts of subject matter jurisdiction, and, according to the court, as there was no other justification for a collateral attack on the consent judgment in this case. *Foster v Foster*, ___NW3d___; 2022 Mich. LEXIS 734 at *1 (Apr. 5, 2022)), reh'g denied, opinion amended at *Foster v Foster*, ___NW3d___; 2022 Mich. LEXIS 997, at *1 (May 27, 2022) (*Foster III*).

Despite the incongruity in its holding in *Foster I*, that federal law has always preempted state law in this particular subject, and that 38 U.S.C. § 5301(a)(3) rendered the 2008 consent judgment an impermissible assignment, see *Foster I*, 505 Mich. at 165-171, n. 51, 172-173, the Court held that *in this case* state courts did not lack subject matter jurisdiction even if there was federal preemption, and therefore, Petitioner could be barred by the doctrine of res judicata from challenging the judgment.

The Court completely ignored Petitioner's statutory argument that any agreements found to have violated 38 U.S.C. § 5301 were void, despite having raised this argument from the beginning of this appeal in 2014, through final briefing in the Court, and at oral argument.

Petitioner filed a motion for rehearing pointing out several errors in the Michigan Supreme Court's opinion. The court denied rehearing but amended its opinion to acknowledge that Petitioner's entitlement

to disability benefits incepted in 2007, prior to the 2008 consent judgment.

REASONS FOR GRANTING THE PETITION

1. Section 5301(a)(3)(A) and (C) is a federal statute which voids from inception all agreements in which a disabled veteran agrees for consideration to pay his federal benefits to another party. No state court can circumvent this provision using state common-law doctrines of judicial convenience such as *res judicata* or collateral estoppel. Allowing state courts to use such theories to ignore preemptive federal statutes is tantamount to ignoring the Supremacy Clause.

Ridgway, *supra*, provides the most succinct yet comprehensive summary of Congress' authority on the scope and breadth of legislation concerning military affairs vis-à-vis state family law. Citing, inter alia, *McCarty v McCarty*, 453 U.S. 210; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981) and *Wissner*, *supra*, the Court stated:

> Notwithstanding the limited application of federal law in the field of domestic relations generally this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. While state family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law

> be overridden, ***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 prevai***l. ***And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. That principle is but the necessary consequence of the Supremacy Clause of our National Constitution.*** *Ridgway*, 454 U.S. at 54-55 (cleaned up) (emphasis added).

These cases confirm the broad reach of the Supremacy Clause in the narrow areas of the Constitution wherein Congress retained absolute power to act. U.S. Const., Art. VI, cl. 2 (1789).

Thus, the enumerated power of Congress in Article I to raise and maintain the armed forces "is complete in itself". *Torres*, *supra*. This "power" includes providing the benefits to veterans after their service to the nation renders them disabled. *McCarty v. McCarty*, 453 U.S. 210, 232-33; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981) (noting that state courts are not free to reduce the benefits that Congress has determined are necessary for the servicemember). These funds are appropriated under Congress' military powers, and in no area of the law have the courts given Congress more deference. *Id*. at 230. See also *Rostker v. Goldberg*, 453 U.S. 57, 63; 101 S. Ct. 2646; 69 L. Ed. 2d 478 (1981); *United States v. O'Brien*, 391 U.S. 367,

377; 88 S. Ct. 1673; 20 L. Ed. 2d 672 (1968) (also cited in *Torres*, *supra*).

Thwarting Congress' objectives to provide benefits to returning servicemembers and veterans, whether by blocking discrimination suits by them against their state employer or finding ways through legislation or judicial fiat to dispossess them of their personal benefits, results in the same frustration of the national cause. Again, as succinctly noted by this Court in *McCarty*, the funds of the government are appropriated for a specific, enumerated purpose and if they may be diverted or redirected by state process or otherwise, the functioning of the government would cease. *McCarty*, 453 U.S. at 229, n. 23, quoting *Buchanan v. Alexander*, 4 How. 20 (1845).

It is also beyond debate that Congress' military powers are the direct source of all federal military compensation and benefits provisions for our nation's forgotten warriors. See, e.g., *United States v. Oregon*, 366 U.S. 643, 648-49; 81 S. Ct. 1278; 6 L. Ed. 2d 575 (1961) (stating "Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…for veterans."); *Johnson v. Robison*, 415 U.S. 361, 376, 384-85; 94 S. Ct. 1160; 39 L. Ed. 2d 389 (1974); *McCarty*, 453 U.S. at 232-33, *Ridgway v. Ridgway*, 454 U.S. 46, 54-56; 102 S. Ct. 49; 70 L. Ed. 2d 39 (1981) (applying Congress' enumerated powers to pass laws allowing servicemembers to designate beneficiaries for receipt of federal life insurance benefits, the Court ruled that "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal

enactments"), and *Howell*, 137 S. Ct. at 1405, 1406 (holding that under 38 U.S.C. § 5301 (the provision at issue in this case) "[s]tates cannot 'vest' that which (under governing federal law) they lack the authority to give.").

Therefore, all statutory provisions protecting veterans' disability pay are directly supported by Congress' enumerated Military Powers. Of course, Congress' "enumerated powers" are accorded federal supremacy under Article VI, Clause 2 of the Constitution (the Supremacy Clause). By ratifying the Constitution, "the States implicitly agreed that their sovereignty would yield to federal policy to build and keep the Armed Forces. *Torres*, *supra*. Consistent with this structural understanding, Congress has long legislated regarding the maintenance of the military forces at the expense of state sovereignty. *Id*. Thus, the Supreme Court has recognized that "ordinary background principles of state sovereignty are displaced in this uniquely federal area." *Id*., citing *Tarble's Case*, 13 Wall. 397, 398 (1872).

If a state court could ignore the directives of a federal statute which prohibits them from entering "any legal or equitable" orders dispossessing veterans of these benefits, and which, by its plain language, declares that any agreement or security for an agreement on the part of the beneficiary to dispossess himself of those benefits is "void from inception," then the state could "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 U.S. 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 U.S. 1, 210-211; 6 L. Ed. 23 (1824) (emphasis added). There, the Court expounded upon Congress' enumerated powers: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution" and further, "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects…." "*Full power* to regulate a particular subject, implies the whole power, and leaves no residuum." *Id*. at 196-197 (emphasis added). Unfortunately, in its second opinion, the Michigan Supreme Court ignored these unwavering principles of constitutional hierarchy and shirked its duties to follow them.

In any event, the consent judgment in this case, which is the same as a contract, as the Michigan Supreme Court recognized in its first opinion in this case, *Foster I*, 505 Mich. at 172-173, simply is, was, and always will be "*void ab initio*". A contract that is "void from its inception" is treated as if it never existed. Void contracts do not in effect exist; indeed, the very term 'void contract' is an oxymoron because a contract that is void is not a contract at all. Black's Law Dictionary (6th ed.) (defining 'void contract' as: '[a] contract that *does not exist* at law') (emphasis added).

It is of no moment that Petitioner raised the issue in 2010, or in 2014, or even now. An agreement that

is "void from inception" is an *absolute nullity*. "A void judgment is '[a] judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected *at any time and any place*, *whether directly or collaterally*. From its inception, a void judgment continues to be absolutely null. It is *incapable* of being *confirmed*, *ratified*, or *enforced in any manner or to any degree*." Black's Law Dictionary (7th ed.), p. 848 (emphasis added).

"It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered though the court may have had jurisdiction over the subject matter and the parties." 1 Freeman, Judgments (5th ed.) § 354, p. 733 (emphasis added). If a judgment is, even in part, beyond the power of the court to render, it is void as to the excess. *Ex Parte Rowland*, 104 U.S. 604, 612; 26 L. Ed. 861 (1881) (stating "if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements.") "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v. United States*, 91 U.S. 21, 27; 23 L. Ed.193 (1875). See also *Barney v. Barney*, 216 Mich. 224, 228; 184 N.W. 860 (1921) and *Koepke v. Dyer*, 80 Mich. 311, 312; 45 NW 143 (1890) (the latter cited in Freeman, supra, § 324, pp. 648-649 (discussing the severability of and the effects of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)). See also, Freeman, *supra*, § 226, p.

443 ("[T]he court may strike from the judgment any portion of it which is wholly void.") (emphasis added).

All this to say that there is no necessity for a state court to declare the obvious, and there is no heed to be paid to one that ignores it, even a state's highest court that tergiversates in its rulings from one term to the next. Here, the consent judgment is void. *Any court*, *at any time*, can, in fact, must, sua sponte, undo the effects of a judgment or ruling that is declared by federal statute (indeed supreme and absolute federal law) to be void from inception.

This Court ruled in 2017 that pursuant to 38 U.S.C. § 5301(a)(1) a state court has *no authority* under this provision to *vest* any rights to the restricted disability benefits in anyone other than the federally designated beneficiary. *Howell*, 137 S. Ct. at 1405. Following that decision, the Michigan Supreme Court ruled that this statute applied to the consent judgment in this case. *Foster I*, 505 Mich. at 172-173. Notwithstanding the Court's decision in *Foster II*, this Court has the authority to recognize that because that 2008 agreement was a contract that sought to dispossess Petitioner of his vested federal disability benefits contrary to the federal statute voiding any such agreements, no subsequent court can ever claim that Petitioner has a *legal obligation* to follow what is, in all essence, an absolute nullity. This is especially true because at the time the 2008 judgment was entered into, Petitioner was already disabled and his entitlement to his restricted benefits had already incepted. The Michigan Supreme Court acknowledged this in its first opinion, *Foster I*, 505 Mich. at 159, n. 4, and was forced to amend its second

opinion to affirm this essential fact. *Foster III*, 2022 Mich. LEXIS 997, at *1.

The 2008 consent agreement was, at the time it was executed, void to the extent that it obligated Petitioner to part with his federal veterans' disability pay. It was, as the statute provides, "void from inception." See 38 U.S.C. § 5301(a)(3)(A) and (C). As previously noted, where a "contract was, as the statute says, 'void'; that word 'void' is the mandate of the statute. It means the ultimate of legal nullity. The English is plain. So is the verity of the lower court's judgment." *Fields v. Korn*, 366 Mich. 108, 110; 113 N.W.2d 860 (1962) (allowing recovery in restitution where a contract for the sale of real property was void under the statute of frauds).

2. Moreover, assuming *arguendo* that the state common law theories interposed to avoid the sweeping preemptive effect of the § 5301, the state can never sanction a continuing violation of that provision where it prohibits state courts from using any legal or equitable order to force the veteran to use his or her disability benefits to satisfy any judgment or order.

In *Howell*, this Court said of § 5301 that "state courts cannot 'vest' that which they have no authority to give. …" The plain language of the provision contains explicit language providing that a state court can use no legal or equitable power whatever to dispossess the disabled veteran of his or her personal entitlement to disability benefits. See 38 U.S.C. § 5301(a)(1). This language, and the Court's clear pronouncement in *Howell* teaches that the state is under a continuing obligation to respect the mandates

of federal law embodied in preemptive federal statutes passed pursuant to Congress' enumerated military powers.

Ridgway, *supra*, addressed a provision identical to § 5301, and ruled that it prohibited the state from using any legal or equitable process to frustrate the veteran's designated beneficiary from receiving military benefits (life insurance). 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; 82 S. Ct. 1089 ; 8 L. Ed. 2d 180 (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 (emphasis added). The Court continued: "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.*, citing *McCarty*, *supra*. "That principle is but the necessary consequence of the Supremacy Clause of the National Constitution." *Id.* In *McCarty* the Court quite plainly said that the "funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *McCarty*, 453 U.S. at 229, n. 23 (emphasis added), quoting *Buchanan v. Alexander*, 45 U.S. 20 (1846).

As with all federal statutes addressing veterans, 38 U.S.C. § 5301 is liberally construed in favor of protecting the beneficiary and the funds received as compensation for service-connected disabilities. *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. at 162 (interpreting 38 U.S.C. § 3101 (now § 5301) and stating the provision was to be "liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof" and that the funds "should remain inviolate."). See also *Henderson v. Shinseki*, 562 U.S. 428, 440-441; 131 S. Ct. 1197; 179 L. Ed. 2d 159 (2011) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Oregon*, 366 U.S. at 647 ("[t]he solicitude of Congress for veterans is of long standing.").

Moreover, 38 U.S.C. § 5301, by its plain language, applies to more than just "attachments" or "garnishments". It specifically applies to "any legal or equitable process whatever, either before or after receipt." See *Wissner*, 338 U.S. at 659 (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary). This Court in *Ridgway*, in countering this oft-repeated contention, stated that it "fails to give effect to the unqualified sweep of the federal statute." 454 U.S. at 60-61. The statute "prohibits, in the broadest of terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" *Id.* at 61.

Relating the statute back to the Supremacy Clause, the Court concluded that the statute:

[E]nsures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[notwithstanding] any other law. . .of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy…. *Id*. Accord *McCarty*, 453 U.S. at 229, n. 23.

Indeed, the statute itself states that agreements covered by subsection (a)(3)(A) are likewise "void from their inception." A clearer pronouncement of a court's inability to sanction or otherwise approve of such an agreement could not be imagined. "Void from inception" means the violating provision never existed.

This analysis would suggest that any ruling by a state court which purports to allow the state to continue to force a disabled veteran to use his veterans' disability pay to satisfy a monetary payment obligation contained in a property settlement agreement would be null and void, and of no force an effect.

In its first opinion in this case, the Michigan Supreme Court explicitly ruled that the agreement Petitioner had entered into was prohibited by 38 U.S.C. § 5301(a)(3)(A). The court did not *reverse* that ruling in its second opinion. In fact, the court

completely ignored the language of the statute which *voids from inception* the very agreement which the court had already ruled was a prohibited assignment. [cites.]

Regardless of the court's second opinion, Petitioner cannot be forced to violate the federal statute going forward by using his only source of sustenance, his veterans' disability pay, to pay Respondent. And, indeed, the state can employ no "legal or equitable" powers to force Petitioner to do that which preemptive federal law prohibits.

CONCLUSION AND RELIEF REQUESTED

Petitioner respectfully requests the Court to grant his petition or summarily reverse the Supreme Court of Michigan as being contrary to preemptive federal law.

Respectfully submitted,

CARSON J. TUCKER, JD, MSEL
Counsel of Record
LEX FORI, PLLC
DPT #3020
1250 W. 14 Mile Rd.
Troy, MI 48083-1030
(734) 887-9261
cjtucker@lexfori.org

Dated: May 4, 2023

APPENDIX

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FILED April 5, 2022

STATE OF MICHIGAN
SUPREME COURT

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant- Appellant,

v No. 161892

RAY JAMES FOSTER,
Defendant/Counterplaintiff- Appellee.

BEFORE THE ENTIRE BENCH

VIVIANO, J.

At issue presently in this case is whether defendant can collaterally attack a provision in the parties' consent judgment of divorce related to the division of defendant's military retirement benefits on the ground that it conflicts with federal law. We previously held, among other things, that "[t]he trial court was preempted under federal law from including in the consent judgment the . . . provision on which plaintiff relies." *Foster v Foster*, 505 Mich 151, 175; 949 NW2d 102 (2020) (*Foster I*). But we "express[ed] no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment" and, instead, "remand[ed] the case to the Court of Appeals so that the panel [could] address the effect of our holdings on defendants' ability to challenge the terms of the consent judgment." *Id.* at 175, 175-176. On remand, the Court of Appeals held 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 Court of Appeals, issued July 30, 2020 (Docket No. 324853) (*Foster II*), p 2. Because "an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked," the Court of Appeals concluded that "defendant did not engage in an improper collateral attack on the consent judgment " *Id.* We disagree. Instead, we hold that the type of federal preemption at issue in this case does not deprive state courts of subject-matter jurisdiction. As a result, we conclude that defendant's challenge to enforcement of the provision at issue is an improper collateral attack on a final judgment.

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are adequately set forth in our previous opinion, *Foster I*, 505 Mich at 157-161, and need not be restated in their entirety here. For purposes of this opinion, it is sufficient to highlight the following points.

The parties' consent judgment of divorce was entered in December 2008. At the time of the divorce, defendant was receiving both military retirement pay and military disability benefits for injuries he sustained during the Iraq War. Pursuant to their property settlement, plaintiff was awarded 50% of defendant's retirement pay, also known as "disposable military retired pay." She was not awarded any of defendant's military disability benefits. To protect plaintiff in the event that defendant became entitled to (and accepted) more

disability benefits than he currently received, consequently diminishing the retirement benefits that were divided and awarded to plaintiff, the parties agreed to include a provision in the consent judgment of divorce that has become known as the "offset provision." In the offset provision, if defendant elected to receive an increase in disability pay, he agreed to pay plaintiff an amount equal to what she would have received had defendant not elected to do so.[1]

In February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat-Related Special Compensation (CRSC).[2]

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[1] The offset provision states as follows:

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

[2] Under federal law, a retired veteran's retirement pay can be divided with a former spouse in divorce proceedings, but disability pay cannot. See 10 USC 1408(c) (permitting division

As a result, the amount plaintiff received each month decreased from approximately $800 to approximately $200. Defendant failed to comply with the offset provision by paying plaintiff the difference.

In May 2010, plaintiff filed a petition seeking to hold defendant in contempt for failing to comply with the consent judgment. A few months later, defendant argued, for the first time, that under federal law, CRSC benefits are not subject to division in a divorce action. In an opinion and order dated October 8, 2010, the trial court denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the provisions of the judgment. The trial court acknowledged that it did not have the power to divide military disability pay but noted that the parties here had agreed upon the division and neither

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of "disposable retired pay"); 10 USC 1408(a)(4)(A) (defining "disposable retired pay"). See generally Sullivan & Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 152. The VA waiver reduces the amount of retired pay the veteran receives, which reduces the sum of money being divided with a former spouse. *Id.* CRSC is an exception to the antidouble-dipping rule. CRSC payments "are not retired pay." 10 USC 1413a(g). CRSC is an additional payment to a veteran, on top of disability pay, in the same amount as the reduction to the veteran's retired pay as a result of the VA waiver. However, CRSC payments, like disability payments, are also not divisible with a former spouse in divorce proceedings. See *Foster I*, 505 Mich at 171; Defense Finance and Accounting Service, Comparing CRSC and CRDP. <https://www.dfas.mil/retiredmilitary/disability/comparison.html> (accessed March 9, 2022) [https:perma.cc/77E7-CAS9]. See generally *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 163.

party had moved to set aside the judgment on the ground of mutual mistake. The trial court warned that if defendant failed to comply with the order that he would be held in contempt.

On March 25, 2011, plaintiff filed a petition to hold defendant in contempt, alleging that he had not made any payments as ordered. Although he did not appear at the hearing, defendant filed a response, arguing that he was not in contempt and, for the first time, arguing that the issue was within the jurisdiction of the federal courts. On May 10, 2011, the trial court entered an order holding defendant in contempt, granting a money judgment to plaintiff, and issuing a bench warrant for defendant's arrest because he did not appear at the hearing.

At a show-cause hearing on June 27, 2014, defendant, relying on 10 USC 1408 and 38 USC 5301, argued that he could not assign his disability benefits and that the trial court had erred by not complying with federal law. The trial court observed, "[W]e have litigated this issue and re-litigated this issue and it has not been properly appealed." The trial court ordered plaintiff to pay the arrearage.

On September 22, 2014, the trial court entered an order holding defendant in contempt and ordering him to pay the arrearage and attorney fees. Defendant appealed that order in the Court of Appeals.

The Court of Appeals initially affirmed the trial court order. *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13,

2016 (Docket No. 324853). Defendant sought leave to appeal in this Court. We vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Howell v Howell*, 581 US___; 137 S Ct 1400; 197 L Ed 2d 781 (2017). *Foster v Foster*, 501 Mich 917 (2017). The Court of Appeals again affirmed. *Foster v Foster* (On Remand), unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853).

Defendant again sought leave to appeal in this Court. After granting the application, the Court held as follows:

> We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss 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. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*,

> [290 Mich App 551, 574-575; 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. This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment. [*Foster I*, 505 Mich at 156 (citation omitted).]

On the second remand, the Court of Appeals reversed in *Foster II*. After a lengthy block quote of this Court's opinion in *Foster I*, the Court of Appeals dedicated a single paragraph to the issue of subject-matter jurisdiction. It cited *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds in *Sprietsma v Mercury Marine*, 537 US 51, 63-64 (2002); *People v Kanaan*, 278 Mich App 594, 602; 751 NW2d 57 (2008); and *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000), for the proposition that state courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable. The Court concluded that "defendant did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption." *Foster II*, unpub op at 2.

Plaintiff sought leave to appeal in this Court, and we granted plaintiff's application to address

> whether the defendant has the ability to challenge the relevant term of the consent judgment in this case given that federal law precludes a provision requiring that the plaintiff receive reimbursement or indemnification payments to compensate for reductions in the defendant's military retirement pay resulting from his election to receive any disability benefits. See *Howell v Howell*, 581 US ___; 137 S Ct 400; 197 L Ed 2d 781 (2017). [*Foster v Foster*, 506 Mich 1030 (2020).]

II. STANDARD OF REVIEW

The application of the doctrine of res judicata is a question of law that we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Questions of subject-matter jurisdiction are also questions of law that we review de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

This Court previously held that the offset provision in the parties' consent judgment of divorce impermissibly divides defendant's military disability pay in violation of federal law. See *Foster I*, 505 Mich at 175 ("The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies."). We must now

answer the question we left open in *Foster I*: whether defendant may challenge this provision of the consent judgment on collateral review.

A. THE DOCTRINE OF RES JUDICATA APPLIES TO JUDGMENTS THAT DIVIDE MILITARY RETIREMENT AND DISABILITY BENEFITS

We have previously explained the doctrine of res judicata as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citation omitted).]

Importantly for purposes of this case, the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle. See *Colestock v Colestock*, 135 Mich App 393, 397-398; 354 NW2d 354 (1984) ("A judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle.");

Detwiler v Glavin, 377 Mich 1, 14; 138 NW2d 336 (1965) (holding that the doctrine of res judicata applies to "a valid but erroneous judgment"). See also *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 LEd2d 103 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

This Court has long recognized as "a settled rule of law that a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified." *Pierson v Pierson*, 351 Mich 637, 645; 88 NW2d 500 (1958).[3]

The Court of Appeals has explained why finality in this context is extremely important:

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

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[3] See also *Keeney v Keeney*, 374 Mich 660, 663; 133 NW2d 199 (1965); *Greene v Greene*, 357 Mich 196, 201; 98 NW2d 519 (1959); and *Roddy v Roddy*, 342 Mich 66, 69; 68 NW2d 762 (1955).

> the courts. [*McGinn v McGinn*, 126 Mich App 689, 693; 337 NW2d 632 (1983) (citation omitted).][4]

The United States Supreme Court has recognized that the application of the doctrine of res judicata in this context is an issue of state law. See *Mansell v Mansell*, 490 US 581, 586 n 5; 109 S Ct 2023; 104 L Ed 2d 675 (1989) ("Whether the doctrine of res judicata . . . should have barred the reopening of pre-*McCarty* [v *McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981),] settlements is a matter of state law over which we have no jurisdiction."). See also 2 Turner, Equitable Distribution of Property (4th ed), § 6:6, p 49 (noting that the Court had dismissed in *Sheldon v Sheldon*, 456 US 941 (1982), for want of a substantial federal question, a petition raising the issue of whether "'federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law' ").[5]

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[4] See also *Staple v Staple*, 241 Mich App 562, 579; 616 NW2d 219 (2000) ("The Family Law Section of the State Bar, representing more than three thousand family law specialists, elaborates on the public policy value of finality in divorce cases: 'There is probably not a single family law practitioner in the State of Michigan who would not advocate the importance of finality in their divorce cases. Divorce cases, by their nature, involve parties coming together and resolving contentious matters The parties, after the divorce, wish to go on in their separate lives and not…be subject to future petitions for relief'").

[5] As this Court has recognized, this type of dismissal indicates "that all the issues properly presented to the Supreme Court

Applying these principles, the provision of the parties' consent judgment of divorce that divides defendant's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law. See generally *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt").[6]

B. THE PARTIES' DIVORCE JUDGMENT IS NOT VOID AND THEREFORE IS NOT SUBJECT TO COLLATERAL ATTACK

Even though it is otherwise enforceable, defendant argues that because the offset provision is preempted by federal law, it is automatically void and, therefore,

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have been considered on the merits and held to be without substance; for this reason, the adjudication is binding precedent under the doctrine of stare decisis with respect to those issues when raised in subsequent matters." *Gora v Ferndale*, 456 Mich 704, 713; 576 NW2d 141 (1998) (quotation marks and citations omitted).

[6] It is worth noting that our holding places us in good company because the majority of state courts have held that "military benefits of all sorts can be divided under the law of res judicata." Turner, § 6:9, p 72. See *Id.* at 72-73 n 4 (listing cases). A minority of state courts hold to the contrary. See *Id.* at 74 n 9 (listing cases and text accompanying). However, as the author observes, "[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*," and "[n]one have showed any awareness of the postremand history of *Mansell*[.]" *Id.* at 74.

subject to collateral attack at any time.[7] As an initial matter, defendant asserts that a judgment containing a provision that exceeds the limits of the trial court's authority is void. *Id.* However, as we explained in *Buczkowski v Buczkowski*, 351 Mich 216, 221-222; 88 NW2d 416 (1958), there is an important distinction between the court's jurisdiction of the parties and the subject matter of the suit, on the one hand, and the court's erroneous exercise of that jurisdiction, on the other:

> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. The

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[7] This Court has long recognized a distinction between a judgment that is void and one that is voidable. See *Clark v Holmes*, 1 Doug 390, 393 (1844) ("It is a well settled doctrine that, when proceeding to exercise the powers conferred, [inferior courts of special and limited jurisdiction] must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and when they thus have jurisdiction of the person and the cause, if in the further proceedings they commit error, the proceedings are not void, but only voidable, and may be reversed for error by the proper court of review where a power of review is given; . . . but on the contrary, when they have not such jurisdiction of the cause and of the person, their proceedings are absolutely void, and cannot afford any justification or protection, and they became trespassers by any act done to enforce them."). See also 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2612.13, pp 624-625 (discussing the distinction between void and voidable judgments).

judgment of a court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.

The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co. v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:

> There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.[8]

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[8] *Buczkowski*, 351 Mich at 221-222 (cleaned up). See also *People v Washington*, 508 Mich ___; ___ NW2d ___ (2021), slip op at 10-

In *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), again quoting from *Jackson City Bank*, we explained that only judgments entered without personal jurisdiction or subject-matter jurisdiction are void and subject to collateral attack:

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

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11 ("The prosecutor is correct that there is a widespread and unfortunate practice among both state and federal courts of using the term 'jurisdiction' imprecisely, to refer both to the subject-matter and the personal jurisdiction of the court, and to the court's general authority to take action."); *Id.* at ___ n 5; slip op at 12 n 5 (noting that "the terms 'power' and 'authority' are generally used to refer to errors in the exercise of jurisdiction and other nonjurisdictional errors").

As these authorities make clear, defendant's assertion that the judgment is void and subject to collateral attack simply because it conflicts with federal law is "manifestly in error." *Buczkowski*, 351 Mich at 221.

Next, defendant argues that the judgment is void and subject to collateral attack because Congress deprived state courts of subject-matter jurisdiction over the division of military disability benefits.[9] To prevail on this argument, defendant must demonstrate that Congress has given exclusive jurisdiction over the division of military disability benefits in a divorce action to a federal forum. See, e.g., 21 CJS, Courts, § 272, p 288 ("The preemption

[9] To the extent defendant continues to assert that all types of federal preemption deprive state courts of subject-matter jurisdiction—the position he advanced during his prior trip to this Court—we disagree with this assertion. Instead, we adopt the analysis on this point in the concurring opinion in *Foster I* and clarify our caselaw in this area. See *Foster I*, 505 Mich at 181-188 (VIVIANO, J., concurring). In particular, although in *Henry v Laborers' Local 1191*, 495 Mich 260, 287 n 82; 848 NW2d 130 (2014), we asserted that "preemption is a question of subject-matter jurisdiction," it is clear that "our assertion was made in the context of *Garmon* preemption [see *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959),] and was indisputably correct in that context given that Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act " *Foster I*, 505 Mich at 184. We also disavow our statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." Finally, to the extent it reached a different conclusion, we overrule *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010).

doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.").[10] However, as discussed later in this opinion, defendant has failed to persuade us that the Veteran's Administration or any other federal forum has exclusive jurisdiction over the division of military disability benefits in a divorce action.

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[10] See also *Marshall v Consumers Power Co*, 65 Mich App 237, 245; 237 NW2d 266 (1976) (setting out a two-part test for determining whether Congress has impliedly preempted state law, under which a court must (1) "determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case," and (2) "if it has, [determine] whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system"). The second part of the test is not satisfied in this case because Congress has not "vested exclusive jurisdiction of th[is] subject matter," i.e., division of military disability benefits in a divorce action, in a federal forum. See *Veterans for Common Sense v Shinseki*, 678 F3d 1013, 1025-1026 (CA 9, 2012) (en banc) ("[W]e conclude that [38 USC 511] precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must seek a forum in the Veterans Court and the Federal Circuit.") (quotation marks and citations omitted; emphasis added). And *Kalb v Feuerstein*, 308 US 433, 438-439; 60 S Ct 343; 84 L Ed 370 (1940), cited by defendant, only serves to confirm this point. At issue in Kalb was whether a state court had jurisdiction in a foreclosure matter over property that fell under the jurisdiction of the bankruptcy court. But Congress has established an exclusive federal forum for bankruptcy matters. *Id.* at 439.

The United States Supreme Court rejected a similar argument in *Rose v Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987), after first observing:

> We have consistently recognized that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be pre- empted. Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests. [*Id.* at 625 (cleaned up).]

Relying on 38 USC 3107(a)(2), the veteran spouse argued that the Veteran's Affairs administrator had exclusive authority over all issues involving the disposition of military disability benefits. Rejecting that argument, the Court explained:

> This jurisdictional framework finds little support in the statute and implementing regulations. Neither [38 USC 3107(a)(2) nor 38 CFR 3.450 through 3.461 (1986)] mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on that court's ability to enforce such an order. Nor is it clear that Congress envisioned the Administrator making

> independent child support determinations in conflict with existing state-court orders. . . .
>
> . . . Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes that do contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support. Thus, we do not agree that the implicit pre-emption appellant finds in § 3107(a)(2) is "positively required by direct enactment," or that the state court's award of child support from appellant's disability benefits does "major damage" to any "clear and substantial" federal interest created by this statute. [*Rose*, 481 US at 627-628, quoting *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979).][11]

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[11] The Court further described the purpose of the federal statutes as follows:

> The interest in uniform administration of veterans' benefits focuses, instead, on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules. These are the issues Congress deemed especially well-suited for administrative determination insulated from judicial review. Thus, even assuming that [38 USC] 211(a) covers a contempt proceeding brought in state court against a

Although the Court in *Rose* found that the state child support statute was not preempted by federal law, its analysis is still helpful in determining whether Congress has established an exclusive forum for dividing military disability benefits in a divorce action. Defendant here contends that the Secretary of Veterans Affairs has exclusive jurisdiction over all issues concerning veteran's benefits, including the division of those benefits in a state court divorce action. Defendant correctly notes that appellate jurisdiction from a decision by the Secretary is limited to the federal courts.[12] 38 USC 511(a) establishes that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans" and generally precludes review of the Secretary's decision "as to any such question" "by any other official or by any court," with a limited number of exceptions. And 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. But just as the Court in Rose was "not reviewing the Administrator's decision finding the veteran eligible

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> disabled veteran to enforce an order of child support, *that court is not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits*. [*Rose*, 481 US at 629 (cleaned up; emphasis added).]

[12] Specifically, 38 USC 7104(a) provides for an appeal from the Secretary's decision under 38 USC 511(a) to the Board of Veterans' Appeals. In turn, the United States Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals, 38 USC 7252(a), and the United States Court of Appeals for the Federal Circuit has jurisdiction to review a decision of the Court of Appeals for Veterans Claims, 38 USC 7292.

for specific disability benefits," *Rose*, 481 US at 629, the trial court in this case was not reviewing a decision of the Secretary of Veterans Affairs under 38 USC 511(a). Therefore, contrary to defendant's assertion, there is no exclusive federal forum for dividing military disability benefits in divorce actions. We agree with plaintiff that 38 USC 511—just like 38 USC 211(a), which was at issue in *Rose*—does not refer to, restrict, or displace state court jurisdiction.

In sum, we hold that federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive our state courts of subject-matter jurisdiction over a divorce action involving the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was "a mistake in the exercise of undoubted jurisdiction," *Jackson City Bank*, 271 Mich at 544, that judgment is not subject to collateral attack.[13]

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[13] We believe the law in this area is correctly described in Turner, § 6:6, p 50:

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

IV. CONCLUSION

Because the Court of Appeals erroneously concluded that the type of federal preemption at issue in this case deprives state courts of subject-matter jurisdiction, and because there is no other justification for a collateral attack on the consent judgment in this case, we reverse the judgment of the Court of Appeals and remand this case to the Dickinson Circuit Court for further proceedings not inconsistent with this opinion.

David F. Viviano
Bridget M. McCormack
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

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substantive law cannot be collaterally attacked after it becomes final.

STATE OF MICHIGAN
SUPREME COURT

ORDER

May 27, 2022

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant- Appellant,

v

SC: 161892
COA: 324853
DickinsonCC:07-015064-DM

RAY JAMES FOSTER,
Defendant/Counterplaintiff- Appellee.

On order of the Court, the motion for rehearing of the Court's April 5, 2022 opinion is considered and, in lieu of granting rehearing, we AMEND the opinion of the Court by replacing the sentence in section I stating, "In February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat- Related Special Compensation (CRSC)" with the following: "In February 2010, defendant began receiving increased disability benefits, which included Combat-Related Special Compensation (CRSC)." In all other respects, the motion for rehearing is DENIED. MCR 7.311(F).

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant-Appellee,

v

UNPUBLISHED July 30, 2020
No. 324853
Dickinson Circuit Court
LC No. 07-015064-DM

RAY JAMES FOSTER,
Defendant/Counterplaintiff-Appellant.

ON SECOND REMAND

Before: MARKEY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ. PER CURIAM.

Our Supreme Court has again remanded this case to us to "address the effect of [its] holdings on defendant's ability to challenge the terms of the consent judgment." *Foster v Foster*, ___ Mich ___, ___; __ NW2d __ (2020); slip op at 3. We reverse the trial court's order requiring defendant, under the offset provision in the consent judgment, to make payments to plaintiff to cover the reduction in his retirement pay.

The following introductory paragraphs of the Michigan Supreme Court's opinion provide a concise setup for our analysis:

> This case involves a dispute between former spouses who entered into a consent judgment of

divorce (the consent judgment), which provided that defendant would pay plaintiff 50% of his military retirement benefits. Beyond that, the parties agreed that if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits. Defendant elected to increase his disability benefits when he applied for Combat-Related Special Compensation (CRSC), a form of military disability benefits, pursuant to 10 USC 1413a. He started receiving CRSC shortly after the divorce. As a result, defendant's retirement benefits decreased, which in turn decreased the share of the retirement benefits payable to plaintiff. When defendant failed to reimburse plaintiff for the reduced payment she received in connection with defendant's lowered military retirement benefits, plaintiff sought relief in the Dickinson Circuit Court, asking that the consent judgment be enforced. The trial court and the Court of Appeals enforced the plain terms of the consent judgment and required defendant to reimburse plaintiff for the reduction in her interest in defendant's retirement benefits. Defendant argues that federal law preempts state law in regard to the division of veteran benefits and, thus, the consent judgment is unenforceable.

We conclude that federal law preempts state law such that the consent judgment is

> unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss 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. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment. [*Foster*, ___ Mich at ___; slip op at 1-3,]

State courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds in *Sprietsma v Mercury Marine*, 537 US 51, 63-64; 123 S Ct 518; 154 L Ed 2d 466 (2002); *People v Kanaan*, 278 Mich App 594, 602; 751 NW2d 57 (2008); *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000). And an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked. *Bowie v Arder*, 441 Mich 23, 56;

490 NW2d 568 (1992); *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc (On Reconsideration)*, 305 Mich App 460, 477; 853 NW2d 467 (2014) (a collateral attack is allowed if the court never acquired jurisdiction over the subject matter). Moreover, "[s]ubject-matter jurisdiction cannot be granted by implied or express stipulation of the litigants." *Harris v Vernier*, 242 Mich App 306, 316; 617 NW2d 306 (2000); see also *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 564; 884 NW2d 799 (2015) ("Nor can subject-matter jurisdiction be conferred by the consent of the parties"). Accordingly, in the instant case, defendant did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject- matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption.

We reverse and remand for further proceedings or actions, if any, as the trial court may deem necessary. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause

FILED April 29, 2020

STATE OF MICHIGAN
SUPREME COURT

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant- Appellee,

v No. 157705

RAY JAMES FOSTER,
Defendant/Counterplaintiff- Appellant.

BEFORE THE ENTIRE BENCH

ZAHRA, J.

This case involves a dispute between former spouses who entered into a consent judgment of divorce (the consent judgment), which provided that defendant would pay plaintiff 50% of his military retirement benefits. Beyond that, the parties agreed that if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits.

Defendant elected to increase his disability benefits when he applied for Combat-Related Special Compensation (CRSC), a form of military disability benefits, pursuant to 10 USC 1413a. He started receiving CRSC shortly after the divorce. As a result, defendant's retirement benefits decreased, which in

turn decreased the share of the retirement benefits payable to plaintiff. When defendant failed to reimburse plaintiff for the reduced payment she received in connection with defendant's lowered military retirement benefits, plaintiff sought relief in the Dickinson Circuit Court, asking that the consent judgment be enforced. The trial court and the Court of Appeals enforced the plain terms of the consent judgment and required defendant to reimburse plaintiff for the reduction in her interest in defendant's retirement benefits. Defendant argues that federal law preempts state law in regard to the division of veteran benefits and, thus, the consent judgment is unenforceable.

We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss 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. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*, 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.[1] This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Ray Foster, commenced service in the United States Army in 1985, prior to his marriage to plaintiff, Deborah Foster. During the marriage, defendant was deployed in the Iraq war and suffered serious and permanently disabling combat injuries. Thereafter, defendant continued his military career and, after more than 22 years of service, he retired in September 2007. Because defendant was injured during combat, he was eligible for CRSC under 10 USC 1413a, and defendant applied for CRSC around the time of his retirement. In February 2008, defendant received notice that he was eligible for CRSC retroactive to October 2007.

Plaintiff filed for divorce in November 2007, and a final consent judgment of divorce was entered in December 2008. Before entering that judgment, the trial court conducted a hearing regarding the proposed consent judgment. Defendant testified that he was receiving both military retirement pay and military disability benefits based on his combat-

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[1] *Megee v Carmine*, 290 Mich App 551, 574-575; 802 NW2d 669 (2010).

related injuries. The litigants, through counsel, agreed that defendant's disability benefits were not subject to division by the court because they were not marital property under federal law. At the time of the divorce, plaintiff was gainfully employed as a registered nurse.

The proposed property settlement awarded plaintiff 100% of any interest she acquired in retirement and pension benefits as a result of her employment during the marriage. Additionally, plaintiff was to receive 50% of defendant's disposable retirement pay that accrued during the marriage.[2] The parties also agreed to the inclusion of the following provision (the offset provision) in the proposed consent judgment:

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to

[2] The consent judgment provided that plaintiff would receive 50% of defendant's disposable retirement pay based on that portion of the retirement that accrued during the course of the marriage. Plaintiff understood that this meant she would receive something slightly less than a 50/50 split because defendant was employed in the military before the marriage.

> Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

At the divorce hearing, the trial court inquired as to why the language of this provision suggested that defendant was not currently receiving any disability benefits when, in fact, he was. Counsel explained that it was intended to apply in the event that defendant was offered an increase in disability benefits because such an increase would diminish the retirement benefits owed to plaintiff under the proposed settlement. The trial court inquired into defendant's understanding of this provision:

> The Court: . . . Mr. Foster, you do acknowledge that if you were to defer any of your current military retirement pay or convert it to disability pay, or if your military retirement pay were reduced because the level of your disability pay was increased, you acknowledge this Court's ability to enforce payment to Ms. Foster [of] the level of benefits that she would be entitled [to] presently from your retirement pay?
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> [Defendant]: Yes.

No specific amounts were mentioned at the hearing or in the actual consent judgment. Suffice it to say, however, that plaintiff received slightly more than $800 per month until February 2010. When defendant began receiving CRSC,[3] his disposable retirement benefit amount was reduced, and plaintiff's monthly payment was reduced to a little more than $200.[4]

Defendant nonetheless failed to pay plaintiff the difference between the reduced amount of retirement pay she received beginning in February 2010 and the amount that she had received shortly after entry of the consent judgment. Consequently, numerous hearings took place in the trial court over several years, all of which were designed to compel defendant to pay plaintiff the difference between the amount plaintiff would have been entitled to under the consent judgment had defendant not received CRSC and the amount plaintiff actually received after the

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[3] Retirement pay is taxable, whereas disability benefits are not, and so defendant was economically incentivized to waive retirement pay in favor of disability benefits. See *Howell v Howell*, 581 US ___, ___; 137 S Ct 1400, 1403; 197 L Ed 2d 781 (2017), citing *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981).

[4] The Court of Appeals concluded that defendant became eligible to receive CRSC after entry of the consent judgment. This is contrary to defendant's testimony, and we have found nothing in the record to support this conclusion. Defendant testified at the September 30, 2010 show-cause hearing that he applied for CRSC when he applied to retire and that he received correspondence from the Veteran's Administration that he was approved to receive those benefits retroactive to October 2007. Defendant claimed that he shared this correspondence with his lawyer.

government commenced paying defendant CRSC. These proceedings culminated in the order from which defendant appeals that found him in contempt of court for failure to pay plaintiff in compliance with the consent judgment. The court ordered him to pay plaintiff $1,000 per month, with $812 credited as current payments due under the consent judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full. Defendant has been paying plaintiff in monthly installments since the contempt order was entered. Payments were guaranteed by an "appearance bond" in the amount of $9,500 and secured with a lien on his mother's home.

Defendant appealed in the Court of Appeals, arguing that the trial court erred by not finding plaintiff's attempts to enforce the consent judgment preempted by federal law. The Court of Appeals concluded that the matter was not preempted by federal law and affirmed the trial court's contempt order.[5] Defendant sought leave to appeal in this Court. In lieu of granting leave to appeal, we vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of the opinion of the Supreme Court of the United States in *Howell v Howell*.[6] On remand, the Court of Appeals again affirmed the trial court's finding of contempt, concluding that *Howell* did not overrule the Court of

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[5] *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 324853), pp 1, 5 (*Foster I*), vacated 501 Mich 917 (2017).

[6] *Foster v Foster*, 501 Mich 917 (2017), citing *Howell*, 581 US ___; 137 S Ct 1400.

Appeals' decision in *Megee*.[7] The panel reasoned that *Howell* was distinguishable because it involved general service-connected disability benefits and because the *Howell* opinion rested squarely on the language in former 10 USC 1408(a)(4)(B), which provided—and still provides in 10 USC 1408(a)(4)(A)(ii)—that "disposable retired pay" means a member's total monthly retired pay less amounts that "are deducted from the retired pay . . . as a result of . . . a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]"[8] The Court of Appeals also observed that the *Megee* decision distinguished CRSC from general service-connected disability pay found in Title 38 on the basis of CRSC's status as Title 10 compensation.[9] Given that CRSC is at issue in the instant case, and that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC, the Court of Appeals concluded that *Megee* was on point and remained binding precedent.[10] Defendant again sought relief in this Court, and we granted his application for leave to appeal to consider the federal-preemption question, the continuing viability of *Megee*, and the propriety of the contempt order entered against defendant.[11]

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[7] *Foster v Foster* (On Remand), unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853) (*Foster II*), pp 1, 7.

[8] *Id.* at 7, citing *Howell*, 581 US at ___; 137 S Ct at 1402-1404.

[9] *Foster II*, unpub op at 7.

[10] *Id.*, citing MCR 7.215(J)(1).

[11] *Foster v Foster*, 503 Mich 892 (2018).

II. ANALYSIS

Defendant argues that under federal law as outlined in *Howell*, veterans' disability benefits are – and always have been – nondisposable, indivisible benefits that constitute a personal entitlement free from state legal process. He contends that CRSC is categorically precluded from being considered disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) and that federal law thus preempts the states from an exercise of authority that would result in the division of such benefits. This remains true, defendant asserts, even when a consent judgment of divorce uses language effectively "indemnifying" or "reimbursing" a nonveteran spouse for payments that would have been received if retirement pay had not been waived in order to receive disability benefits, as opposed to language dividing received disability benefits outright.

A. LEGAL BACKGROUND

Background information on the framework providing for military retired pay and military disability benefits, including CRSC, is useful to review before assessing the merits of the parties' arguments. "Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay."[12] Retirement pay is

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[12] *Mansell* v *Mansell*, 490 US 581, 583; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (citations omitted).

calculated on the basis of the years served and the rank attained by the retiring veteran.[13]

In *McCarty v McCarty*, the Supreme Court of the United States held that federal law precludes state courts from treating military retirement pay as divisible marital property in divorce proceedings.[14] Specifically, the Supreme Court interpreted federal statutes governing retirement benefits and concluded that it was the intent of Congress that military retired pay "actually reach the beneficiary."[15] Thus, under *McCarty*, "[r]etired pay [could not] be attached to satisfy a property settlement incident to the dissolution of a marriage."[16]

Congress responded with the enactment of the USFSPA.[17] Under the new statutory scheme, state courts were authorized to treat "disposable retired pay" as divisible community property in a divorce.[18] The pertinent statutory text reads:

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[13] *Id.* Additional retired pay may be warranted when a service member is recalled to active duty. *McCarty*, 453 US at 223 n 16, citing 10 USC 1402.

[14] *McCarty*, 453 US at 223-232.

[15] *Id.*

[16] *Id.* at 228.

[17] 10 USC 1408 et seq. See also *Mansell*, 490 US at 584; *King v King*, 149 Mich App 495, 498; 386 NW2d 562 (1986).

[18] 10 USC 1408(c)(1). See also *Mansell*, 490 US at 584.

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.[19]

The Act defines "disposable retired pay" as follows:

> [T]he total monthly retired pay to which a member is entitled less amounts which—
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> (i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

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[19] 10 USC 1408(c)(1).

> (iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.[20]

Nearly eight years after the USFSPA was enacted, the Supreme Court of the United States in *Mansell v Mansell* confirmed that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[21] *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.[22]

"Veterans who became disabled as a result of military service are eligible for disability benefits."[23] Nonetheless, in order to prevent veterans from receiving double payment in the form of retirement pay and disability benefits, "federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability benefits are not, the veteran often

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[20] 10 USC 1408(a)(4)(A).

[21] *Mansell*, 490 US at 594-595.

[22] *Id.* at 588-594

[23] *Id.* at 583.

elects to waive retirement pay in order to receive disability benefits."[24]

An exception to the typical bar against receipt of both retirement pay and disability benefits—and the one most relevant to the instant matter—is CRSC, which is separate from standard VA disability benefits.[25] "To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a combat-related disability."[26] CRSC is calculated as the amount of monthly retirement pay the veteran would be entitled to under Title 38, "determined without regard to any disability of the retiree that is not a combat-related disability."[27] The maximum amount of allowable CRSC is "the reduction in retired pay that is applicable to the retiree for that month under sections 5304 and 5305 of title 38."[28]

B. FEDERAL PREEMPTION

We now turn to defendant's contention that the offset provision of the consent judgment was preempted by federal law. Whether federal law preempts state action is a question of law that this

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[24] *Howell*, 581 US at ; 137 S Ct at 1403, citing *McCarty*, 453 US at 211-215.

[25] 10 USC 1413a.

[26] 10 USC 1413a(c).

[27] 10 USC 1413a(b)(1).

[28] 10 USC 1413a(b)(2).

Court reviews de novo.[29] Likewise, the interpretation of a statute is a question of law that we review de novo.[30] A court's refusal to enter a stay is reviewed for an abuse of discretion,[31] as is the decision to impose a security bond.[32] A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.[33]

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[34]

Federal law may preempt state law in multiple ways, one of which has come to be known as "field

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[29] *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

[30] *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

[31] *Larion v Detroit*, 149 Mich App 402, 410; 386 NW2d 199 (1986).

[32] *In re Surety Bonds for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997).

[33] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[34] US Const, art VI, cl 2.

preemption."[35] This type of preemption recognizes that "Congress may have intended 'to foreclose any state regulation in the area,' irrespective of whether state law is consistent or inconsistent with 'federal standards.'"[36] Where applicable, the duly enacted laws passed by Congress effectively forbid the states from taking action in the field preempted.[37] In assessing defendant's claims, we are mindful of guidance provided by the Supreme Court of the United States, which stated that "'[t]he purpose of Congress is the ultimate touchstone' in every preemption case"[38] and that "Congress may indicate its preemptive intent in two ways: 'explicitly . . . in a statute's language' or, by implication, through a statute's 'structure and purpose.'"[39] In determining whether field preemption functions as a bar to state law, we must examine whether the trial court's order in this case obstructs "the accomplishment and

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[35] *Oneok, Inc v Learjet, Inc*, 575 US 373, 377; 135 S Ct 1591; 191 L Ed 2d 511 (2015). See also *Mich Canners & Freezers Ass'n, Inc v Agricultural Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984).

[36] *Oneok, Inc*, 575 US at 377, quoting *Arizona v United States*, 567 US 387, 401; 132 S Ct 2492; 183 L Ed 2d 351 (2012).

[37] *Oneok, Inc*, 575 US at 377.

[38] *Arbuckle v Gen Motors LLC*, 499 Mich 521, 532; 885 NW2d 232 (2016), quoting *Retail Clerks Int'l Ass'n v Schermerhorn*, 375 US 96, 103; 84 S Ct 219; 11 L Ed 2d 179 (1963).

[39] *Arbuckle*, 499 Mich at 532, quoting *Jones v Rath Packing Co*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed 2d 604 (1977).

execution of the full purposes and objectives of Congress."[40]

In *Howell v Howell*, the Supreme Court of the United States reiterated its conclusion from *Mansell*, stating that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property."[41] From this, the *Howell* Court broadly held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.[42] Further, it makes no difference whether a military veteran waives retirement pay postjudgment or prejudgment as part of an overall divorce settlement.[43] Disability pay cannot become divisible marital property through the use of an order requiring the veteran to "reimburse" or "indemnify" the spouse, rather than an order dividing a portion of waived retirement pay outright.[44]

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[40] See *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941).

[41] *Howell*, 581 US at ___; 137 S Ct at 1405.

[42] *Id.* at ___; 137 S Ct at 1402, 1406.

[43] *Id.* at ; 137 S Ct at 1405.

[44] *Id.* at __; 137 S Ct at 1406. The *Howell* Court was not ignorant of the hardship that this holding might work on divorcing spouses. *Id.* at ___; 137 S Ct at 1406. Indeed, the Court noted that state courts remained free to account for the waiver of military retirement pay when calculating or recalculating the need for spousal support. *Id.* at ____; 137 S Ct at1406, citing

To the extent that *Howell* was not concerned with CRSC specifically, the Supreme Court has signaled that *Howell* is nevertheless applicable to such benefits. For example, in *Merrill v Merrill*, the Supreme Court of Arizona addressed the application of a state law to a divorce involving a veteran and a nonveteran former spouse.[45] The statute stated that in dividing property in a proceeding for the dissolution of a marriage, Arizona state courts could not:

> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code § 1413a or 38 United States Code chapter 11.
>
> 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.
>
> 3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.[46]

Rose v Rose, 481 US 619, 630-634, 632 n 6; 107 S Ct 2029; 95 L Ed 2d 599 (1987); 10 USC 1408(e)(6).

[45] *Merill v Merill*, 238 Ariz 467, 468; 362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017).

[46] Ariz Rev Stat Ann 25-318.01.

In cases of postdecree reductions of military retirement pay caused by the veteran spouse's election to receive CRSC, however, the Arizona Supreme Court held that, so long as the decree was entered before the statute's effective date, the statute did not preclude entry of an order indemnifying the nonveteran spouse to compensate for the lesser payments that resulted from the reduction.[47] Similarly, in *In re Marriage of Cassinelli*, the California Court of Appeals upheld an order forcing a retired and disabled veteran to reimburse his former spouse for the reduction of her share of his retirement pay in a community property settlement resulting from his waiver of retirement pay to receive disability pay that included CRSC.[48] Specifically, the California Court of Appeals held that a state court "could properly order [the veteran spouse] to reimburse [the nonveteran spouse] for her lost community property interest" without violating "either federal law or finality principles."[49]

In both cases, the Supreme Court of the United States granted certiorari and vacated the judgments of the state courts before remanding for

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[47] *Merrill*, 238 Ariz at 470.

[48] *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1291, 1297; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US ___; 138 S Ct 69 (2017).

[49] *Cassinelli*, 4 Cal App 5th at 1291. See also *Id.* at 1299 ("[A] state court can order a military spouse who has waived retired pay to reimburse a civilian spouse for the latter's loss of a community property interest in the retired pay without violating *Mansell*.").

reconsideration in light of *Howell*.[50] That is, on the basis of its decision in *Howell*, the Supreme Court vacated state court decisions ruling that veterans could be forced to reimburse former nonveteran spouses in divorce proceedings if they had waived retirement pay in order to receive CRSC under 10 USC 1413a. Such benefits are of the very same kind at issue in this case.

Applying these principles to the matter at hand, we conclude that *Howell* and *Mansell* preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC.[51] The *Howell* Court broadly stated that, in the wake of *Mansell*, "federal law completely pre- empts the States from treating waived military retirement pay as divisible community property."[52] A "reimbursement" or "indemnification" to compensate for the reduction of

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[50] *Merrill*, 581 US ___; 137 S Ct 2156; *Cassinelli*, 583 US ___; 138 S Ct 69.

[51] Plaintiff does not appear to argue that *Howell* is inapplicable to the instant case simply because it was decided more than eight years after the parties entered into the consent judgment at issue. To assuage any doubt as to the applicability of *Howell* to this matter for this reason, however, it is important to note that *Howell* is merely a clarification of *Mansell*. See *Howell*, 581 US at __; 137 S Ct at 1405 ("This Court's decision in *Mansell* determines the outcome here."). Because *Mansell* was decided in 1989—long before the parties were divorced—the date of the *Howell* opinion's issuance is of no matter.

[52] *Howell*, 581 US at ___; 137 S Ct at 1405 (emphasis added).

payments resulting from the nonveteran spouse's share of partially waived military retirement pay is effectively no different than a direct division of the disability benefits themselves.[53]

Plaintiff asserts that, under the plain language of 10 USC 1408(a)(4)(A)(ii), only those reductions in retired pay stemming from waivers required in order to receive compensation under Title 5 or Title 38 are excluded from "disposable retired pay." This implies that reductions in funds resulting from waivers to receive benefits under Title 10, like CRSC, may not be excluded from "disposable retired pay." Therefore, maintains plaintiff, the reduction can be accounted for in a marital-asset division under 10 USC 1408(c)(1). The Court of Appeals was apparently persuaded by this logic.[54] But plaintiff and the panel below ignored the language of 10 USC 1413a(g) stating that "[p]ayments under this section[, which provides for CRSC payments,] are not retired pay." Pursuant to 10 USC 1408(a)(4)(A), disposable retired pay is calculated, prior to accounting for reductions (including those resulting from waivers of retired pay), by totaling the amount of "monthly retired pay" to which a veteran is entitled. Because CRSC is not "retired pay" under Title 10, it would not be subject to division as a marital asset under 10 USC 1408(c). Any amounts waived that lead to the receipt of CRSC would likewise not be divisible in this manner.[55]

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[53] *Id.* at ___; 137 S Ct at 1405-1406.

[54] See *Foster II*, unpub op at 7.

[55] The Court of Appeals misunderstood the nature of CRSC benefits in this regard. See *Id.* (distinguishing the case from

This analysis is not undone by plaintiff's insistence that this case is distinguishable from *Howell* because the parties consented to plaintiff's continued receipt of funds equal to those she would have received had defendant not elected to receive CRSC. Under 38 USC 5301(a)(1):

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall

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Howell because *Howell* "did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay"); *Megee*, 290 Mich App at 565 (distinguishing the case from *Mansell* because the "plaintiff here did not waive his right to retirement pay in order to receive compensation under title 5 or title 38, but to receive title 10 compensation"). Defendant's election of CRSC did not directly require a waiver of retired pay. Rather, defendant's election to receive CRSC benefits would have been contingent on receiving disability benefits, 10 USC 1413a(b), and the increase in disability benefits was what would have legally triggered the decrease in retirement pay. See 38 USC 5304; 38 USC 5305. A letter dated April 14, 2010, from the Defense Finance and Accounting Service to plaintiff confirms that the reduction in the amount paid to plaintiff "was due to the increase in [defendant's] Va Disability" benefits.

Moreover, it makes sense that 10 USC 1408(a)(4)(A)(ii) would not include language allowing for the deduction of amounts waived to receive CRSC under Title 10 because the limitation to consideration of amounts waived in order to receive compensation under Title 5 or Title 38 was enacted in 1982. PL 97-252, § 1002; 96 Stat 718. The provision in Title 10 allowing for CRSC, 10 USC 1413a, was not enacted until 20 years later, in 2002. PL 107-314, § 636; 116 Stat 2458.

> be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title [38 USC 1901 et seq.], or of servicemen's indemnity.

Subsection (a)(3)(A) further states that

> in any case where a beneficiary entitled to compensation . . . enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, . . . such agreement shall be deemed to be an assignment and is prohibited.

"A consent judgment is in the nature of a contract, and is to be construed and applied as such."[56] Among the key elements of any contract in Michigan is consideration.[57] Thus, the consent judgment in this

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[56] *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

[57] *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545

case effectively amounted to "an agreement . . . under which agreement . . . [plaintiff] acquire[d] for consideration the right to receive" an amount equivalent to what she would have received had defendant not waived retirement pay to receive CRSC.[58] This is, under federal statute, an impermissible "assignment."[59]

C. EFFECT ON *MEGEE v CARMINE*

With the preceding analysis in mind, it is appropriate to conclude that *Howell* overruled the Michigan Court of Appeals' judgment in *Megee v Carmine*. In *Megee*, the veteran spouse (the plaintiff) elected to receive CRSC, which resulted in a diminution of his retirement pay and the nonveteran spouse's (the defendant's) 50% award stemming from that amount.[60] The *Megee* panel held:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to

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(1937).

[58] See 38 USC 5301(a)(3)(A).

[59] See *Id.*

[60] *Megee*, 290 Mich App at 561.

> the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired.[61]

This is, however, exactly the conduct that *Howell* and *Mansell* endeavored to preclude. Regardless of the voluntary nature of the waiver or the temporal relation of the waiver to the consent judgment, the *Megee* panel ultimately held that the portion of retirement pay that the plaintiff waived to receive CRSC was compensable to the defendant in the division of assets pursuant to divorce proceedings. We therefore overrule *Megee*.

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[61] *Id.* at 566-567, 574-575.

D. PROCEEDINGS ON REMAND

Plaintiff argues that the instant appeal constitutes an impermissible collateral attack on the consent judgment. The panel below agreed with her in this regard (before ruling on the merits of the parties' contentions), but did so in a conclusory fashion, stating that "defendant is engaging in an improper collateral attack on the divorce judgment" and citing *Kosch v Kosch*, a 1999 decision of the Court of Appeals.[62] But *Kosch* merely held that the defendant's failure in that case to file an appeal from the original judgment of divorce categorically precluded a collateral attack on the merits of that decision.[63] This is ordinarily true except in cases concerning jurisdictional error.[64] The *Kosch* opinion did not discuss this particular nuance. With this in mind, we leave it to the Court of Appeals on remand to address the effect of our holdings today on the trial court's subject-matter jurisdiction to enter the consent judgment of divorce containing the offset provision at issue and to address defendant's ability to challenge the consent judgment on collateral review.

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[62] *Foster II*, unpub op at 2, 6, citing *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) (quotation marks and citation omitted).

[63] *Kosch*, 233 Mich App at 353.

[64] See *Pettiford v Zoellner*, 45 Mich 358, 361; 8 NW 57 (1881); *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935); *Couyoumjian v Anspach*, 360 Mich 371, 386; 103 NW2d 587 (1960).

III. CONCLUSION

The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies. The broad language of *Howell* precludes a provision requiring that plaintiff receive reimbursement or indemnification payments to compensate for reductions in defendant's military retirement pay resulting from his election to receive any disability benefits, including CRSC as provided for under Title 10.

Nevertheless, we express no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment. The Court of Appeals did not substantively review this point or the effect of federal preemption on the trial court's subject-matter jurisdiction. We therefore vacate that portion of the March 22, 2018 opinion and judgment of the Court of Appeals concluding that defendant's contentions amounted to an improper collateral attack on the consent judgment, and we reverse the balance of the panel's opinion. We remand the case to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

Brian K. Zahra
Bridget M. McCormack
Stephen J. Markman
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh

STATE OF MICHIGAN
SUPREME COURT

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant- Appellee,

v No. 157705

RAY JAMES FOSTER,
Defendant/Counterplaintiff- Appellant.

VIVIANO, J. (concurring).

I concur fully in the reasoning of the majority opinion and its holding that the trial court was preempted under federal law from including the offset provision on which plaintiff relies in the consent judgment of divorce.[1] I also agree with the majority's decision to remand this case to the Court of Appeals so that it may consider whether defendant may challenge this provision of the consent judgment on collateral review. I write separately to more fully address questions that will arise on remand and that are, in my view, inadequately developed by the parties' briefs.

I. THE PARTIES' DIVORCE JUDGMENT IS FINAL AND MAY NOT BE MODIFIED UNLESS THE FAMILY COURT DID NOT HAVE SUBJECT-

[1] I believe a more precise way to state the Court's holding is that MCL 552.18, the statute that provides the trial court's authority to divide pension, annuity, or retirement benefits as part of the marital estate in a divorce judgment, is preempted by federal law to the extent it otherwise permits division of the type of veterans' and military disability benefits at issue in this case.

MATTER JURISDICTION OVER THE PARTIES' DIVORCE ACTION

Although some portions of a divorce judgment are subject to modification, such as alimony or child support, the property-settlement provisions of a divorce judgment "are final and, as a general rule, cannot be modified." *Colestock v Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984), citing *Boucher v Boucher*, 34 Mich App 213; 191 NW2d 85 (1971). Thus, "[a] judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle." Colestock, 135 Mich App at 397-398, citing *McGinn v McGinn*, 126 Mich App 689; 337 NW2d 632 (1983).

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

> We are cited to no authority to support this contention and it is manifestly in error. The court had jurisdiction of the parties and it had jurisdiction of the subject matter of the suit, that is, support and maintenance. Having such

jurisdiction it also had jurisdiction to make an error if, indeed, it did. . . .

The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack.*** The judgment of a court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.

The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:

> There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.
>
> [*Buczkowski*, 351 Mich at 221-222 (cleaned up).]

We have often cited *Jackson City Bank* for this proposition, including most recently last term in *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), in which we quoted the very next paragraph from that case:

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

> if appealed from. It may not be called in question collaterally." [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545.]

In *McGinn*, a case also involving military pensions, the Court of Appeals explained the importance of finality in the context of divorce judgments:

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

As defendant appears to concede, these finality concerns are certainly implicated in this case because defendant's assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment. See generally *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or

the party must face the risk of being held in contempt").

Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. See *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013) ("[T]he [l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it.") (quotation marks and citation omitted). But instead of focusing his analysis on whether the federal statutes governing veterans' and military disability benefits deprive the state courts of subject-matter jurisdiction, defendant makes the sweeping assertion that all types of federal preemption deprive state courts of subject-matter jurisdiction.[2] Although I believe defendant's assertion

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[2] See Defendant's Brief on Appeal (February 27, 2019) at 2 ("As a prima facie jurisdictional matter, this Court has long held where federal law preempts state law, as it absolutely does in this case, the courts of this state lack subject matter jurisdiction to enter an order contrary to the prevailing federal rule."); *Id.* ("Where subject-matter jurisdiction is lacking due to federal preemption, any judgments and orders entered in contravention of the prevailing federal law are void and subject to collateral attack, notwithstanding consent of the parties or the length of time that has passed since such judgments or orders were entered."); *Id.* at 33 ("Where federal pre-emption applies to bar a state court's actions, a reviewing court must address the preemptive effect of the federal law on the lower court's jurisdiction because state courts do not have subject matter jurisdiction to enter orders contrary to the federal mandate."); *Id.* ("A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the

is demonstrably incorrect, some of our precedents do appear at first glance to support it. And, as defendant acknowledges, the issue could also have implications far beyond this case if the entire spectrum of federal-preemption claims could potentially be raised to mount collateral attacks on final judgments in myriad types of cases. See Defendant's Brief on Appeal (February 27, 2019) at 6 ("There should be no doubt that an order . . . preempted by federal law is void and may be attacked, challenged, and nullified at any time, even on appeal, indeed, even after the time for appeal has passed."). Therefore, before addressing the precise legal issue in this case, I will first explain why defendant's assertion that all types of federal preemption deprive state courts of subject-matter jurisdiction is wrong as a matter of law.

II. CONTRARY TO DEFENDANT'S SWEEPING ASSERTION, NOT ALL TYPES OF FEDERAL PREEMPTION DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION

The law in this area has been aptly summarized as follows:

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

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judgments they spring from, are void ab initio and exposed to collateral attack.").

> Accordingly, where state and federal courts have concurrent jurisdiction over a federal cause of action, and a state proceeding on such cause of action presents a federal preemption issue, the proper course is to seek resolution of that issue by the state court. Similarly, there are some cases in which a state law cause of action is preempted by federal law, but only a state court has jurisdiction to so rule. A finding of preemption will generally not remove the case from the jurisdiction of the state court but will only alter the law applied by that court. [21 CJS Courts, § 272 (emphasis added; citations omitted).]

It is well settled that "[s]tate courts are adequate forums for the vindication of federal rights." See *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013). See *Id.* ("The States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.") (cleaned up). See also *Office Planning Group, Inc v Baraga-Houghton- Keweenaw Child Dev Bd*, 472 Mich 479, 493; 697 NW2d 871 (2005) ("It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever, by their own constitution, they are competent to take it. State courts possess sovereignty concurrent with that of the

federal government, subject only to limitations imposed by the Supremacy Clause. Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.") (cleaned up).

Notably, these same principles apply when federal courts are analyzing whether a preemption claim deprives the federal courts of subject-matter jurisdiction. In *Violette v Smith & Nephew Dyonics, Inc*, 62 F3d 8, 11 (CA 1, 1995), cert den 517 US 1167 (1996), the defendant argued for the first time on appeal that the plaintiff's state-law products- liability claims were preempted by certain provisions of a federal statute. Relying upon *Int'l Longshoremen's Ass'n, AFL-CIO v Davis*, 476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986), the defendant argued that "preemption is a jurisdictional matter which cannot be waived and may be raised at any time." *Violette*, 62 F3d at 11. Distinguishing between "choice-of-forum" and "choice-of-law" preemption, the federal court explained:

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

> including timely presentment and waiver. [*Id.* at 11-12 (citation omitted).]

Since the type of preemption at issue in Violette presented a "choice-of-law" question, it was "not . . . jurisdictional, and was waived when not presented in the district court." *Id.* at 12.

Our Court of Appeals correctly explained the two-part preemption inquiry as follows:

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

Defendant cites *Henry v Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), for the proposition that federal preemption deprives state courts of subject-matter jurisdiction. In *Henry*, after observing

that the defendants first raised the issue of preemption in the Court of Appeals, we stated that "preemption is a question of subject- matter jurisdiction" and that, "[a]s such, this Court must consider it." *Id.* at 287 n 82. Although our statement that "preemption is a question of subject-matter jurisdiction" was made without qualification, the above statements were supported by the following quotation from *Davis*, 476 US at 393: "A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." Thus, our assertion was made in the context of *Garmon* preemption and was indisputably correct in that context since Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act (NLRA).[3] And, even if

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[3] The term "*Garmon* preemption" was coined after the United States Supreme Court's decision in *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959). See *Id.* at 245 ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."). Our Court and the Court of Appeals have found preemption under *Garmon* in a number of cases. See, e.g., *Henry*, 495 Mich 260; *Bebensee v Ross Pierce Electric Corp*, 400 Mich 233; 253 NW2d 633 (1977); *Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 266; 685 NW2d 313 (2004); *Sargent v Browning-Ferris Indus*, 167 Mich App 29, 33-36; 421 NW2d 563 (1988); *Bescoe v Laborers' Union Local No 334*, 98 Mich App 389, 395-409; 295 NW2d 892 (1980). See also *Town & Country Motors, Inc v Local Union No 328*, 355 Mich 26; 94 NW2d 442 (1959) (holding before *Garmon* was decided that the circuit court had no jurisdiction over the case because the NLRA preempted

the Court purported to make such a broad holding, it would be dicta since it was "not necessarily involved nor essential to determination of the case." See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (quotation marks and citation omitted). For these reasons, I do not believe that Henry may properly be read as supporting defendant's sweeping assertion that all types of preemption deprive the state courts of subject-matter jurisdiction.[4]

Defendant also cites *Ryan v Brunswick Corp*, 454 Mich 20, 40; 557 NW2d 541 (1997), in which after finding that plaintiff's common-law products-liability claims were preempted under the Federal Boat Safety Act (FBSA), 46 USC 4301 et seq., this Court held that

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the area of labor law at issue).

[4] The same analysis applies to other "choice-of-forum" federal-preemption cases. In *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1992), the Court of Appeals held that "the issue of federal preemption is one of jurisdiction, and questions of subject-matter jurisdiction can be raised at any time, even if not raised before the appeal is taken." (Citation omitted.) However, as in Henry, this broad assertion was made in the context of a choice-of-forum preemption question, i.e., whether the Public Service Commission lacked jurisdiction to disallow recovery of costs approved by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 USC 717 et seq., which gives exclusive authority to FERC to set interstate natural gas rates. See also *Mississippi Power & Light Co v Mississippi ex rel Moore*, 487 US 354, 377; 108 S Ct 2428; 101 L Ed 2d 322 (1988) (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

"summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) was proper."[5] In reciting the applicable legal principles, the Court stated that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Id.* at 27.

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[5] After finding that the plaintiff's tort claim was preempted by federal law, the trial court explained its ruling as follows:

> [T]he Court necessarily lacks jurisdiction to hear this matter and, accordingly, partial summary disposition is appropriate under (C)(4) for the lack of subject matter jurisdiction, and also as I think correctly argued by the defendant, it fails to state a claim upon which relief can be granted because the failure to equip its product with a propeller guard or to warn of its absence is something that the manufacturer of an outboard or inboard outdrive boat propulsion unit cannot be held liable for. Since that is the case, I grant the defendant's motion for partial summary disposition under both (C)(4) and (C)(8) for those reasons I've indicated. [*Id.* at 22 n 3 (quotation marks omitted).]

The Court of Appeals affirmed on both grounds, *Ryan v Brunswick Corp*, 209 Mich App 519, 526; 531 NW2d 793 (1995), and, as mentioned above, so did this Court. Since the referenced court rules provide alternate grounds for summary disposition (under (C)(4) for lack of subject-matter jurisdiction and under (C)(8) for failure to state a claim on which relief can be granted), it is unclear which of these holdings is precedentially binding. The ambiguity in the Court's holding can perhaps best be explained by the fact that the Court did not need to focus on whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment. Thus, to the extent that the Court erred by affirming summary disposition under (C)(4)—which, in the absence of an exclusive federal forum for resolution of claims under the FBSA, seems apparent—it was only a labeling error since dismissal under (C)(8) was the proper way to dispose of the case after finding the type of preemption at issue.

However, the Court did not cite any authority whatsoever for this assertion. Nor did we address whether Congress had designated a federal forum for resolution of these types of disputes. And, in any event, our preemption holding in *Ryan* was abrogated by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002), which held that the FBSA does not expressly or implicitly preempt state common-law claims. In light of the ambiguous nature of our holding (noted above), the lack of authority for it, and its abrogation by the United States Supreme Court, I do not think the jurisdictional assertion in *Ryan* carries much precedential weight.[6] Finally, and

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[6] The broad assertion from *Ryan*—that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction"—has been cited on a number of occasions. In two cases, the Court of Appeals cited *Ryan* but found no preemption and thus did not need to apply *Ryan*'s broad assertion. See, e.g., *People v Kanaan*, 278 Mich App 594; 751 NW2d 57 (2008) (holding that 42 USC 1320a-7b does not preempt the Medicaid False Claim Act, MCL 400.601 et seq.); *Konynenbelt v Flagstar Bank FSB*, 242 Mich App 21; 617 NW2d 706 (2000) (holding that the plaintiff's state-law claims were not preempted by the Home Owners' Loan Act, 12 USC 1461 et seq., or the Depository Institutions Deregulation and Monetary Control Act, 12 USC 1735f-7a). In a third case, the Court of Appeals cited *Ryan* and found preemption but remanded to the trial court for entry of summary disposition in favor of the defendant without specifying whether the dismissal was for lack of subject-matter jurisdiction. See *Martinez v Ford Motor Co*, 224 Mich App 247; 568 NW2d 396 (1997) (holding that the plaintiff's state-law tort claim was preempted by the National Motor Vehicle Safety Act, 15 USC 1381 et seq.).

But in *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010), citing *Ryan*, the Court of Appeals affirmed the circuit court's order granting summary disposition for defendant under MCR 2.116(C)(4) on

perhaps most significantly, such a broad reading of this one statement in *Ryan* would conflict with the holding and basic jurisdictional principles set forth in *Office Planning Group* and other cases finding that our state courts have concurrent jurisdiction over certain claims governed by federal law.[7] It would also

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the ground that it lacked subject-matter jurisdiction over the claim. In that case, the Court of Appeals determined that the trial court correctly held that it lacked subject-matter jurisdiction over plaintiff's wrongful-discharge claim since it was preempted by the Labor-Management Reporting and Disclosure Act, 29 USC 401 et seq. *Id.* at 149. But the Court of Appeals did not ground its holding on a designation by Congress of an alternate federal forum for resolution of these types of disputes. Moreover, it is not entirely clear on which basis the circuit court granted summary disposition, since defendant's motions were brought under MCR 2.116(C)(4), (C)(8), and (C)(10), and since on reconsideration, the trial court clarified that "summary disposition of plaintiff's claim had been granted under the substantive-preemption doctrine, not the jurisdictional-preemption doctrine." *Id.* at 138. Finally, although the Court of Appeals noted that *Ryan* had been "overruled in part on other grounds," *Id.* at 140, the majority did not discuss whether the broad assertion from *Ryan* remained good law once its operative preemption holding was abrogated by the United States Supreme Court. Like in *Ryan*, the ambiguity in the Court's holding in *Packowski* is perhaps best thought of as a labeling error since the Court did not need to focus on the issue of whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment.

[7] See, e.g., *Arbuckle v Gen Motors LLC*, 499 Mich 521, 533-534; 885 NW2d 232 (2016) (holding that since state courts have concurrent jurisdiction over cases involving collective-bargaining agreements under § 301(a) of the Labor Management Relations Act, 29 USC 185(a), a state court had jurisdiction to decide the merits of the case even though § 301 preempts state substantive law); *Betty v Brooks & Perkins*, 446 Mich 270, 287 n

leave Michigan citizens without any forum to enforce federal laws when Congress has conferred exclusive jurisdiction upon state courts to enforce them.[8]

Thus, contrary to the sweeping assertions in defendant's brief, not all federal preemption deprives state courts of subject-matter jurisdiction. Instead, state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Although two of our cases might have caused some confusion on this point, I do not believe that they may fairly be read as supporting the demonstrably incorrect proposition of law for which defendant cites them.

III. FOLLOWING UNITED STATES SUPREME COURT PRECEDENT, A MAJORITY OF OUR SISTER STATE COURTS HAVE HELD THAT FEDERAL LAW DOES NOT DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION OVER THE TYPE OF VETERANS' AND MILITARY DISABILITY BENEFITS AT ISSUE IN THIS CASE

As the majority notes, in *McCarty v McCarty*, the United States Supreme Court held that "upon the

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21; 521 NW2d 518 (1994) (same); *Flanagan v Comau Pico*, 274 Mich App 418, 429-431; 733 NW2d 430 (2007) (same); *Local 495 UAW v Diecast Corp*, 52 Mich App 372, 377-379; 217 NW2d 424 (1974) (same). See also *In re Lager Estate*, 286 Mich App 158, 164; 779 NW2d 310 (2009) (noting that "federal courts generally have subject-matter jurisdiction over ERISA claims" but that state courts have concurrent jurisdiction over claims brought by a beneficiary to recover benefits due under a personal savings plan).

[8] See, e.g., *Wade v Blue*, 369 F3d 407, 410 (CA 4, 2004).

dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws." *McCarty v McCarty*, 453 US 210, 211; 101 S Ct 2728; 69 L Ed 2d 589 (1981). In response, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408, which permits state courts to treat veterans' "disposable retired pay" as divisible property during divorce proceedings. 10 USC 1408(c).

In *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), the United States Supreme Court addressed whether the USFSPA allows state courts to treat retirement pay waived by a retired service member in order to receive disability benefits as property divisible upon divorce. The Court rejected the civilian spouse's argument that the USFSPA was intended to broadly reject *McCarty* and completely restore to state courts the authority they had prior to *McCarty*. *Id.* at 588, 593-594. Instead, the majority found that the USFSPA only partially superseded *McCarty*, holding that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595. Importantly, in a footnote, the *Mansell* Court discussed the state court's application of the doctrine of res judicata:

> In a supplemental brief, Mrs. *Mansell* argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty* v.

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

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

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

> It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of

> res judicata was outside the scope of federal appellate jurisdiction; it refused to reverse or even review on the merits a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision—a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court's denial of review is a very strong statement that division of military benefits on a theory of res judicata is not prohibited by federal law.
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> * * *
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> If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA would have been void. The Supreme Court's unanimous refusal to hear the case a second time, and its sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote 5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. [2 Turner, Equitable Distribution of Property (4th ed), § 6:6, pp 54-55.][9]

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[9] See also Turner, *State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update*, 16 Divorce Litig 76, 80 (2004) ("Because *Mansell* ultimately permitted the division of

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

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

The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Sheldon*, 456 US at 941. Unlike denial of a petition for certiorari, "[a] dismissal for want of a substantial federal question is an adjudication on the merits, and it carries the same precedential value as a full opinion." Turner, § 6:6, p 49, citing *Hicks v Miranda*,

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the benefits at issue, it is clearly wrong to hold, as a few decisions have held, that federal law deprives state courts of subject-matter jurisdiction over veteran's and military disability benefits. *Mansell* is not a rule of subject-matter jurisdiction; rather, it is a rule of substantive law. When no prior order and no prior agreement exists, federal law requires that disability benefits be awarded to the owning spouse, and it preempts any state law to the contrary. When a prior order exists, however, federal law permits state courts to divide military and veteran's disability benefits, as they were actually divided in the *Mansell* litigation.").

422 US 332, 344; 95 S Ct 2281; 45 L Ed 2d 223 (1975) (emphasis omitted).[10] Therefore, according to the author, *Sheldon* "establish[es] that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits are not void for lack of subject matter jurisdiction." Turner, § 6:6, p 49 (emphasis omitted).

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

> Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue—if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases—*Sheldon* recognizes that *McCarty* does not support reversal of the state court judgment. Federal substantive law controls the issue, but under either federal or state procedural rules, a decision which is

[10] See also *White v White*, 731 F2d 1440, 1443 (CA 9, 1984); *Evans v Evans*, 75 Md App 364, 374; 541 A2d 648 (1988).

> based upon the wrong substantive law cannot be collaterally attacked after it becomes final. [*Id.* at 50.]

The author notes that "[a] strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only." *Id.* at 55.[11] And, perhaps of even more relevance here, "[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata." *Id.* at § 6:9, p 72.[12] The issue of res judicata was not presented in *Howell v Howell*, 581 US __; 137 S Ct 1400; 197 L Ed 2d 781 (2017), and therefore, *Howell* does not appear to provide any guidance on this issue.[13]

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[11] See *Id.* at n 24 (listing cases). The author also notes that "[a] minority of state courts persist in holding to the contrary." *Id.* at 55. See also *Id.* at n 25 (listing cases).

[12] See *Id.* at 72-73 n 4 (listing cases). Again, the author notes that a minority of state courts hold to the contrary. See *Id.* at 74 n 9 (listing cases) and text accompanying. However, he observes that "[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*," and "[n]one have showed any awareness of the postremand history of *Mansell*[.]" *Id.* at 74.

[13] See Turner, § 6:9, p 72 ("The issue of res judicata was not presented on the facts in the most recent Supreme Court decision on division of military service benefits, *Howell* v. *Howell*. The author sees nothing in that decision which questions the strong statement in footnote 5 of *Mansell* that division of military benefits under the law of res judicata would not violate federal law.") (citation omitted). The subsequent orders from the United States Supreme Court vacating two state court decisions for further consideration in light of *Howell* also do not shed any further light on this issue. In *Merrill v Merrill*, 238 Ariz 467, 468;

One case exemplifies the difficulty our courts have had in applying the law in this complex area.[14] In *Biondo v Biondo*, 291 Mich App 720; 809 NW2d 397 (2011), the Court of Appeals allowed the defendant to challenge enforcement of the Social Security equalization provision in his divorce judgment on federal-preemption grounds, even though it rejected his claim—similar to the one appellant is making here—that 42 USC 407 of the Social Security Act, 42 USC 301 et seq., divests the state courts of subject-matter jurisdiction in divorce cases. The Court stated as follows:

> In reaching this conclusion, we specifically reject James Biondo's suggestion that the

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362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017), the original divorce judgment split only the veteran spouse's retirement pay, and the non-veteran spouse petitioned for an award in the amount of the reduced share once the veteran spouse started receiving combat-related special compensation. In *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1292; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US __;138 S Ct 69 (2017), the non-veteran spouse had "filed a motion to modify the judgment by ordering [the veteran spouse] to pay the amount of her share of his retired pay as 'non-modifiable spousal support.'" In other words, both cases involved a later attempt to modify a divorce judgment, not a situation like the present case, in which a provision in the original divorce judgment violated federal law but was not challenged on direct appeal and instead was challenged later in response to a motion to hold the veteran-spouse in contempt for failing to comply with that judgment.

[14] See Turner, § 6:2, p 4 (boldly asserting that "[t]he complexity of classifying, valuing, and dividing [retirement] plans is unmatched by any other issue in any area of modern law").

circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. That federal law has preempted a portion of the parties' consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:

> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [*Buczkowski* v *Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).]

Although the circuit court erred by ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art 6, § 13; MCL 552.6(1). [*Biondo*, 291 Mich App at 727-728.]

Apparently not recognizing the finality implications of its finding that the trial court had subject-matter jurisdiction to enter the parties' divorce judgment, the Court held that, on remand, the circuit court could modify the property-settlement provisions of the divorce judgment on the ground that inclusion of the Social Security equalization provision was a mutual mistake. However, the court did not cite or discuss the applicability of MCR 2.612, the court rule that governs requests for relief from a final judgment, or explain why, if that rule was applicable, the one-year limitations period for requests on the ground of mistake did not apply. See MCR 2.612(C)(1)(a) and (C)(2). Nor did the Court discuss *Sheldon*, footnote 5 in *Mansell*, or the other authorities noted above holding that federal retirement benefits may be divided on a theory of res judicata.

IV. CONCLUSION

Contrary to defendant's sweeping assertion, it is clear that not all federal preemption deprives state courts of subject-matter jurisdiction. On remand, the Court of Appeals will have an opportunity to address whether the particular type of preemption at issue in this case is jurisdictional. The purpose of my concurrence is to properly frame the inquiry, to clarify our caselaw, and to point to some of the pertinent authorities that may aid the Court of Appeals in resolving this complex and jurisprudentially significant issue.

David F. Viviano