APPLICATION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JAMES FOSTER,
PETITIONER,

v.

DEBORAH LYNN FOSTER,
RESPONDENT.

ON APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITIONER'S APPLICATION
TO EXTEND TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Brett Kavanaugh, Associate Justice, Circuit Justice for the 6th Circuit Court of Appeals and including the State of Michigan:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, Petitioner, Sergeant First Class (SFC) (retired) Ray Foster, for good cause, respectfully requests an extension of 60 days to file a Petition for a Writ of Certiorari to the Michigan Supreme Court in the above-captioned case from the latter court's April 5, 2022 opinion, and its subsequent May 27, 2022 order amending that opinion and otherwise denying Petitioner's timely filed motion for rehearing.

The petition for a writ of certiorari in this Court is due on or before Thursday, August 25, 2022. The Michigan Supreme Court's opinion, amended opinion, and denial of Petitioner's rehearing motion are attached to this motion. (Attachments 1 and 2, respectively).

Pursuant to the Rules of the Supreme Court, Rules 13.5 and 22, Petitioners are filing this Application on or before a date 10 days prior to Thursday, August 25, 2022.

JURISDICTION OF THE COURT

This Court has jurisdiction over this Application and over the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257, from its April 5, 2022 opinion and order, and its May 27, 2022 amended opinion and order denying the remainder of Petitioner's timely filed motion for rehearing.

SUMMARY OF THE CASE

In *Foster v Foster,* 505 Mich 151; 949 NW2d 102 (2020) (*Foster I*), the Michigan Supreme Court, ruled that 38 USC § 5301(a)(3) applied to prohibit a consent judgment wherein Petitioner agreed for consideration to dispossess himself of his veterans' disability benefits as part of a 2008 divorce decree. The Court also ruled that federal law preempted state law based on this Court's decisions in *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989) and *Howell*

v Howell, ___US___; 137 S Ct 1400; 197 L Ed 2d 781, 788 (2017), and thus, trial court's could not force veterans to use their veterans' disability benefits to satisfy marital property divisions in divorce proceedings. The Court remanded to the Court of Appeals for consideration of whether the state law doctrines of res judicata or collateral estoppel prevented Petitioner from challenging the trial court's 2008 judgment forcing him to use his federal veterans' disability pay, his only source of income, to satisfy the property settlement.

In a subsequent opinion on appeal after the remand decision, the Michigan Supreme Court reversed the Court of Appeals decision holding that since federal law preempted state law, the state court lacked subject matter jurisdiction and could not preclude Petitioner from collaterally challenging the consent agreement that was "void from its inception" in violation of 38 USC § 5301.

This is a critical decision affecting disabled veterans. The Michigan Supreme Court essentially *ignored* federal statutory law and this Court's sweeping decision in *Howell v Howell*, which held that where 38 USC § 5301 is applicable, the state courts cannot vest disability benefits in anyone other than the beneficiary. *Howell* ruled that state law was and always has been fully preempted where Congress exercises its enumerated powers under Article I of the Constitution concerning military affairs. In such cases, allowing state courts to use doctrines of judicial convenience to thwart the will of Congress is tantamount to allowing the state to circumvent the Supremacy Clause altogether, and, in doing so, dispossess veterans' of their restricted and personal entitlements.

BACKGROUND

Petitioner, Sergeant First Class (SFC) (retired) Ray Foster (Sergeant Foster), spent over 20 years of the service to our country, commencing his duty in the United States Army in 1985. See

Foster I, 505 Mich at 157. He retired as a Sergeant First Class from the United States Army in September of 2007. *Id*. He was deployed to the war-torn countries of Iraq and Afghanistan where, as a platoon leader, he led foot patrols on a daily basis.

During two separate deployments, Sergeant Foster's unit came under attack from improvised explosive devices and enemy contact. As a result of these engagements, Sergeant Foster suffered traumatic brain injuries, a broken back, and broken legs. He also lost several of his fellow troops during these events. 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 Sergeant Foster suffered from his disabilities and was designated disabled as of October 2007).

In 2008, Respondent and Sergeant Foster divorced. Because Sergeant Foster was eligible for and then receiving retired pay from the military, Respondent began receiving a portion of his retirement pay as allowed by federal law. See also 10 USC § 1408(a)(4) and (c) (the Uniform Services Former Spouses Protection Act (USFSPA) defining disposable retired pay and explaining that up to 50 percent of such pay may be considered as a disposable, and therefore divisible, asset in divorce proceedings provided the language of the divorce order qualifies under the federal statute).

Even though Sergeant Foster received a retroactive disability designation that incepted in 2007, disability benefits were not paid to Sergeant Foster until 2010. At that point, the automatic

share of Sergeant Foster's disposable (and therefore legally divisible) military retirement pay that had been being automatically paid to Respondent under the USFSPA ceased. *Id.* at 159.

Sergeant Foster 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 of the United States Code. See 10 USC § 1413a(g) (CRSC benefits are not disposable retirement benefits subject to division under 10 USC § 1408 (USFSPA)). As previously noted, 38 USC § 5301(a)(1) prohibits state courts from entering "any legal or equitable" orders that seek to dispossess the veteran of his or her disability benefits. Moreover, as also noted, subsection (a)(3)(A) of that statute, prohibits the beneficiary from voluntarily agreeing, for consideration to dispossess, himself or herself of these benefits, and subsection (a)(3)(C) "voids from inception" any such agreements. *Foster I*, 505 Mich at 172-73.

The Defense Financy and Accounting Agency (DFAS), the federal agency that previously made direct payments of Respondent's allotted share of Sergeant Foster's disposable retired pay, could no longer legally make payments to Respondent. Thus, there is no doubt that the funds of the government designated by Congress for a specific purpose – to provide maintenance and support to the combat disabled veteran – "remain inviolate." See *Porter*, 370 US at 162 (emphasis added). The federal agencies respect the federal law that prohibits them from paying these funds over to a person who is not entitled to them.

Likewise, there can be no legal or equitable order forcing the veteran to dispossess himself of these benefits and no contractual agreements whereby he agrees to surrender them to another for consideration. See 38 USC § 5301(a)(1) and (a)(3)(A) and (C). Unfortunately, the 2008 consent judgment contained a provision that did just that, providing, in pertinent part, 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. *Foster I*, 505 Mich at 158.

When the DFAS stopped paying Respondent her share of Sergeant Foster's "disposable" retirement pay because the government is prohibited by federal law from directly paying former spouses any portion of a veterans' disability benefits, see 10 USC § 1408 and 38 USC § 5301, she filed a contempt motion against him in the Circuit Court seeking to have the court force him to abide by the illegal consent agreement he had signed in 2008.

In 2014, Sergeant Foster was arrested in Iron County, Michigan on a warrant for a failure to pay his former spouse these illegal property division payments. The trial court issued an "appearance bond," which was unlawfully transformed into a "collateral bond" whereby the trial court ordered Sergeant Foster's elderly and ailing mother to have a lien placed on her home under that bond to force Sergeant Foster 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.

Sergeant Foster hired undersigned counsel and together with his trial attorney, they filed an appeal on December 2, 2014, challenging the trial court's disposition of the case with respect to the bond arrangement and the forced payment of arrearages from Sergeant Foster's restricted federal disability pay. Under threat of contempt and with the sword of Damocles hanging over his mother's home, Sergeant Foster made payments of $1000 per month pending the disposition of his appeal.

In his 2014 appeal, Sergeant Foster cited 38 USC § 5301 and raised the issue concerning the voidness of the 2008 judgment under the statute. Sergeant Foster 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), ruled that the trial court was not preempted by federal law and was not therefore prohibited from issuing the contempt order to force Sergeant Foster 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 Sergeant Foster's treatment of it as an issue was "woefully undeveloped". The Court nonetheless addressed the statute and reasoned that it was not applicable because it contained the statement "except to the extent specifically authorized by law." *Id*. According to the Court, because the Michigan Court of Appeals had ruled in *Megee*, *supra*, that state courts could circumvent federal law and force veterans to part with disability pay that might otherwise be protected by 10 USC § 1408 and 38 USC § 5301, the Court reasoned that this was "the law" referred to in § 5301 which allowed state courts to ignore its otherwise sweeping prohibitions. *Id*.

The Court of Appeals' reasoning that Sergeant Foster's arguments were "woefully undeveloped" on this point is curious, at best. In his docketing statement and in his briefing of the issues, not only did he address the broad application of this statute to the very benefits that he was receiving, but he anticipated and addressed the argument that the Court of Appeals posited in its opinion as precluding application of § 5301 head on. Sergeant Foster demonstrated that a state

court has no authority under the statute to dispossess the veteran of these funds because no federal authority exists to allow it, and any such exemptions must themselves originate with federal law.

In fact, as Sergeant Foster originally explained to the Court of Appeals, rather than giving authority to the state, the USFSPA, 10 U.S.C. § 1408(a)(4)(A) and (c)(1), the only federal statute that says anything at all about property divisions of veteran's disposable retirement pay, actually prohibits the state from counting any other benefits as divisible (including veterans' disability pay). With respect to these benefits, 38 USC § 5301(a)(1) explicitly prohibits their "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." (emphasis added). As Sergeant Foster further explained in his original appeal brief, only federal law can ever provide for an exception to the otherwise absolute preemptive provisions prohibiting the states from controlling or otherwise repurposing these benefits.

The original arguments before the Court of Appeals were based on the reasoning that the state cannot circumvent absolutely preemptive federal law by simply issuing a judicial decision that ignores or disagrees with the mandate of that law. And in this case, remarkably, that law is an affirmative (as opposed to a passive) provision of federal positive law that directly prohibits the state from using "any legal or equitable" process to dispossess disabled veterans of these personal benefits and voids from inception any instrument wherein the disabled veteran agrees to use them to pay over to another for consideration.

If the state could override the law in this regard, then the Supremacy Clause would be pointless. See, e.g., *Marbury v Madison*, 5 US 137, 178; 2 L Ed 60 (1803) (stating that if 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" the Supremacy Clause , and indeed, the entire Constitution would be a

nullity) (emphasis added). States may only exercise jurisdiction and authority over those matters that have been granted to them by Congress. If the rule were otherwise, then 50 states could have 50 different rules under the federal Constitution, a situation which would be "truly deplorable". *Martin v Hunter's Lessee*, 14 US 304, 348; 4 L Ed 97 (1816) (emphasis added) (STORY, J.). If the states "could make alternative distributions outside the clear procedure Congress established" it would transform the narrow exceptions granted by Congress to the states concerning military benefits "into a general license for state law to override" it. *Hillman v Maretta*, 569 US 483,490-91, 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 proceedings).

Indeed, this Court recently issued an opinion that confirms Sergeant Foster's original position in this case regarding the state's surrender of sovereignty and concurrent jurisdiction, and put the final nail in the coffin of any previous notion of state authority in all matters concerning the exercise by Congress of its enumerated Military Powers. See *Torres v Tex Dep't of Pub Safety*, ___US___; ___ S Ct ___; 2022 U.S. LEXIS 3221 (June 29, 2022), Case No. 20-603, Slip Op.

Sergeant Foster 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 restricted disability benefits by way of such means as were employed by the state court in this case.

Sergeant Foster 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, the 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 amicus, the Court ruled that preexisting federal law and the Court's jurisprudence, particularly its 1989 decision in *Mansell v Mansell*, 490 US 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 USC § 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 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 through the Defense Finance and Accounting Service (DFAS) 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 USC § 1408(a)(2), (a)(4)(A) and (c). After the USFSPA, the states only had authority to approve, via a federally qualifying 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 the VFW Amicus Brief, 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 USC § 5301, from dividing (via "any equitable or legal" means) veterans' disability benefit. Amici urged 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 divestiture 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 ruled, consistent with Michigan's iteration, *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 USC § 5301. See 137 S Ct at 1404-05 (noting a split of authority in the states, with a minority holding that federal law preempts state law).

After Howell, Sergeant Foster filed a second supplemental authority statement and a reply to Respondent's answer to his application to appeal in the Michigan Supreme Court. Several months passed, during which state courts across the country began overturning previous decisions that had been contrary to *Howell*. Sergeant Foster kept the Court abreast of these decisions by filing supplemental authority statements.

Finally, on November 15, 2017, the Michigan Supreme Court remanded the case to the Michigan Court of Appeals instructing it to apply *Howell*. Despite the sweeping and unanimous ruling from the United States Supreme Court, 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 Sergeant Foster to use his disability pay because no federal statute prohibited

the state from using Combat Related Special Compensation (CRSC) under Title 10 – Sergeant Foster's only form of income – to satisfy the 2008 consent judgment. *Foster v Foster (On Remand)*, Unpublished Per Curiam Decision of the Michigan Court of Appeals, Docket No 324853 (issued March 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 to a "contempt bond," Sergeant Foster continued paying the $1000 per month arrearages and filed a second Application for Leave to Appeal to the Michigan Supreme Court. Michigan Supreme Court Docket Number 157705, filed May 3, 2018.

Six months later, on November 7, 2018, the Michigan Supreme Court granted the application. Briefing commenced in the case and was not completed until April of 2019. The Court scheduled oral argument on the calendar and it was held in October of 2019.

On April 20, 2020, the Michigan Supreme 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 that provision. *Id*. at 172-173. The Court remanded for the Court of Appeals to consider whether principles of res judicata or collateral estoppel could be raised to prevent Sergeant Foster's late challenge to the terms of the consent judgment. *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 (On Second Remand)*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, Docket No. 324853 (issued July 30, 2020). Since the consent judgment in this case was preempted

by federal law, as the Michigan Supreme Court acknowledged, Sergeant Foster 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. Michigan Supreme Court Case Docket No. 161892. The Court grnated the application. Oral argument was held in November of 2021, and on April 5, 2022, the Michigan Supreme Court unanimously reversed the Court of Appeals decision, and remanded the case to the trial court. *Foster v Foster*, ___NW3d___; 2022 Mich. LEXIS 734, at *1 (Apr. 5, 2022).

The Court held that the state common law doctrine of judicial convenience, res judicata, applies to judgments that divide military retirement and disability benefits. The Court also held that there is no exclusive federal forum for dividing military disability benefits in divorce actions, and 38 U.S.C.S. § 511 does not refer to, restrict, or displace state court jurisdiction. The Court further held that federal preemption under 10 U.S.C.S. § 1408 and 38 U.S.C.S. § 5301 does not deprive Michigan state courts of subject matter jurisdiction over a divorce action involving the division of marital property and the appellate court erroneously concluded that the type of federal preemption at issue in this case deprived state courts of subject matter jurisdiction, and because, according to the court, there was no other justification for a collateral attack on the consent judgment in this case, the court reversed. *Foster v Foster*, ___NW3d___; 2022 Mich. LEXIS 734, at *1 (Apr. 5, 2022)

Despite the incongruity in its holding in *Foster I* that federal law has always preempted state law in this particular subject, and that 38 USC § 5301(a)(3) applied to the 2008 consent judgment, see *Foster I*, 505 Mich at 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, Sergeant Foster could be barred by the state common law doctrine of res judicata from challenging the judgment.

The Court completely ignored Sergeant Foster's argument that the statute voided from inception any violating agreements, despite having raised this issue from the beginning of this appeal in 2014, through final briefing in the Court, and at oral argument. The Court did not address the argument that 38 USC § 5301 rendered the contractual agreement void from inception. Petitioner seeks to file a writ of certiorari to the Supreme Court of Michigan with respect to this holding. The Micihgan Supreme Court's opinion represents an unfortunate example of the continuous efforts on the part of state courts to ignore veterans' rights and find ways to get around this Court's continuous admonitions that federal law preempts all state law in this area. However, the Court's short-sighted and apparently expedient brushing aside of Sergeant Foster's rights was so blatantly superficial. In the face of repeated arguments by Sergeant Foster that the active provision, 38 USC § 5301 (which the *same Court* has already ruled applied in this case), voids from inception any agreements whereby a disabled veteran agrees for consideration to dispossess himself of his only source of income – protected federal disability benefits – the Court simply ignored the plain language of this provision. This is because there is no way that the Court could reconcile its first holding that 38 USC § 5301 applied to the 2008 consent judgment, see 505 Mich at 172-173, with its statement that there is "no justification" for allowing collateral attack on that judgment. Of course, a void judgment is no judgment at all, can be attacked at any time, and has no legal effect. After Sergeant Foster's continued efforts from 2014 through today, the Michigan Supreme Court simply gave up and stuck its proverbial head in the sand to avoid the natural consequence of federal supremacy and the plain language of a federal statute that protects the funds appropriated by the federal government from being subjected to depletion.

REASONS FOR GRANTING EXTENSION OF TIME

1. Petitioner is a disabled veteran who suffers severe, service-connected disabilities.

2. Undersigned counsel is a solo practitioner and assists veterans in *pro bono* and *low bono* representation in trials and appeals throughout the United States.

3. No prejudice would arise from the requested extension. If the petition were granted, the Court would likely not hear oral argument until after the October 2022 term began.

4. This case raises issues concerning the absolute preemption of federal law over state courts in the disposition of VA disability benefits. Under its enumerated Article I "Military Powers", Congress provides veterans disability benefits as a personal entitlement to the veteran.

The Supremacy Clause provides that federal laws passed pursuant to Congress' enumerated Article I powers absolutely preempt all state law. Under this power, Congress has prohibited *any legal process* from being used to deprive veterans of their disability benefits. 38 U.S.C. § 5301.

Unless Congress has *lifted* the absolute preemption provided by federal law in this area, state courts and state agencies simply have no authority, or jurisdiction, to direct that such benefits be seized or paid over to someone other than their intended beneficiary.

Congress has lifted this absolute preemption in a small subset of cases: (1) for marital property through the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408; and (2) spousal support and child support, through the Child Support Enforcement Act (CSEA), 42 U.S.C. § 659. 42 U.S.C. § 659 was amended to specifically *exclude* VA disability benefits that are paid to non-retiree disabled veterans – those veterans who had not retired, and therefore could not have waived retired or retention pay to receive disability benefits. See also *Howell v. Howell*, 137 S. Ct. 1400 (2017).

Where a state court is preempted by controlling federal law, the state court has no authority to issue an order that exceeds its jurisdictional control. When federal law, through the Supremacy Clause preempts state law, as it does in the area of divorce in regard to veterans' benefits, then a state court lacks jurisdiction and authority to issue a contrary award.

VA disability benefits have also been deemed constitutionally protected property rights under the Fifth and Fourteenth Amendments to the Constitution. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) and *Robinson v. McDonald*, 28 Vet. App. 178, 185 (U.S. 2016) (federal veterans' benefits are constitutionally protected property rights). See also *Morris v Shinseki*, 26 Vet. App. 494, 508 (2014) (same).

Petitioner has presented the arguments that demonstrate federal law preempts state law, and that his constitutional rights have been infringed upon by the decision of the Supreme Court of Michigan forcing him to dispossess himself of his only source of income.

Finally, and most importantly, all of the issues of law presented by this case are of national significance due to the increasing number of disabled veterans whose main or only source of income are disability benefits. Petitioner is not the only disabled veteran whose disability pay is a sole means of subsistence and who relies on these benefits to survive.

A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, including all subsequent contempt and related orders, are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v. Feurstein*, 308 U.S. 433, 440, n 12 (1940). "The States cannot, in the exercise of control over local laws and practice, vest

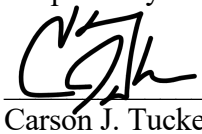
state courts with power to violate the supreme law of the land." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

CONCLUSION

For the foregoing reasons, undersigned counsel requests additional time to prepare a full exposition of the important legal issues at the heart of this dispute.

WHEREFORE, for the reasons stated herein, Petitioners apply to Your Honor and respectfully requests an extension of 60 days from the Thursday, August 25, 2022 due date to file a Petition for a Writ of Certiorari to the Michigan Supreme Court, so that this Court may consider said petition and Petitioner's appeal on or before Monday, October 24, 2022.

Respectfully submitted,



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Dated: August 14, 2022

ATTACHMENT 1

FOSTER V. FOSTER, MICHIGAN SUPREME COURT OPINION, APRIL 5, 2022, ___NW3D___; 2022 MICH. LEXIS 734

Michigan Supreme Court
Lansing, Michigan

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

FOSTER v FOSTER

Docket No. 161892. Argued November 9, 2021 (Calendar No. 2). Decided April 5, 2022.

Plaintiff, Deborah L. Foster, sought to hold defendant, Ray J. Foster, in contempt in the Dickinson Circuit Court, Family Division, for failing to abide by a provision in their consent judgment of divorce. The judgment stated that defendant would pay plaintiff 50% of his military disposable retired pay accrued during the marriage or, if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, that he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such disability benefits (the offset provision). Defendant subsequently elected to receive increased disability benefits, including Combat-Related Special Compensation (CRSC) under 10 USC 1413a. That election reduced the amount of retirement pay defendant received, which, in turn, reduced plaintiff's share of the retirement benefits from approximately $800 a month to approximately $200 a month. Defendant did not comply with the offset provision by paying plaintiff the difference. In response to plaintiff's petition seeking to hold him in contempt, defendant argued that, under federal law, CRSC benefits may not be divided in a divorce action. The court, Thomas D. Slagle, J., denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the consent judgment. Defendant failed to do so, and plaintiff again petitioned for defendant to be held in contempt. Defendant did not appear at the hearing but argued in his written response that the federal courts had jurisdiction over the issue. The court found defendant in contempt, granted a money judgment in favor of plaintiff, and issued a bench warrant for defendant's arrest because of his failure to appear at the hearing. At a show-cause hearing in June 2014, defendant argued that 10 USC 1408 and 38 USC 5301 prohibited him from assigning his disability benefits and that the trial court had erred by not complying with federal law. The court found defendant in contempt and ordered him to pay the arrearage and attorney fees. Defendant appealed in the Court of Appeals, arguing that the trial court erred when it failed to hold that plaintiff's attempts to enforce the consent judgment were preempted by federal law. In an unpublished per curiam opinion, issued October 13, 2016 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., affirmed the trial court's contempt order, reasoning that the matter was not preempted by federal law. Defendant sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400 (2017). 501 Mich 917 (2017). On remand, in an unpublished per curiam opinion issued March 22, 2018 (Docket No.

324853), the same panel of the Court of Appeals again affirmed the trial court's contempt finding, reasoning that defendant's appeal was an improper collateral attack on the consent judgment. The Court of Appeals also distinguished *Howell* and determined that it was still bound by *Megee v Carmine*, 290 Mich App 551 (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. Defendant again sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 503 Mich 892 (2018). In a unanimous opinion, the Michigan Supreme Court overruled *Megee*, concluding that federal law preempted state law such that the consent judgment was unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her because of his election to receive CRSC. The Michigan Supreme Court vacated the portion of the Court of Appeals' opinion regarding collateral attack and remanded to the Court of Appeals for that Court to address the effect of the Michigan Supreme Court's holdings on defendant's ability to challenge the terms of the consent judgment. 505 Mich 151 (2020). On second remand, in an unpublished per curiam opinion issued July 30, 2020 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ., reversed, concluding that the state trial court was deprived of subject-matter jurisdiction because of principles of federal preemption, that defendant did not engage in an improper collateral attack on the consent judgment, and that the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision because of federal preemption. Plaintiff sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 506 Mich 1030 (2020).

In a unanimous opinion by Justice VIVIANO, the Michigan Supreme Court *held*:

Federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan 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, that consent judgment was not subject to collateral attack. Because there was no other justification for a collateral attack on the consent judgment, the judgment of the Court of Appeals was reversed, and the case was remanded to the Dickinson Circuit Court for further proceedings. The statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction" was disavowed, and *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132 (2010), was overruled to the extent it suggested that all types of federal preemption may deprive a state court of subject-matter jurisdiction; 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.

1. The doctrine of res judicata 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. A judgment of divorce dividing marital property is res judicata and not subject to collateral attack even if the judgment may be have been wrong or rested on a subsequently overruled legal principle; in other words, the doctrine of res judicata applies to a valid but erroneous judgment. A divorce decree that 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. The doctrine of res judicata in this context is an issue of state law. Thus, a provision in a consent judgment of divorce that divides a veteran's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law.

2. There is a distinction between a court's jurisdiction of the parties and the subject matter of the action, on the one hand, and the court's erroneous exercise of that jurisdiction. To that end, when a court has personal jurisdiction over the parties and has jurisdiction over the subject matter of the action but erroneously exercises jurisdiction—such as when a property settlement in a divorce action conflicts with federal law—any error in the exercise of jurisdiction by the trial court can only be corrected by direct appeal. In contrast, when the trial court lacks personal jurisdiction over the parties or subject-matter jurisdiction, any judgment by the court is void and may be assailed by both direct appeal and collateral attack. 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. Generally, state law controls matters of domestic relations. For that reason, before state law governing domestic relations will be overridden as preempted by federal law, it must do major damage to clear and substantial federal interests. To determine whether Congress has impliedly preempted state law, a court must (1) determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case and (2) if Congress has, the court must determine whether it has also vested exclusive jurisdiction of that subject matter in the federal court system. Regarding the division of military benefits, 38 USC 511(a) provides that the Secretary of Veterans Affairs shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans 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. In turn, 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. The trial court in this case did not review a decision of the Secretary of Veterans Affairs under 38 USC 511(a). There is no exclusive federal forum for dividing military disability benefits in divorce actions. Thus, while the Secretary has authority under 38 USC 511 over the distribution of military benefits, 38 USC 511 does not refer to, restrict, or displace state court jurisdiction in divorce actions. Because of that, federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property that includes the division of military retirement pay and disability benefits contrary to federal law.

3. In this case, even though the offset provision in the consent judgment was contrary to federal law, the judgment was not void or subject to collateral attack, because the type of federal preemption at issue does not deprive Michigan courts of subject-matter jurisdiction and there was no other justification for a collateral attack on the consent judgment. Accordingly, the Court of Appeals erred when it concluded that the type of federal preemption at issue in this case deprived state courts of subject-matter jurisdiction.

Court of Appeals judgment reversed; case remanded to the trial court for further proceedings.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED April 5, 2022

S T A T E O F M I C H I G A N

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] As a

[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 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*

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 party had moved to set aside the judgment on the ground of mutual mistake. The

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the Puzzle of the Parachute Pension, 24 J Am Acad Matrimonial L 147, 148-150, 152-153 (2011). In order to prevent retired veterans from double-dipping from retirement and disability entitlements, federal law generally requires that a retired veteran receiving both retirement pay and disability benefits give up an amount of retirement pay equal to the amount of disability benefits the veteran is receiving. See 38 USC 5304 (generally prohibiting duplication of benefits); 38 USC 5305 (allowing waiver of retirement pay to receive other benefits). This waiver is sometimes referred to as the "VA waiver." See *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.

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 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),

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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).

[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 . . . .' ").

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]

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, subject to

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

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. 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 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

[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).

> 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]

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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[8] *Buczkowski*, 351 Mich at 221-222 (cleaned up). See also *People v Washington*, 508 Mich ___; ___ NW2d ___ (2021), slip op at 10-11 ("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 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

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[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).

[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

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.

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:

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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.

> 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]

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.

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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 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).]

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 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

[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.

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]

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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[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 substantive law cannot be collaterally attacked after it becomes final.

ATTACHMENT 2

FOSTER V FOSTER, MICHIGAN SUPREME COURT,
___MICH___; 974 NW2D 185 (2022)

Order

Michigan Supreme Court
Lansing, Michigan

May 27, 2022

Bridget M. McCormack,
Chief Justice

161892 (193)

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

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant-Appellant,

v

SC: 161892
COA: 324853
Dickinson CC: 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).

t0524

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 2022

Clerk