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

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QUESTIONS PRESENTED

In April of 2020, the Michigan Supreme Court unanimously ruled that a property settlement agreement in a divorce in which Petitioner agreed to satisfy his obligations to his former spouse, Respondent, using veteran's disability pay was preempted by federal law and explicitly prohibited by 38 U.S.C. § 5301(a)(3). *Foster v Foster,* 505 Mich. 151, 171-173; 949 N.W.2d 102 (2020) (*Foster I*). Based on that statute and this Court's decision in *Howell v. Howell*, 137 S. Ct. 1400 (2017), the court reversed Michigan case law allowing state courts to approve or enforce such agreements. The Court remanded to the Court of Appeals on the question of whether Petitioner was barred by res judicata or collateral estoppel from challenging the 2008 consent judgment.

On Second Remand, the Michigan Court of Appeals ruled that the state lacked jurisdiction and authority to enforce the property settlement agreement, and therefore Petitioner was not collaterally estopped from challenging the 2008 judgment because it was preempted by federal law (according to the aforementioned 38 U.S.C. § 5301, *Howell*, *supra*, and *Foster I*). *Foster v. Foster*, No. 324853, 2020 Mich. App. LEXIS 4880 (Ct. App. July 30, 2020).

In a second unanimous opinion, the Michigan Supreme Court ruled that state law principles of res judicata prevented Petitioner from challenging the judgment in which he was required to pay the property settlement using his restricted VA disability pay. See *Foster v Foster*, ___N.W.3d___; 2022 Mich.

LEXIS 734 (2022) (*Foster II*), modified on remand at *Foster v. Foster*, 974 N.W.2d 185 (2022) (*Foster III*).

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.

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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*), modified on remand at *Foster v. Foster*, 974 N.W.2d 185 (2022) (*Foster III*).

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).

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*).

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. *Howell*, 137 S. Ct. at 1404; *Mansell v. Mansell*, 490 U.S. 581, 588; 109 S. Ct. 2023 (1989), *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022). 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). 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

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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

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 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,

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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.*

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.

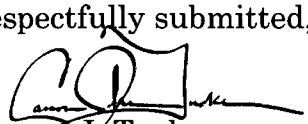
In its first opinion in this case, the Michigan Supreme Court explicitly ruled that the agreement Petitioner had entered into was prohibited by 38 U.S.C. § 5301(a)(3)(A). The court did not *reverse* that ruling in its second opinion. In fact, the court completely ignored the language of the statute which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



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Dated: October 24, 2022