No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL B. YOURKO,

Petitioner,

v.

LEE ANN B. YOURKO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Even if a state court may raise such state law doctrines, may a disabled veteran be compelled by a state court to use his restricted disability benefits to satisfy such an agreement, where 38 U.S.C. § 5301 explicitly prohibits the state from using *any* "legal or equitable" process whatsoever to dispossess the veteran of his personal entitlement and applies to all such benefits "due or to become due" and before or after their receipt by the beneficiary?

PARTIES TO THE PROCEEDING

Petitioner, Michael B. Yourko, was the Defendant-Appellee in the Virginia Supreme Court. Respondent, Lee Ann B. Yourko was the Plaintiff-Appellant in the Virginia Supreme Court.

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

CORPORATE DISCLOSURE

There are no corporate parties involved in this proceeding.

RELATED PROCEEDINGS

This case arises from the following prior proceedings:

Yourko v. Yourko, June 28, 2023 decision of the Virginia Supreme Court denying Petitioner's Motion for Rehearing (App. 1a)

Yourko v. Yourko, 884 S.E.2d 799 (Va. 2023), March 30, 2023 Opinion of the Virginia Supreme Court (App. 2a-12a)

Yourko v. Yourko, 866 S.E.2d 588 (2021), Opinion of the Virginia Court of Appeals (App. 13a-31a)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael B. Yourko, petitions for a Writ of Certiorari to the Supreme Court of Virginia, which denied Petitioner's motion for a rehearing on June 28, 2023 (App. 1a).

OPINIONS BELOW

On March 30, 2023, the Supreme Court of Virginia issued an opinion holding that Petitioner was barred by state-law doctrines of res judicata and collateral estoppel from challenging a settlement agreement in which he agreed to dispossess himself of his restricted federal veterans' benefits, which agreement is explicitly prohibited by preemptive federal law. See 38 U.S.C. § 5301(a)(3). *Yourko v. Yourko*, 884 S.E.2d 799 (Va. 2023), March 30, 2023 Opinion of the Virginia Supreme Court (App. 2a-12a).

The Supreme Court's decision reversed a decision by the Virginia Court of Appeals, which ruled, consistent with prevailing federal law, that a veteran cannot agree or contract away his rights to personal veterans' benefits and the state was preempted by the United States Constitution's Supremacy Clause from ruling otherwise. *Yourko v. Yourko*, 866 S.E.2d 588 (2021), Opinion of the Virginia Court of Appeals (App. 13a-31a).

The Supreme Court of Virginia denied a petition for rehearing on June 28, 2023. (App. 1a).

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 over these bounties without an *express* grant from Congress. See, e.g., *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2465 (2022) (Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces); *Howell v. Howell*, 581 U.S. 214, 218, 137 S. Ct. 1400, 1404 (2017).

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), *Mansell v. Mansell*, 490 U.S. 581, 588; 109 S. Ct. 2023 (1989).

Moreover, contrary to the Virginia Supreme Court's decision here, a veteran beneficiary of these personal entitlements is expressly prohibited by federal law from contracting away his rights to these benefits. See 38 U.S.C. § 5301(a)(1) and (3)(A) and (C).

Any such agreements are "void from inception" and therefore may not be subjected to enforcement or recognition at any time. *Id.*

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 garnish 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).

This Court has ruled that the federal preemption by Congress over matters concerning compensation and benefits paid to military servicemembers and veterans of the armed forces is absolute and occupies the entire field concerning disposition of these federal appropriations. See, e.g., *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 v. Ridgway*, 454 U.S. 46, 54-56; 102 S. Ct. 49; 70 L. Ed. 2d 39 (1981); and *Wissner v. Wissner*, 338 U.S. 655, 658-659; 70 S. Ct. 398; 94 L. Ed. 424 (1950)).

Petitioner is a disabled veteran and military retiree in receipt of military retirement benefits and veterans' disability benefits.

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*, *supra* at 56. This Court construes this provision liberally in favor of the veteran and regards these funds as "inviolate" and therefore 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' 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 appropriated by Congress for the purpose of maintenance and support of disabled veterans under its Article I enumerated powers, without any grant of authority to the states to consider these monies as an available asset in state court proceedings. The state has no 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*, *supra* at 490-91, 493-95, and 496 (simply 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 several cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway*, *supra* at 55-56 and *Wissner*, *supra* at 658-659.

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." *Id.* at 2465 Thus, objections sounding in ordinary federalism principles are 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 is a direct 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 Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C. § 1408, state courts are prohibited from repurposing (i.e., appropriating and redirecting) 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 were allowed to be diverted or redirected by state process or otherwise, the proper functioning of the government as it pertains to the objectives and goals of these monies would be destroyed.

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 has surrendered its sovereignty in this area, the state is preempted by those same federal powers from passing legislation or issuing judicial decisions (extra judicial acts) that would interfere with a veteran's 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 by passing 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 a national military); *Howell*, *supra* at 1406 ("the basic reasons" *McCarty*, *supra*, gave as to why Congress intended to exempt military retirement pay from state community property laws, i.e., to incentivize national service and reward same (the federal interests in attracting and retaining military personnel), applies a fortiori to the protection from state invasion of veterans' disability pay).

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*, 569 U.S. at 490-91, 493-95, and 496 (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*, 338 U.S. 655.

Therefore, the state cannot raise doctrines of judicial convenience like res judicata and collateral estoppel to effectively nullify the protective and functional effects of federal preemption under the Supremacy Clause. Nor can the state circumvent the strict and express prohibition in 38 U.S.C. § 5301 that prohibits a veteran beneficiary from contracting away his or her rights to these benefits. Indeed, "void from inception" are these agreements, and such language means the absolute nullity, indeed, the non-existence of a means by which such an agreement could ever be consecrated, much less, sanctioned.

In the instant case, the Virginia Supreme Court did just this in ruling that Petitioner was barred by state doctrines of judicial convenience such as res judicata and collateral estoppel from challenging the effects of an agreement prohibited by 38 U.S.C. § 5301(a)(1) and (3), in which he agreed to dispossess himself of his federally protected veterans' disability benefits in an amount greater than that which is allowed by federal law. Such an agreement is expressly prohibited and void from its inception under § 5301. Under the absolute preemption of all state law in this particular subject, the state cannot thwart the objectives and goals of Congress by retroactively resuscitating a void agreement.

Here, the Virginia Supreme Court concluded that state doctrines of judicial convenience like res judicata could act to circumvent the Supremacy Clause and 38 U.S.C. § 5301(a)(1) and (3), to effectively nullify,

retroactively, the efficacy of that provision upon agreements by veterans to dispossess themselves of their personal entitlement to disability benefit, even though such agreements are, by federal statute, expressly prohibited and "*void from their inception*." See 38 U.S.C. § 5301; *Howell*, 137 S. Ct. 1405 (citing § 5301 and ruling that state courts cannot "vest" that which they have *no authority* to give in the first instance).

Indeed, the Virginia Supreme Court held exactly that a veteran *could* contract away his rights to these personal entitlements, once they are received. While the Court recognized and cited 38 U.S.C. § 5301(a)(3)(B), it completely and incomprehensibly glossed over subsection (a)(3)(A) and (C), which respectively, explicitly prohibits *and* voids from inception, such contractual agreements.

The court's key reasoning in this regard is as follows:

> Having established that neither *Mansell* nor *Howell* apply to the present case, the remaining question is whether the USFSPA [10 U.S.C. § 1408] *bars a former service member from dividing his or her total military retirement pay via contract*. As previously noted, Congress intended for military retirement pay to be a personal entitlement of the veteran which could not be judicially divided in the context of divorce. *McCarty*, 453 U.S. at 224. Though Congress reduced the extent of this personal entitlement by enacting the USFSPA, it did not eliminate it entirely. See *Mansell*, 490 U.S. at

> 592 (noting that Congress decided to "shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments"). Importantly, ***neither Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received***. In other words, ***federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed, it expressly permits such usage***. See, e.g., 38 U.S.C. 5301(a)(3)(B) (permitting a veteran to use disability benefits to repay loans, provided the payments are "separately and voluntarily executed by the [veteran]"). (App. 9a-10a).

This is *exactly contrary* to what the federal statute provides! Bafflingly, while citing subsection (a)(3)(B), the court completely glossed over, i.e., ignored, subsections (a)(3)(A) and (C), which, again, respectively, *expressly prohibits* and *voids from inception* any form of agreement in which the veteran beneficiary enters into a contractual agreement to dispossess himself of his personal entitlements. (App. 10a).

Where federal preemption applies, the question of a state doctrines like res judicata, collateral estoppel, and, indeed, even contract law, should be irrelevant if, indeed, 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). This is especially true where, as here, the federal statute explicitly prohibits contractual agreements whereby disabled veterans dispossess themselves of their personal entitlements.

The Virginia 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

Respondent filed a complaint for divorce from Petitioner. (App. 13a-14a). Petitioner filed a counterclaim and both parties filed answers. *Id.*

The state circuit court entered a final decree and equitable distribution order as well as a military pension division order (MPDO) on January 28, 2020. (App. 14a). The final decree and equitable distribution order noted that the parties had "memorialized a division of marital assets and debts in an Equitable Distribution Agreement" which the court followed. *Id.*

The final decree and equitable distribution order set the amounts the court determined Petitioner was to pay Respondent in child and spousal support. The military pension division order stated the terms of Petitioner's military retirement division. It provided under the title "Amount of Payment:" "[t]he former

Spouse is awarded thirty percent (30%) of the Service Member's disposable military retired pay."

The military pension division order goes on to state under paragraph 9 titled "Level of Payments:"

> The parties have agreed upon the level of payments to the Former Spouse to guarantee income to her; based upon military retired pay with a deduction for disability compensation, resulting in the Former Spouses' share equaling $1,202.70 per month. The Service Member guarantees the level agreed upon by the parties and agrees to indemnify and hold Former Spouse harmless as to any breach hereof. Furthermore, if the Service Member takes any action, including additional waiver of retired pay for disability compensation which reduces the former spouse share she is entitled to receive, then he shall indemnify her by giving to her directly the amount by which her share or amount is reduced as additional property division payments which do not terminate upon remarriage or cohabitation. Service Member hereby consents to the payment of this amount from any periodic payments he received (such as wages or retired pay from any source) and this clause may be used to establish his consent (when this is necessary) for the entry of an order of garnishment, wage assignment, or income withholding. (App. 14a-15a).

At the time the parties negotiated Respondent's share of the military benefits, they genuinely

believed Petitioner would receive $4,009 per month in disposable retirement pay. However, sometime after the final decree, the military's Defense Finance Accounting Service ("DFAS") computed Petitioner's disposable retirement pay to be only $844 per month, the remainder being disability pay which is not divisible in divorce proceedings. Therefore, DFAS calculated Respondent's 30% share of disposable retirement pay to be $253.20 per month rather than the $1,202.70 per month agreed to in paragraph 9.2 The "indemnification" and "guarantee" language in paragraph 9, accordingly, required Petitioner to pay almost $1,000 per month more in military benefit based pay to Respondent than DFAS calculated was due. (App. 14a-16a).

Over a year after entry of the final decree and pension order, Petitioner filed a motion to reinstate and the state circuit court revived the case on its docket. Petitioner then filed a motion for modification of the final decree and equitable distribution order and pension order.

Petitioner argued that at the time the parties negotiated Respondent's share of his military retirement pay, they believed Petitioner would receive $4,009 per month in disposable retirement pay, resulting in their calculation of Respondent's share at $1,202.70 per month. Petitioner now contended that since DFAS calculated his disposable retirement pay at a total of only $844 per month (the remainder being disability pay) the original calculation and agreement were hopelessly flawed.

Since disability pay is not divisible in divorce proceedings under federal law, Petitioner argued that the parties' mistaken calculation in the final order effectively gave Respondent 140% of his divisible disposable retirement pay – plainly in violation of the 50% maximum allowed by federal law. 10 U.S.C. § 1408(e)(1).

Husband also maintained that federal law prohibited the circuit court from requiring him to indemnify Respondent for any reduction she received in divisible disposable pay. He contended that the circuit court should modify its ordered monthly payment of $1,202.70 either because the order was not final, paragraph 9 contained a mutual mistake resulting in a clerical error, ***or it was void ab initio as contrary to federal law and Supreme Court precedent***. (App. 15a-16a).

The trial court ruled that Petitioner was bound by the MPDO in which he agreed to dispossess himself of the amount of his retirement pay at the time he entered into the agreement, irrespective of the changed circumstances which saw Petitioner's "disposable" retirement pay reduced and his "restricted" or "non-disposable" disability increased to compensate him for his service connected injuries.

The Virginia Court of Appeals reversed. (App. 13a-31a). Citing longstanding Virginia case law, and federal law, it held that state court orders may be challenged if they are void ab initio. (App. 20a). The Court of Appeals agreed with Petitioner's argument that the disputed orders were void ab initio because they flatly violated federal law. (App. 20a-21a).

The Court of Appeals referred to this Court's decision in *Howell*, *supra*, and reasoned as follows:

> [T]he *Howell* Court pronounced that, even if an indemnification provision does not specifically require that a veteran use his disability pay to indemnify or reimburse the former spouse, the purpose of such a requirement contradicts and seeks to circumvent the *Mansell* holding. *Id*. The Court bluntly held that requiring a former spouse to indemnify or reimburse an ex-spouse for the lost retirement pay is a semantic difference and nothing more. *Id*. Ordering a veteran to pay a former spouse the difference in benefits after a disability pay deduction, particularly a dollar-for-dollar reimbursement, would "displace the federal rule and stand as an obstacle to the . . . purposes and objectives of Congress." *Id*. (App. 23a).

The Court ruled that "Virginia courts should not issue orders that require or permit servicemembers to make contracts, 'guarantees,' or 'indemnification' promises to former spouses in contravention of *Howell*. (App. 24a).

The Court went on to consider whether a state court order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter over the parties, or if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could 'not lawfully adopt.'" (App. 25a-26a). The Court noted that under Virginia law an order that is void ab initio may be attacked beyond twenty-one-days from

judgment by a party to the proceeding in which the putative judgment was entered.

While the Court recognized that the circuit court had subject matter jurisdiction to issue the challenged orders – even if it reached an erroneous conclusion, in examining whether the orders are void, Virginia law looks beyond jurisdiction and also directs that an order is void if the circuit court was without power to render the order. (App. 25a).

The Court concluded that it was "this mandate of Virginia law that require[d]" striking down the order at issue and ruling in Petitioner's favor. The Court reasoned further that "defects in jurisdiction are not the only means by which an order may be void: [I]t is essential to the validity of a judgment or decree that the court rendering it shall have jurisdiction of both the subject-matter and parties. But this is not all; for both of these essentials may exist, and still the judgment or decree may be void, because the character of the judgment was not such as the court had the power to render…." (App. 26a).

The Court noted that the reasoning in *Howell* closed a "loophole" opened up by the states in which they were circumventing the express prohibitions of federal law by allowing indemnification orders and settlement agreements to force a division of restricted benefits not allowed by federal law. The Court reasoned that *Howell* established that it was not within a state court's power to require a servicemember to "reimburse" or "indemnify" a spouse for retirement pay waived (or diminished) to receive veteran's disability payments. (App. 27a-28a).

Instead, *Howell* pronounced that such court-ordered attempts to maneuver around *Mansell* were preempted and forbidden by federal law.

The Court concluded that the USFSPA and case law from the United States Supreme Court interpreting the statute have granted state courts the power to divide a veteran's military pay in divorce proceedings, with several key limitations: (1) a state court cannot order that a former spouse receive any amount beyond 50% of the veteran's disposable retirement pay (10 U.S.C. §§ 1408(c)(1), (e)(1)), and (2) a state court cannot order a veteran to indemnify a former spouse for any loss caused by a veteran's acceptance of disability pay which reduces retirement pay. *Howell*, 137 S. Ct. at 1406.

The Court ruled that the state court's order was prohibited under *Howell* and was such that the court "had no power to render it." (App. 29a) (internal citations omitted). Thus, the orders were void ab initio for lack of power – and because they are void ab initio, Respondent's reliance on res judicata was of no help to her.

Respondent appealed to the Virginia Supreme Court, which reversed the Court of Appeals. (App. 2a-12a).

The Virginia Supreme Court held that a veteran could contract away his rights to these personal entitlements. While the Court recognized and cited 38 U.S.C. § 5301(a)(3)(B), it completely and incomprehensibly glossed over subsection (a)(3)(A) and (C), which respectively, explicitly prohibits and

voids from inception, such contractual agreements. The court's key reasoning in this regard was as follows:

> Having established that neither *Mansell* nor *Howell* apply to the present case, the remaining question is whether the USFSPA [10 U.S.C. § 1408] bars a former service member from dividing his or her total military retirement pay via contract. As previously noted, Congress intended for military retirement pay to be a personal entitlement of the veteran which could not be judicially divided in the context of divorce. *McCarty*, 453 U.S. at 224….
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> Importantly, neither Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed, it expressly permits such usage. See, e.g., 38 U.S.C. 5301(a)(3)(B) (permitting a veteran to use disability benefits to repay loans, provided the payments are "separately and voluntarily executed by the [veteran]"). (App. 9a-10a).

Petitioner filed a motion for rehearing, which the Virginia Supreme Court denied. (App. 1). Petitioner now seeks review of the Virginia Supreme Court's decision.

REASONS FOR GRANTING THE PETITION

1. Once again, state courts across the country are thumbing their collective noses at this Court's express pronouncements of absolute federal supremacy in this particular subject matter. In addition to the Virginia Supreme Court in this case, which reversed a Court of Appeals opinion that followed correct legal precedent and federal law, courts in Michigan,[1] Nevada,[2] Washington, and Louisiana,[3] among others, have followed suit.

In *Foster*, *supra*, after first holding that 38 U.S.C. § 5301 applied to prohibit marital settlement agreements in which disabled veterans agreed to dispossess themselves of their disability benefits, and therefore were prohibited, see, *Foster v. Foster*, 505 Mich. 151, 172-73, 949 N.W.2d 102, 113 (2020) (undersigned for appellant), the *same* Court bizarrely (but not unsurprisingly) succumbed to pressure by the state and federal family law bar associations and

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[1] *Foster v. Foster*, 509 Mich. 109; 983 N.W.2d 373 (2022) (undersigned for appellant), petition for cert denied, 217 L.Ed.2d 15 (2023) (undersigned for Petitioner).

[2] *Martin v. Martin*, 498 P.3d 1289 (Nev. 2021), petition in progress (undersigned for Petitioner).

[3] *Boutte v. Boutte*, 304 So. 3d 467, 472 (La. App. 2020) (undersigned for appellant veteran), state cert denied July 8, 2020, cert denied *Boutte v. Boutte*, 142 S. Ct. 220 (2021) (undersigned for Petitioner).

collaborative elements, which have been consistently (and unfortunately successfully) stealing[4] veterans' disability benefits, and ruled that doctrines of judicial convenience like "res judicata" or "collateral estoppel" could circumvent preemptive federal law. Like the Virginia Supreme Court here, the Michigan Supreme Court wholly ignored 38 U.S.C. § 5301(a)(3)(A) and (C), which respectively prohibits and voids from

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[4] In the several cases that undersigned has been involved in concerning this particular subject matter, these "methods" include forcing severely mentally and physically disabled veterans to dispossess themselves of their benefits by way of supposed "settlement" agreements, "indemnification" orders, or other manipulative and exploitative methods, including unethical and prohibited ex parte communications with family court judges and family support agencies, forced contractual agreements under threats of and actual arrest and imprisonment, forced collateral and bail bond arrangements collateralizing the property and assets of relatives (all prohibited by 38 U.S.C. § 5301(a)(1) and (3)(A) and (C)), harassment by law enforcement agencies who have invalid and illegal "warrants" out for non-payment of these property settlement agreements, and, sadly, threatened and real deprivation of visitation with minor children). Disabled veterans continue to be held hostage by these dastardly and cowardly acts on the part of the opposition. Only this Court can put a stop to it by way of accepting this case and holding once and for all that all military benefits are "off limits" unless Congress specifically allows the state to consider the benefit in a state law proceeding. That is the law that the states should be adhering to.

inception all contractual agreements by veterans to dispossess themselves of their federal benefits.

These states have ignored (some blatantly) the federal statute, 38 U.S.C. § 5301, that this Court cited to and followed in *Howell*, and which removes all authority from state courts to vest these restricted benefits in anyone other than the entitled veteran beneficiary.

This, even after the federal statute and its express language has been presented to these courts for consideration. Undersigned counsel knows this because he has personally filed petitions on behalf of the disabled veterans in many of these cases, *Foster*, *supra, Martin*, *supra*, *Boutte*, *supra*. See also, *In re Marriage of Weiser*, 14 Wash. App. 2d 884, 890-91, 475 P.3d 237, 240-41 (2020).

There is a split of authority now among the states because some state courts have ruled, correctly, that notwithstanding state doctrines of judicial convenience like *res judicata* and *collateral estoppel*, or even "sanctity of contracts," the absolute preemption of federal law must prevail if there is to be uniformity and respect for the Constitution's inherent structural integrity. See, e.g., *Berberich v. Mattson*, 903 N.W.2d 233, 237 (Minn. Ct. App. 2017) (undersigned on the *amicus curiae* brief for the veteran), *Phillips v. Phillips*, 347 Ga. App. 524, 530, 820 S.E.2d 158, 163-64 (2018); *Russ v. Russ*, 2021-NMSC-014, ¶ 5, 485 P.3d 223, 225 (2021); *In re Babin*, 56 Kan. App. 2d 709, 714, 437 P.3d 985, 989 (2019); *Brown v. Brown*, 260 So. 3d 851, 858 (Ala. Civ. App.

2018); *Fattore v. Fattore*, 458 N.J. Super. 75, 84-85, 203 A.3d 151, 156-57 (Super. Ct. App. Div. 2019).

Still other states have gotten this right from the beginning and have not wavered from their adherence to the federal Constitution's strict mandate regarding supremacy of federal law in this particular subject. See, e.g., *Ryan v. Ryan*, 257 Neb. 682, 689, 600 N.W.2d 739, 744 (1999) (holding that because res judicata does not bar collateral attacks on void judgments and the state court had no authority or jurisdiction to issue an order dividing VA disability income and that portion of the order dividing such income was void and subject to collateral attack in any subsequent enforcement action).

It appears after all of these petitions have been filed, that this Court too is accepting those wayward states' insubordination, and their mockery of the Constitution and the supremacy of federal law.

Once again, it will likely take another two decades for this Court to right a wrong that will dispossess thousands of disabled veterans of their personal entitlements. The social, economic, emotional, and physical effects of this Court's latency in addressing these constitutionally infirm state court decisions will be severely imposed upon a generation of disabled veterans who cannot afford to wait another two decades.

2. 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 like *res judicata* or collateral estoppel. Allowing state courts to use such theories to ignore preemptive federal statutes is tantamount to ignoring the Supremacy Clause and allowing circumvention of the objectives and goals of Congress in exercising its enumerated military powers to incentive and reward national service.

There is no "preemption" if the state can simply nullify federal law by claiming that a judgment or court order that is preempted can be nonetheless allowed to stand. This is especially true where, as here, the federal statute explicitly *voids* from inception any agreement on the part of the disabled veteran to dispossess himself of his disability pay.

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 agreement on the part of Petitioner in this case to dispossess himself of his veterans' disability simply is, was, and always will be "*void ab initio*", i.e., "void from inception". See 38 U.S.C. § 5301(a)(1) and (3)(A) and (C). 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 entered into the agreement, which was then reduced to a state court judgment from which no immediate appeal or challenge was lodged. 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 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, Freeman, *supra*, § 324, pp. 648-649 (citing cases and 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. Here, the decree's provision in which Petitioner obligated himself to use his restricted benefits to "make up" or "indemnify" Respondent is illegal and void per the plain and unambiguous language of 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C). This decree is exactly contrary to this Court's admonition in *Howell* wherein it stated that the state court cannot circumvent the preemptive effects of federal law by allowing restricted veterans' disability benefits to be "vested" or "obligated" to another in any way. *Howell*, 137 S. Ct. at 1405 (the state cannot vest that which they have no authority to give, citing 38 U.S.C. § 5301).

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, and fully aware of it, the Virginia Supreme Court ruled that Petitioner's agreement to dispossess himself of his vested federal disability benefits could not be challenged on the basis

of this Court's decision in *Howell*, *supra*, and preemptive federal law.

The agreement was, at the time it was executed, void to the extent that it obligated Petitioner to part with his federal veterans' benefits. 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." See, e.g., *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).

3. Assuming *arguendo* that the state common law theories interposed by the Virginia Supreme Court to avoid the sweeping preemptive effect of § 5301 could apply retroactively, the state cannot sanction a continuing violation of that provision, which explicitly prohibits state courts from using any legal or equitable order to force the veteran to use his or her restricted benefits to satisfy any judgment or order, and such prohibition applies to all payments received or to be received by the beneficiary.

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 "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 could have existed. How can a state court resuscitate an agreement that is void from inception by simply claiming that one who entered into such an agreement cannot subsequently challenge it?

In his influential treatise on judgments, Freeman discussed the effects of void judgments on state court proceedings. "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, Freeman, *supra*, § 324, pp. 648-649 (citing cases and 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).

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.

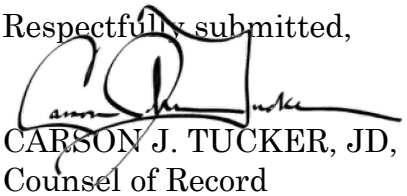
The Virginia Supreme Court explicitly ruled that the agreement Petitioner had entered into was enforceable and that res judicata prevents him from challenging it. Whether that is a legitimate means of

avoiding explicit federal preemption, Petitioner cannot be forced to violate the federal statute going forward by using his restricted benefits to pay Respondent. The statute prohibits the obligation of these funds through any legal process "paid or to be paid" and yet to be received. See 38 U.S.C. § 5301(a)(1). In other words, the state cannot sanction a continuing violation of federal law, which is what the Virginia Supreme Court has effectively done in its opinion holding Petitioner to be forever bound by this void agreement to dispossess himself of his federal benefits to pay his former spouse monies that she is not entitled to under the provisions of the USFSA, 10 U.S.C. § 1408. 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.

Respectfully submitted,



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Dated: November 27, 2023

INDEX TO APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 28th day of June, 2023.

Lee Ann B. Yourko, Appellant,

against Record No. 220039
Court of Appeals No. 0363-21-1

Michael B. Yourko, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on March 30, 2023, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Russell took no part in the resolution of this petition.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: Deputy Clerk

PRESENT: Goodwyn, C.J., Powell, Kelsey, McCullough, Chafin, and Mann, JJ., and Millette, S.J.

LEE ANN B. YOURKO

v. Record No. 220039

MICHAEL B. YOURKO

OPINION BY
JUSTICE CLEO E. POWELL
MARCH 30, 2023

FROM THE COURT OF APPEALS OF VIRGINIA

Lee Ann. B. Yourko ("Wife") appeals the decision of the Court of Appeals reversing the circuit court. Specifically, Wife takes issue with the Court of Appeals' determination that certain indemnification provisions in a property settlement agreement that she entered into with Michael B. Yourko ("Husband") violated federal law and, therefore, were void ab initio.

I. BACKGROUND

As part of their divorce proceedings, Husband and Wife negotiated an agreement regarding the division of his military retirement pay. In conjunction with entry of the final divorce decree, the circuit court entered a Military Pension Division Order ("MPDO") which memorialized the parties agreement.[1] Under the terms of the MPDO, Wife was entitled to 30% of Husband's "disposable military retired pay."

[1] The MPDO is the equivalent of a property settlement agreement. *See* Code § 20-155 (permitting parties to "enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them" which does not otherwise have to be in writing, provided the terms of the agreement are "contained in a court order endorsed by counsel or the parties or . . . recorded and transcribed by a court reporter and affirmed by the parties on the record personally"). As the Court of Appeals has noted, property settlement agreements are a type of marital agreement which are "made in connection with the dissolution of a marriage or a separation." *Wills v. Wills*, 72 Va. App. 743, 759 (2021); *see also Plunkett v. Plunkett*, 271 Va. 162, 166 (2006) (implicitly equating marital agreements to property settlement agreements). Here, we note that there is language in the MPDO that clearly indicates that it is derived from an agreement between Husband and Wife regarding the division of Husband's military retirement pay. This is supported by the fact that Husband sought to challenge the MPDO based on his assertion that the parties had made a mutual mistake of fact in calculating the amount of his

Paragraph 9 of the MPDO states:

> The parties have agreed upon the level of payments to [Wife] to guarantee income to her, based upon military retired pay with a deduction for disability compensation, resulting in [Wife's] share equaling $1,202.70 per month. [Husband] guarantees the level agreed upon by the parties and agrees to indemnify and hold [Wife] harmless as to any breach hereof. Furthermore, if [Husband] takes any action, including additional waiver of retired pay for disability compensation which reduces the former spouse share she is entitled to receive, then he shall indemnify her by giving to her directly the amount by which her share or amount is reduced as additional property division payments which do not terminate upon her remarriage or cohabitation. [Husband] hereby consents to the payment of this amount from any periodic payments he received (such as wages or retired pay from any source) and this clause may be used to establish his consent (when this is necessary) for the entry of an order of garnishment, wage assignment, or income withholding.[2]

At some point after entry of the MPDO, the agency in charge of distributing military benefits, the Defense Finance Accounting Service ("DFAS"), computed Husband's disposable retired pay to be only $844 per month. Per DFAS, the remainder of his retirement benefits were considered to be disability pay, which is not divisible under federal law. As a result, DFAS calculated Wife's share of Husband's disposable military retirement pay to be only $253.20 per month rather than $1,202.70.

disposable retired pay, thereby indicating that the MPDO was the product of an agreement between the parties. Accordingly, for the purposes of this case, we will treat the MPDO as a property settlement agreement.

[2] Although the record indicates that Husband objected "to the provisions of paragraph nine (9)," the nature of his objection is unclear. Further, as neither party appealed the entry of the MPDO, its provisions became the law of the case. "'Under [the] law of the case doctrine, a legal decision made at one [stage] of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'" *Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006) (quoting *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F.Supp.2d 549, 609 (W.D.Va.2000)) (modifications in original). Accordingly, any objection Husband may have raised regarding Paragraph 9 is deemed waived.

Husband subsequently moved to reinstate the parties' divorce proceedings to the circuit court's active docket pursuant to Code § 20-121.1. Once his motion was granted Husband moved to amend the final decree, the equitable distribution order and the MPDO. He argued that the parties had erred in their calculation of his disposable retired pay and, as a result, the MPDO required him to pay approximately 140% of his disposable retired pay. Husband further sought to have Paragraph 9 of the MPDO struck as void ab initio as the indemnification provisions were contrary to federal law. Specifically, he claimed that indemnification provisions would require him to pay more than 50% of his disposable retired pay in violation of federal law.

After considering the matter, the circuit court dismissed Husband's motion. The circuit court explained that it had no authority to amend the MPDO because more than 21 days had passed since the order was entered. The circuit court further stated that there were no clerical errors in the MPDO nor was there a mutual mistake of fact by the parties. Finally, the circuit court found that the MPDO "was an agreement" with regard to the amount Wife "was going to get from the military portion . . . and that there [were] provisions . . . in paragraph 9, as to how it would ensure that [Wife] get that amount."

Husband appealed to the Court of Appeals, arguing that the circuit court erred in ruling that it lacked the authority to amend the MPDO. In a published opinion, the Court of Appeals reversed the decision of the circuit court. *Yourko v. Yourko*, 74 Va. App. 80 (2021). The Court of Appeals agreed with the circuit court's determination that the MPDO was a final order, that it contained no clerical errors and that there was no mutual mistake of fact. *Id.* at 89-91. However, it went on to rule that federal law preempted Virginia law on questions involving the divisibility of military retirement benefits. *Id.* at 96. Relying on the United States Supreme Court's decision in *Howell v. Howell*, 581 U.S. 214 (2017), the Court of Appeals determined that,

"indemnification or reimbursement to compensate a former spouse for the waived military retirement pay was in violation of federal law."[3] *Id.* at 94. Although *Howell* only addressed situations where indemnification is ordered by a court, the Court of Appeals explained that the difference between court ordered indemnification and contractual indemnification was semantic in nature. *Id.* at 96. The Court of Appeals went on to hold that, because the indemnification provision was in violation of federal law, it was void ab initio and, therefore, it could "be attacked beyond twenty-one-days from judgment." *Id.* at 97 (citing *Bonanno v. Quinn*, 299 Va. 722, 736-38 (2021)).

Wife appeals.

II. ANALYSIS

On appeal, Wife argues that the Court of Appeals erred in interpreting *Howell* to forbid courts from recognizing indemnification provisions related to military retirement pay in property settlement agreements. Wife contends that the holding of *Howell* was limited to preventing courts from *requiring* indemnification. She insists that *Howell* does not address whether spouses could voluntarily agree to indemnify a former spouse in the event military retirement pay is reduced.[4] We agree.

[3] Additionally, the Court of Appeals overruled its decisions in *Owen v. Owen*, 14 Va. App. 623 (1992), and *McLellan v. McLellan*, 33 Va. App. 376 (2000), which permitted indemnification provisions in negotiated property settlement agreements to address the reduction in military disposable retired pay caused by the veteran waiving benefits in order to receive disability pay.

[4] At oral argument, Wife also argued that the doctrine of res judicata barred Husband from challenging the validity of the indemnification provision of the MPDO. We note, however, that none of Wife's assignments of error raise the issue of res judicata as a basis for challenging the Court of Appeals' ruling. As this Court has repeatedly admonished, we will only consider appellate arguments that are the subject of a proper assignment of error. *See Wolfe v. Bd. of Zoning Appeals of Fairfax Cnty.*, 260 Va. 7, 14 (2000); *City of Winchester v. American*

The primary question raised in Wife's appeal is whether the United States Supreme Court's interpretation of the Uniformed Services Former Spouses' Protection Act ("USFSPA"), 10 U.S.C. § 1408, in *Howell* invalidates the indemnification provisions of an agreement between the parties. This question involves the interaction of federal statutes, Virginia statutes and United States Supreme Court jurisprudence. As such, this case presents a question of law which we review de novo. *See Maretta v. Hillman*, 283 Va. 34, 40 (2012).

In 1981, the United States Supreme Court ruled that Congress did not intend to allow courts to divide military retirement pay as part of judicially divisible property in a divorce proceeding. *McCarty v. McCarty*, 453 U.S. 210, 223 (1981) (observing that "the application of community property law conflicts with the federal military retirement scheme"). In reaching this conclusion, the United States Supreme Court noted that Congress treated military retirement pay differently from other federal retirement systems. *Id.* at 221. Moreover, it pointed out that Congress had referred to military retirement pay as "'a *personal entitlement* payable to the retired member himself as long as he lives.'" *Id.* at 224 (quoting S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968)) (emphasis in original).

In response to *McCarty*, Congress enacted the USFSPA, which authorized courts to treat veterans' "disposable retired pay" as judicially divisible property in divorce proceedings. 10 U.S.C. § 1408. Under the USFSPA, "disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled," less certain deductions. 10 U.S.C. § 1408(a)(4)(A). One such deduction occurs where military retirement pay has been waived in order to receive

Woodmark Corp., 250 Va. 451, 460 (1995). Accordingly, we do not consider whether the doctrine of res judicata has any bearing on the present case.

veterans' disability payments. *Id.*[5] Thus, opting to receive disability payments would result in a reduction of the amount of disposable retired pay that may be divided between the parties.

In *Mansell v. Mansell*, 490 U.S. 581, 585 (1989), the United States Supreme Court addressed the effect that the USFSPA had upon its decision in *McCarty*. Its analysis began by noting that, because "the application of state community property law to military retirement pay" was "completely pre-empted" by pre-existing federal law, the USFSPA acted as "an affirmative grant of authority giving the States the power to treat military retirement pay as community property."[6] *Id.* at 588. However, it observed that the power granted by Congress was limited to only a portion of a veteran's military retirement pay. It specifically noted "that the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-95. In other words, the USFSPA was only a partial rejection of *McCarty*; a veteran's disability benefits remained a personal entitlement.

Recognizing that the amount of disposable retired pay may be reduced by the actions of a veteran after a property division award was entered in a divorce proceeding, some courts opted to require that veterans reimburse or indemnify their former spouse if the veteran opted to waive military retirement pay for disability pay. *See, e.g., In re Marriage of Howell*, 361 P.3d 936 (Ariz. 2015); *Glover v. Ranney*, 314 P.3d 535 (Alaska 2013); *Krapf v. Krapf*, 786 N.E.2d 318

[5] Veteran disability pay, unlike military retirement pay, is not taxed. 38 U.S.C. § 5301(a)(1). As such, many veterans choose to waive retirement pay in order to receive an equivalent amount of disability pay. *Howell*, 581 U.S. at 216.

[6] Although "community property" and "equitable distribution" refer to different methods of judicial property division in the context of divorce, the United States Supreme Court explicitly held that the USFSPA applies equally to both methods. *See Mansell*, 490 U.S. at 585 n.2 ("The language of the [USFSPA] covers both community property and equitable distribution States, as does our decision today.").

(Mass. 2003); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). The United States Supreme Court rejected this approach, however, ruling that a state court could not "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver." *Howell*, 581 U.S. at 216. It explained that a court ordering a veteran to reimburse or indemnify their spouse for the reduction in disposable retired pay caused by waiver due to disability was no different than an order that divided the disability pay. *Id.* at 221.

> The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders 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 pre-empted.

Id. at 222.

It is important to note, however, that neither *Mansell* nor *Howell* involved a property settlement agreement that contained an indemnification provision. Moreover, neither opinion can be read as addressing the enforceability of such a provision. *Mansell* simply proscribes state courts from "treating military retirement pay that had been waived to receive disability benefits as community property." 490 U.S. at 586. *Howell*, on the other hand, only makes clear that state courts cannot *order* a veteran who elects to waive retirement pay for disability pay to indemnify a former spouse. 581 U.S. at 222. It is against this backdrop that we must analyze the facts of this case.

The record here establishes that the parties divided Husband's military retirement pay as part of a negotiated property settlement agreement, i.e., the MPDO. As a property settlement

agreement, the MPDO is a contract under Virginia law and must be treated accordingly. *See Southerland v. Estate of Southerland*, 249 Va. 584, 588 (1995) ("Property settlement agreements are contracts and are subject to the same rules of construction that apply to the interpretation of contracts generally."). Therefore, it cannot be said that the circuit court erred by treating Husband's disability pay as marital property for purposes of equitable distribution in violation of *Mansell* because the present case is limited to the parties' contractual obligations under the MPDO. *Howell* is similarly not implicated, as nothing in the record indicates that the *circuit court* sought to "circumvent" the USFSPA by ordering that Husband indemnify Wife for the reduction in disposable retired pay; rather, the indemnification provision was undisputedly part of the MPDO.

Having established that neither *Mansell* nor *Howell* apply to the present case, the remaining question is whether the USFSPA bars a former service member from dividing his or her total military retirement pay via contract. As previously noted, Congress intended for military retirement pay to be a personal entitlement of the veteran which could not be judicially divided in the context of divorce. *McCarty*, 453 U.S. at 224. Though Congress reduced the extent of this personal entitlement by enacting the USFSPA, it did not eliminate it entirely. *See Mansell*, 490 U.S. at 592 (noting that Congress decided to "shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments"). Importantly, neither Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed, it expressly permits such

usage. *See, e.g.*, 38 U.S.C. 5301(a)(3)(B) (permitting a veteran to use disability benefits to repay loans, provided the payments are "separately and voluntarily executed by the [veteran]").

Moreover, the fact that the contract is between a husband and wife does not change the analysis. As at least one treatise on this subject matter has recognized:

> It's one thing to argue about a judge's power to require under principles of fairness and equity, a duty to indemnify; that approach has been eliminated by the *Howell* decision. It's another matter entirely to require a litigant to perform what he has promised in a contract.

2 Mark E. Sullivan, *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families* 691 (3d ed. 2019).

Indeed, this was the approach that the Court of Appeals adopted over 30 years ago. In *Owen v. Owen*, 14 Va. App. 623 (1992), a husband and wife entered into a property settlement agreement wherein the husband agreed to pay the wife "one-half of his Army gross retirement pay based on twenty-five years of Army service, subject only to any deductions for federal and state taxes required with respect to the Wife's share of said pension." *Id.* at 625. Like the present case, the husband also agreed to "take no action to defeat his wife's right to share in these benefits," and to "indemnify her for any breach by him in this regard." *Id.* As a result, it was determined that the wife was entitled to a portion of his pension totaling $1,241.47 per month. *Id.* After the husband retired, he was deemed to be 60% disabled as a result of service-connected injuries. *Id.* When he sought to reduce the amount of his payments to the wife, the trial court upheld the property settlement agreement and ordered the husband to pay the full amount. *Id.* On appeal, the Court of Appeals affirmed the trial court's decision, pointing out that the property settlement agreement did not assign the husband's military disability benefits to the wife, which would be a violation of the USFSPA. *Id.* at 626. "Rather, it insure[d] the wife a steady or possibly increasing monthly payment in return for her waiver of the right to receive

spousal support once the husband retired." *Id.* at 627. In so doing, the Court of Appeals implicitly recognized and upheld the parties' right to contract.

After determining that *Howell* barred servicemembers from making "contracts, 'guarantees,' or 'indemnification' promises to former spouses," the Court of Appeals expressly overruled *Owen* and its progeny. *Yourko*, 74 Va. App. at 96. This was error. As previously noted, *Howell* is not implicated when parties contractually agree to divide military retirement benefits and include an indemnification provision. For similar reasons, *Howell* is not implicated when a court seeks to enforce an otherwise valid indemnification provision. Rather, by the plain language of the opinion, *Howell* is only implicated when a *court* seeks to circumvent the USFSPA by ordering indemnification.

It is further worth noting that, contrary to the Court of Appeals' ruling, nothing in the MPDO specifies that Wife must be indemnified from Husband's military disability pay. The MPDO only requires that Husband "indemnify [Wife] by giving to her directly the amount by which her share or amount is reduced as additional property division payments which do not terminate upon her remarriage or cohabitation." By its plain language, the MPDO specifies that the indemnification is a *direct* payment from Husband to Wife. With regard to the source of funds, the MPDO is silent, stating only that Husband "hereby consents to the payment of this amount from any periodic payments he received (such as wages or retired pay from any source)." The record clearly indicates that Husband's income far exceeds the amount necessary to indemnify Wife even if the totality of his military retirement pay is excluded.[7] Therefore, the

[7] According to the Final Decree, Husband's gross monthly income was $10,266.00. Excluding his military retirement benefits ($4,009.00), this leaves $6,257.00 that Husband could use to indemnify Wife. As the indemnification amount is $949.50, it is clear that Husband could indemnify Wife without using any of his military retirement pay, much less his disability pay.

MPDO cannot be interpreted as requiring Husband to use any of his military disability pay to indemnify Wife. On this record, any assertion to the contrary is entirely speculative, as the MPDO does not dictate the source of the indemnification payments. As such, Husband "'is free to satisfy his obligations to his former wife by using other available assets.'" *Owen*, 14 Va. App. at 627 (quoting *Holmes v. Holmes*, 7 Va. App. 472, 485 (1988)).

For these reasons, we expressly adopt the holding of the Court of Appeals in *Owen* that, with regard to the division of military retirement benefits, "federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits." 14 Va. App. at 628.[8] Along these same lines, federal law does not bar courts from upholding such agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties.

III. CONCLUSION

For the foregoing reasons, we will reverse the decision of the Court of Appeals and reinstate the circuit court's decision dismissing Husband's motion to amend.

Reversed and final judgment.

[8] In reaching this conclusion, we join a growing number of states holding that "*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022). *See also Martin v. Martin*, 520 P.3d 813, 819 (Nev. 2022); *In re Marriage of Weiser*, 475 P.3d 237, 249 (Wash. Ct. App. 2020).

COURT OF APPEALS OF VIRGINIA

PUBLISHED

Present: Judges Huff, Ortiz and Friedman
Argued by videoconference

MICHAEL B. YOURKO

v. Record No. 0363-21-1

LEE ANN B. YOURKO

OPINION BY
JUDGE FRANK K. FRIEDMAN
DECEMBER 21, 2021

FROM THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND
COUNTY OF JAMES CITY
Michael E. McGinty, Judge

Charles E. Haden for appellant.

Kyle J. Burcham (Heather Larson Pedersen; Pedersen Law, PLLC, on brief), for appellee.

Michael Yourko ("husband") appeals from the trial court's dismissal of his motion for modification of a final decree and equitable distribution order, and a military pension division order. Husband assigns error to the circuit court's refusal to modify these orders.

The parties to this divorce negotiated an agreement regarding the division of husband's military retirement pay. A year later husband challenged the orders complaining that aspects of the agreement to divide his military retirement pay were violative of federal law. Husband accurately depicts the orders' improper terms, and federal law's preemption and repudiation of these terms, but Lee Ann Yourko ("wife") claims the collateral attack came long after the circuit court lost jurisdiction over the orders under Rule 1:1. Husband argued that the orders could be challenged at this juncture as the product of a mutual mistake or clerical error, or, in the alternative, he contended that the orders were void *ab initio* or non-final. The circuit court refused to set aside the challenged orders. We reverse.

I. FACTUAL BACKGROUND

Wife filed a complaint for divorce from husband. After husband filed a counterclaim and both parties filed answers, the circuit court entered a final decree and equitable distribution order as well as a military pension division order on January 28, 2020. The final decree and equitable distribution order noted that the parties had "memorialized a division of marital assets and debts in an Equitable Distribution Agreement" which the court followed. The final decree and equitable distribution order set the amounts the court determined husband was to pay wife in child and spousal support. The military pension division order stated the terms of husband's military retirement division. It provided under the title "Amount of Payment:" "[t]he former Spouse is awarded thirty percent (30%) of the Service Member's disposable military retired pay."[1] The military pension division order goes on to state under paragraph 9 titled "Level of Payments:"

> The parties have agreed upon the level of payments to the Former Spouse to *guarantee* income to her; based upon military retired pay with a deduction for disability compensation, resulting in the Former Spouses' share equaling $1,202.70 per month. *The Service Member guarantees the level agreed upon by the parties and agrees to indemnify and hold Former Spouse harmless as to any breach hereof.* Furthermore, *if the Service Member takes any action, including additional waiver of retired pay for disability compensation which reduces the former spouse share she is entitled to receive, then he shall indemnify her by giving to her directly the amount by which her share or amount is reduced as additional property division payments which do not terminate upon remarriage or cohabitation.* Service Member hereby consents to the payment of this amount from any periodic payments he received (such as wages or retired pay from any source) and this clause may be used to

[1] As is discussed *infra*, the maximum amount that a spouse of a servicemember can receive as a marital share of pension benefits in a divorce is 50%. 10 U.S.C. § 1408(e)(1). Here, wife was granted 50% of the benefits accrued during the marriage. This came to 30% of the total benefits due husband – this was so because husband joined the military more than eleven years before the marriage. The parties agreed that husband had 336 total months of service; 206 of these months came during the marriage. See Starr v. Starr, 70 Va. App. 486, 492 (2019).

> establish his consent (when this is necessary) for the entry of an order of garnishment, wage assignment, or income withholding.

(Emphasis added.)

While husband objected to certain "indemnification" language included in the circuit court's orders, the orders adopted the basic points of the parties' agreement and the orders became final without either side appealing them. At the time the parties negotiated wife's share of the military benefits, they genuinely believed husband would receive $4,009 per month in disposable retirement pay. However, sometime after the final decree, the military's Defense Finance Accounting Service ("DFAS") computed husband's disposable retirement pay to be only $844 per month, the remainder being disability pay which is not divisible in divorce proceedings. Therefore, DFAS calculated wife's 30% share of disposable retirement pay to be $253.20 per month rather than the $1,202.70 per month agreed to in paragraph 9.[2] The "indemnification" and "guarantee" language in paragraph 9, accordingly, required husband to pay almost $1,000 per month more in military benefit based pay to wife than DFAS calculated was due.

Over a year after entry of the final decree and pension order, husband filed a motion to reinstate and the circuit court revived the case on its docket. Husband then filed a motion for modification of the final decree and equitable distribution order and pension order. Husband argued that at the time the parties negotiated wife's share of his military retirement pay, they believed husband would receive $4,009 per month in disposable retirement pay, resulting in their calculation of wife's share at $1,202.70 per month. Husband now contended that since DFAS calculated his disposable retirement pay at a total of only $844 per month (the remainder being disability pay) the original calculation and agreement were hopelessly flawed.

[2] This difference in retirement pay was not due to any action taken by husband in order to receive more disability pay.

Since disability pay is not divisible in divorce proceedings under federal law, husband argued that the parties' mistaken calculation in the final order effectively gave wife 140% of his divisible disposable retirement pay – plainly in violation of the 50% maximum allowed by federal law. 10 U.S.C. § 1408(e)(1). Husband also maintained that federal law prohibited the circuit court from requiring him to indemnify wife for any reduction she received in divisible disposable pay. He contended that the circuit court should modify its ordered monthly payment of $1,202.70 either because the order was not final, paragraph 9 contained a mutual mistake resulting in a clerical error, or it was void *ab initio* as contrary to federal law and Supreme Court precedent.

The circuit court found it could not reopen the case because the twenty-one-day deadline in Rule 1:1 had passed. It dismissed husband's motion for modification. It also specifically found there was no mutual mistake or clerical error. This appeal followed.

II. STANDARD OF REVIEW

Husband's assignment of error asks this Court to interpret federal statutes, Virginia statutes, federal case law, and Virginia's common law precedent. The assignment of error therefore presents questions of law that this Court reviews *de novo*. See Eley v. Commonwealth, 70 Va. App. 158, 162 (2019) (noting that questions of statutory law are reviewed *de novo*); Commonwealth v. Greer, 63 Va. App. 561, 568 (2014) (stating that interpretation of the common law presents a legal question "reviewed *de novo* on appeal"). Generally, review of claims alleging a mutual mistake involve mixed questions of law and fact. While the court's underlying findings of fact are entitled to deference, the ultimate conclusion of whether particular conduct constitutes a scrivener's error is a question of law to be reviewed *de novo*. See Westgate at Williamsburg Condo. Ass'n, Inc. v. Richardson, 270 Va. 566, 575 (2005). Where the essential facts are undisputed, a question of law is presented regarding the circuit court's application of the law to those facts. See Rodriguez v. Leesburg Bus. Park, 287 Va. 187, 193 (2014).

III. ANALYSIS

A. The Final Decree and Equitable Distribution Order and Military Pension Division Order were Final for the Purposes of Rule 1:1.

A final judgment is "one which disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment." Super Fresh Food Mkts. of Va., Inc. v. Ruffin, 263 Va. 555, 560 (2002). It is well settled that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Rule 1:1. The same is true for final divorce decrees. Jackson v. Jackson, 69 Va. App. 243, 247 (2018). Equitable distribution and support orders, although subject to a trial court's continuing jurisdiction, are nonetheless considered "final judgments" for purposes of Rule 1:1's twenty-one-day window. See Hastie v. Hastie, 29 Va. App. 776, 780 (1999) ("It is well settled that equitable distribution orders become final within twenty-one days of entry."). They may be modified by a subsequent order, but only while the court retains jurisdiction for twenty-one days, or otherwise by reservation or statute. Id.[3]

The final decree here was a final judgment; it resolved all substantive issues. The final decree declared the divorce between husband and wife, while also dictating equitable distribution divisions between husband and wife. It resolved support levels and custody issues. The pension order set the division of husband's retirement pay. The final decree or pension order would have needed to convey the intent to "forestall[] the *commencement* of the twenty-one day time period of

[3] Several Virginia statutes provide avenues for the trial court to modify a previous domestic order. For example, Code § 20-107.3(K) expressly grants authority to trial courts to have continuing authority and jurisdiction in divorce matters for the limited purpose of making additional orders "necessary to effectuate and enforce any order entered pursuant to this section," including orders to affect or divide any retirement plans. Code § 20-109(B) grants trial courts authority to modify awards of spousal support upon a material change in circumstances.

Rule 1:1" in order to retain jurisdiction. Ruffin, 263 Va. at 563.[4] By the time husband filed a motion for modification, over a year after the final decree and pension order were entered, the circuit court had lost jurisdiction to rewrite the challenged orders unless the orders were void *ab initio* or fell within a statutory exception to Rule 1:1.

B. There was No Mutual Mistake or Clerical Error Allowing a Modification of the Final Decree or Pension Order after Twenty-one Days.

Husband argues that, even if the circuit court lost its jurisdiction to modify its orders after twenty-one days, the circuit court still had the power to modify the orders if they contained a clerical error. He relies on Code § 8.01-428(B) which provides trial courts the authority to modify final orders beyond the twenty-one-day mark set by Rule 1:1 when they contain clerical errors "arising from oversight or from an inadvertent omission." Husband argues that, because the parties were gravely mistaken about the amount of retirement pay husband would receive from DFAS, their mutual mistake resulted in a clerical error that the court had the power to modify.

Generally, a clerical error under Code § 8.01-428(B) can be described as a "scrivener's" error or "similar errors in the record, which are demonstrably contradicted by all other documents," and cause the record to fail to "speak the truth." Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 283 (2002). A mutual mistake under Code § 8.01-428(B) can occur when the parties use an incorrect word or phrase in the written agreement that is different from what the parties had agreed on. For example, in Dorn v. Dorn, 222 Va. 288 (1981), the parties agreed to a monthly support level, but in drafting the agreement mistakenly wrote that the payments would be made

[4] Here, the final decree did allow for the case to be retained on the court's docket for six months "for entry of the appropriate Approved Domestic Relations Orders for the purpose of the division of retirement benefits, and any amendments thereto that may be necessary to effectuate the parties' agreement." The pension division order, a qualified domestic relations order, was, in fact, entered the same day as the final decree. Husband suggests that the orders remained interlocutory because the circuit court reserved the right to extend support after ten years, but this does not render the orders non-final.

"bi-weekly," rather than "per month." Dorn, 222 Va. at 290-91. The Supreme Court found the record supported an "oversight" in the written order that mistakenly doubled support requirements. Id. at 291-92. The Court ruled that the statute gave the trial court power to modify support obligations in the "rare situation where the evidence clearly supports the conclusion that an error covered by Code § 8.01-428(B) has been made." Id. at 292.

Husband relies on an unpublished case from this Court, Lewis v. Lewis, No. 1042-15-1 (Va. Ct. App. May 17, 2016), to support his argument. In Lewis, the parties entered into an agreement indicating that spousal support would "terminate upon the remarriage or the death of either party." Id. at 2. The husband then remarried and stopped paying the wife her support based on *his* remarriage. Id. at 2-3. The wife filed a motion alleging the husband was in default of his payments, arguing that the separation agreement should have included "her" before "remarriage," and the exclusion of "her" was a scrivener's error. Id. at 3. The trial court agreed with the wife. Id. at 5. On appeal, we agreed that this was a scrivener's error and upheld the finding of the court that the wife had met her burden and established that a mutual mistake had occurred. Id. at 10. See also Hughes v. Hughes, No. 1745-00-1, slip op. at 2-7 (Va. Ct. App. June 19, 2001) (finding that there was a modifiable mutual mistake in a separation agreement and order involving a military spouse's eligibility for health insurance through the military). In Hughes we stated that in "determining whether a mutual mistake of fact existed at the time of agreement, the inquiry is . . . whether each party held the same mistaken belief with respect to a material fact *at the time the agreement was executed*." Id. at 6 (emphasis added) (quoting Collins v. Dep't of Alcoholic Beverage Control, 21 Va. App. 671, 681 (1996)).

Here, husband admits that the amount listed on the pension order was what the parties thought was *correct* at the time of entry of the orders. In looking at the plain language of Code § 8.01-428(B), there was no "oversight" that resulted in a mutual mistake. The parties negotiated

and calculated the amount that wife would receive based on the facts known to them at the time. This is evidenced in the record by the fact husband provided an exhibit to the trial court in which he calculated the marital share of benefits to be $1,226.19, not nearly the $253 he now relies upon after DFAS' subsequent calculation. There was no oversight by the parties in the written form of their agreements; the order reflected what the parties intended at the time they executed their agreement. There was no typographical error, omission of a critical word, incorrect date, or other error that resulted in a clerical error. After execution of the agreement and entry of the orders, DFAS simply rendered an unexpected decision as to husband's retirement pay.

Simply put, the orders husband now seeks to attack "spoke the truth" and accurately reflected the parties' intentions at the time of their agreement. The circuit court found that there was no mutual mistake or clerical error allowing the trial court to modify the order after twenty-one days. This Court agrees with that reasoning.

C. The Orders Impermissibly Divide Husband's Disability Pay in Violation of Federal Law.

A court order may also be attacked after twenty-one days when it is void *ab initio*. See Bonanno v. Quinn, 299 Va. 722, 736-38 (2021); Rawls v. Commonwealth, 278 Va. 213, 218 (2009). Husband contends that the disputed orders are void *ab initio* as they flatly violate federal law. Wife contends the orders were appropriate under Virginia law.

1. Legal Background and History Regarding the Division of Military Retirement Pay in Divorce.

a. Disposable Retirement Pay is Divisible in Divorce Proceedings – But Disability Pay is Not Divisible.

In McCarty v. McCarty, 453 U.S. 210 (1981), the United States Supreme Court addressed whether military retirement pay, generally, was divisible at divorce.[5] Id. at 211. The Supreme

[5] Historically, military veterans from the time of the Revolutionary War period have been provided retirement pay for disability, but it was not until the Civil War that military veterans received non-disability military retirement. McCarty, 453 U.S. at 212.

Court decided that the application of community property law conflicted with the federal military retirement scheme; in other words, it found that state courts could not divide military retirement pay between divorcing spouses because, in part, Congress intended that the retirement pay – a taxpayer funded benefit – was to reach the veteran retiree only. Id. at 223-32.

In response, Congress passed the Uniformed Services Former Spouses Protection Act ("USFSPA"), setting forth the conditions under which state courts could divide some military service benefits. Mansell v. Mansell, 490 U.S. 581, 584 (1989). The USFSPA permits state courts to treat "disposable retirement pay" as the property of both the veteran and the veteran's spouse under state domestic relations law. 10 U.S.C. § 1408(c)(1). In defining "disposable retirement pay," however, the USFSPA specifically excludes, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. 10 U.S.C. § 1408(a)(4)(A).[6]

The Supreme Court of the United States addressed the impact of the USFSPA on divorcing military spouses within a few years of its enactment. In Mansell, the Court acknowledged that the legislature intended to allow state courts to divide military retirement pay between divorcing spouses but distinguished the divisibility of disability pay (which cannot go to a former spouse). 490 U.S. at 586-88. The Court explained that the grant of power to state courts was "precise and limited" and did not include the authority to divide any portion of a veteran's retirement pay that was "waived in order to receive veterans' disability payments." Id. at 588-89. Accordingly, the Supreme Court held that the USFSPA preempts a state court's

[6] Eligible military veterans may waive a portion of retirement pay in order to receive an equivalent amount of disability pay. 38 U.S.C. § 5305. Unlike standard military retirement pay, disability pay is not taxed, and therefore veterans often elect to waive retirement pay in order to receive an equivalent amount of disability pay. 38 U.S.C. § 5301(a)(1); Howell v. Howell, 137 S. Ct. 1400, 1403 (2017). The choice to waive retirement pay in order to receive disability pay can be presented to and made by veterans decades after spouses have agreed to divide the veteran's retirement pay in divorce.

ability to "treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Id. at 594-95.

b. The Prohibition Against Requiring Servicemembers to "Indemnify" or "Reimburse" Against Reductions or Waivers of Retirement Pay

In 2017, the Supreme Court heard Howell v. Howell, 137 S. Ct. 1400 (2017), in which the Court considered whether a state court could order a veteran to indemnify, or reimburse, a former spouse for any difference in retirement pay to the former spouse as a result of the veteran waiving retirement pay in favor of disability pay. Id. at 1402, 1406. In Howell an Arizona family court ordered a veteran to ensure that his ex-spouse would continue to receive 50% of his original retirement pay, as determined by their divorce thirteen years prior, without regard for the disability pay he had elected to start receiving. Id. at 1404. In essence, the Arizona Supreme Court concluded that the spouse had a "vested" interest in the original, higher amount. Id. The Arizona Supreme Court found that the family court was not in violation of Mansell because it had not actually divided the veteran's disability pay, did not direct him to rescind his waiver, and did not direct him to give his disability pay to his former spouse. Id. It reasoned that the family court "simply ordered [the veteran] to 'reimburse' [former spouse] for 'reducing . . . her share' of military retirement pay." Id. The Supreme Court of the United States soundly rejected this logic.

Howell, like Mansell, found that federal law preempted state courts from dividing waived military retirement pay between divorcing spouses. Id. at 1405. Significantly, it also decided that an indemnification or reimbursement to compensate a former spouse for the waived military retirement pay was in violation of federal law. Id. at 1406. The Supreme Court proclaimed:

> In this case a State treated as community property and awarded to a veteran's spouse upon divorce a portion of the veteran's total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive nontaxable disability benefits from the Federal Government instead. Can the State

> subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not. Our cases and the statute make clear that the answer to the indemnification question is "no."

Id. at 1402 (citations omitted); see also id. at 1406 ("All such orders [containing indemnification provisions] are . . . pre-empted.").

In explaining its holding, the Howell Court pronounced that, even if an indemnification provision does not specifically require that a veteran use his disability pay to indemnify or reimburse the former spouse, the purpose of such a requirement contradicts and seeks to circumvent the Mansell holding. Id. The Court bluntly held that requiring a former spouse to indemnify or reimburse an ex-spouse for the lost retirement pay is a semantic difference and nothing more. Id. Ordering a veteran to pay a former spouse the difference in benefits after a disability pay deduction, particularly a dollar-for-dollar reimbursement, would "displace the federal rule and stand as an obstacle to the . . . purposes and objectives of Congress." Id.[7]

Wife, nonetheless, argues that Virginia state law allows parties to negotiate an equitable distribution agreement that considers both retirement benefits and disability benefits in fixing the civilian spouse's share. She cites to Owen v. Owen, 14 Va. App. 623, 628 (1992), and McLellan v. McLellan, 33 Va. App. 376, 382 (2000), for the proposition that the circuit court did not order the division of disability payments, but permissibly required husband to guarantee and indemnify

[7] See also Foster v. Foster, 949 N.W.2d 102 (Mich. 2020) (relying on Howell in concluding the trial court erred in requiring veteran to reimburse a former spouse for the reduction in benefits due to his receiving non-disposable special pay); Merrill v. Merrill, 137 S. Ct. 2156, 2156 (2017) (vacating and remanding a judgment "in light of [Howell]," which found that the family court could enter an indemnification order to compensate a former spouse for a reduction in her share of non-disposable elected benefits); Cassinelli v. Cassinelli, 138 S. Ct. 69, 69 (2017) (vacating and remanding a judgment "in light of [Howell]," which found that a military spouse was required to reimburse a civilian spouse for electing to waive retirement pay and receive disability benefits, though reimbursement need not be directly from the disability benefits).

a sum certain to wife from any of his available assets based on the parties' negotiated agreement. Both Owen and McLellan essentially subscribed to the view that divorcing couples could circumvent the Mansell prohibition by agreement.

Notably, Howell was decided well after both Owen and McLellan approved such agreements. Again, the Howell Court made clear that using semantics to circumvent Mansell in an attempt to divide disability pay is not allowed. Howell, 137 S. Ct. at 1406; see Foster v. Foster, 949 N.W.2d 102, 111-13 (Mich. 2020) (explaining that a reimbursement of waived retirement pay was no different than a division of the disability benefits themselves, and finding the plaintiff's argument that the parties agreed to the reimbursement unpersuasive in changing that analysis). In light of Howell, to the extent Owen and McLellan permit Virginia courts to order a servicemember to "indemnify" or "reimburse" an ex-spouse for a waiver (or reduction) of retirement pay – they are overruled. Virginia courts should not issue orders that require or permit servicemembers to make contracts, "guarantees," or "indemnification" promises to former spouses in contravention of Howell.

While we find that federal law preempts state law on these questions of military retirement divisibility, husband's ability to overturn the challenged orders at this late juncture hinges on whether the orders are void *ab initio* or merely voidable under Virginia law.[8]

[8] Notably, an unappealed judgment of divorce dividing military pension benefits can be upheld under state law finality and preclusion principles, even if the judgment may have been wrong under federal law or rested on a subsequently overruled legal principle. Whether such an error is subject to *res judicata* or finality rules such as Rule 1:1 is generally a question of state law that does not raise a federal question. See 2 Brett R. Turner, Equitable Distribution of Property § 6:6, at 54-55 (4th ed.); Mansell, 490 U.S. at 586 n.5 (stating that the underlying state court decision in Mansell was not based on *res judicata* or finality issues – but if it had been, no federal question would have been raised); see also In re Marriage of Mansell, 217 Cal. App. 3d 219, 234-45 (1989) (on remand from Supreme Court, finding that *res judicata* barred husband's motion to modify the divorce decree).

2. There are Several Circumstances Under Which an Order Can Be Deemed Void *ab initio.*

Husband contends that the orders are so much at odds with federal law that they must be deemed void *ab initio* and, thus, can be attacked at any time without regard to Rule 1:1's twenty-one-day window. "An order is void *ab initio* if entered by a court in the absence of jurisdiction of the subject matter over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could 'not lawfully adopt.'" Singh v. Mooney, 261 Va. 48, 51-52 (2001).[9] Under Virginia law an order that is void *ab initio* may be attacked beyond twenty-one-days from judgment by a party to the proceeding in which the putative judgment was entered. Bonanno, 299 Va. at 736-38. By contrast, an order is voidable if the trial court merely made reversible error in its creation. Singh, 261 Va. at 51-52. If found voidable, such an order may only be set aside consistent within the framework of Rule 1:1 and proper appellate proceedings. Id.[10]

Here, the circuit court had subject matter jurisdiction to issue the challenged orders – even if it reached an erroneous conclusion. However, in examining whether the orders are void, Virginia law looks beyond jurisdiction and also directs that an order is void if the circuit court was without power to render the order. Id. It is this mandate of Virginia law that requires us to strike down the orders at issue.

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[9] Here, there is no evidence in the record (or any argument on appeal) that the circuit court employed a "mode of procedure" it was not permitted to adopt.

[10] Husband, of course, was a party to the original proceeding here. Thus, he is permitted to challenge the order as void *ab initio* beyond twenty-one days from judgment. Bonanno, 299 Va. at 736-38; Collins v. Shepherd, 274 Va. 390, 395, 402-03 (2007) (Rule 1:1 does not bar a party from filing a motion to vacate a judgment more than twenty-one days after its entry when the challenged judgment is void *ab initio*.). In Bonanno, the Supreme Court rejected language appearing in various Virginia opinions stating that an order that is void *ab initio* may be attacked "by any persons, anywhere, at any time, or in any manner." Bonanno restricted the ability of strangers to a proceeding to collaterally attack void orders beyond twenty-one days. 299 Va. at 730-32, 736-38. That limitation, however, is not applicable here.

a. While the Circuit Court had Subject Matter Jurisdiction to Rule on the Divisibility of Military Benefits, the Court Did Not Have the Power to Enter these Indemnification Orders, Rendering them Void *ab initio.*

A "challenge to an order based on a trial court's misapplication of a statute generally raises a question of court error, not a question of the court's jurisdiction." Hicks v. Mellis, 275 Va. 213, 219 (2008). Even when dealing with federal preemption:

> 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.

21 C.J.S. Courts § 272; see Foster, 949 N.W.2d at 117-21 (Viviano, J. concurring). Congress has not given exclusive jurisdiction to a federal forum with respect to division of military benefits.[11] However, the Supreme Court of Virginia has recognized that defects in jurisdiction are *not* the only means by which an order may be void:

> [I]t is essential to the validity of a judgment or decree that the court rendering it shall have jurisdiction of both the subject-matter and parties. *But this is not all*; for both of these essentials may exist, and still the judgment or decree may be void, because [1] *the character of the judgment was not such as the court had the power to render . . . .*

Anthony v. Kasey, 83 Va. 338, 340 (1887) (emphasis added); see Singh, 261 Va. at 51-52; Evans v. Smyth-Wythe Airport Comm'n, 255 Va. 69, 73 (1998).

[11] In his treatise Turner explains: "McCarty and Mansell state a rule of substantive federal law, and not a rule of subject matter jurisdiction." Turner, § 6:6, at 54-55. He also discusses the importance of Sheldon v. Sheldon, 456 U.S. 941 (1982), for the proposition that errors in divisibility of military pensions do not divest state courts of subject matter jurisdiction. Turner, § 6:6, at 49. In Sheldon, one of the issues presented on certiorari was whether federal preemption of state law regarding division of military retirement pay rendered state judgments in that area void for lack of subject matter jurisdiction. Id. The United States Supreme Court dismissed the appeal "for want of a substantial federal question," which carried the same precedential value as a full opinion. See id.; Hicks v. Miranda, 422 U.S. 332, 344 (1975). The outcome in Sheldon, thus, further confirms that "decisions which erroneously divide preempted benefits *are not void for lack of subject matter jurisdiction*." Turner, § 6:6, at 49 (emphasis in original); see Foster, 949 N.W.2d at 123-24 (Viviano, J., concurring).

The "power to render" inquiry requires that Virginia courts must act within the scope of their derived power. Virginia state courts derive their power from Virginia's Constitution, the General Assembly, and grants of power from the federal government. See Va. Const. art. III, § 14; Evans, 255 Va. at 74 (finding the state court did not have the power to allow a statutorily formed commission to relinquish the power granted to it by the General Assembly); Mansell, 490 U.S. at 589-95 (explaining that the USFSPA granted state courts limited power to divide military benefits in divorce).

When a state's action conflicts with federal action in an area within the federal government's power, the state's action "must give way." PLIVA, Inc. v. Mensing, 564 U.S. 604, 617 (2011); see also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute."). This notion is embodied in the Federal Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state will be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."). Just as a state court's action is void if it exceeds the power conferred by Virginia statutes, so too is a state court's action void if it exceeds the limits imposed on it by the federal government because it "transcend[s] the power conferred by law." See Windsor v. McVeigh, 93 U.S. 274, 282 (1876), cited with approval by Kasey, 83 Va. at 340.

Mansell explained that the USFSPA "granted [state courts] the authority to treat disposable retired pay as community property" in divorce proceedings. Mansell, 490 U.S. at 589. But it noted that this grant of power was "precise and limited" in that it did not include the authority to divide any portion of a veteran's retirement pay that was "waived in order to receive veterans' disability payments." Id. (citing 10 U.S.C. § 1408(a)(4)(B)). A gray area quickly developed by which courts sometimes ordered servicemembers to "indemnify" and "guarantee"

around the prohibition in Mansell that disability pay could not go to the servicemember's spouse in divorce.

The reasoning in Howell closed this "loophole" and established that it was not within a state court's power to require a servicemember to "reimburse" or "indemnify" a spouse for retirement pay waived (or diminished) to receive veteran's disability payments. Howell pronounced that such court-ordered attempts to maneuver around Mansell were preempted and forbidden by federal law. The USFSPA and case law from the United States Supreme Court interpreting the statute have granted state courts the power to divide a veteran's military pay in divorce proceedings, with several key limitations: (1) a state court cannot order that a former spouse receive any amount beyond 50% of the veteran's disposable retirement pay (10 U.S.C. §§ 1408(c)(1), (e)(1)), and (2) a state court cannot order a veteran to indemnify a former spouse for any loss caused by a veteran's acceptance of disability pay which reduces retirement pay. Howell, 137 S. Ct. at 1406.

In this case, the circuit court's orders were issued more than three years *after* Howell.[12] The final decree and equitable distribution order and military pension division order require husband to indemnify and guarantee payment of a sum certain derived from military retirement pay. The net result of this impermissible indemnification is that, after DFAS' allocation of benefits, husband is required to pay 140% of his retirement benefits to his former spouse. This outcome is flatly

[12] Prior to Howell, the Supreme Court of the United States had not addressed whether a court could require a spouse to reimburse or indemnify a former spouse for any reductions in disposable retirement pay as a result of electing to receive disability pay. Working within this gray area, divorcing parties and their attorneys sometimes agreed to terms requiring reimbursement or indemnification in separation agreements, and courts working within this gray area ordered the same. See Smith v. McLaughlin, 289 Va. 241, 253-54 (2015) (an attorney is not liable for failing to correctly predict the outcome of an unsettled legal issue as long as he acted reasonably within the existing legal framework). However, after the 2017 Howell opinion, it became apparent that state courts could not order "reimbursements" such as occurred here. Post-Howell indemnity and reimbursement military pension division orders must be deemed outside the court's power and void *ab initio*.

prohibited under Howell and the character of the circuit court judgment was such that the court "had no power to render it." Singh, 261 Va. at 51-52. Accordingly, the orders are void *ab initio* for lack of power – and because they are void *ab initio*, wife's reliance on Rule 1:1 and *res judicata* is of no help to her. Id. at 52 ("Rule 1:1 . . . does not apply to an order which is void *ab initio*."); Carrithers v. Harrah, 63 Va. App. 641, 649 (2014) ("Res judicata . . . does not protect a truly void order from scrutiny.").

b. The Remedy

The issue left before us is whether the final decree and equitable distribution order, and pension division order, can remain intact while we simply excise the void paragraphs, or whether the decree is void such that it requires recalculation of various related rulings. There is a split of reasoning among Virginia cases on how to remedy this situation.

In the context of divorce proceedings, on several occasions the Supreme Court of Virginia has modified only the void provisions in a decree while leaving the decree otherwise undisturbed. In Lapidus v. Lapidus, 226 Va. 575, 579-81 (1984), the trial court ordered the husband to contract for life insurance as part of a divorce decree. Id. at 579. The Supreme Court ruled that the trial court did not have the power to compel the husband to contract for life insurance and found "that provision in the decree is void." Id. It modified the trial court's decree by removing the provision requiring husband to contract for life insurance, and affirmed the decree as modified. Id. at 581. Similarly, in Watkins v. Watkins, 220 Va. 1051, 1055 (1980), the Court held that the trial court "lacked the statutory power to lawfully adopt [a] remedy" enjoining husband from disposing of shares of stock. ("Consequently, the foregoing paragraph of the final decree will be adjudged void, and to that extent only the judgment of the trial court will be reversed."). In Ring v. Ring, 185 Va. 269, 277 (1946), the Court held that the trial court lacked the power to impound a husband's stock as security for payment of spousal support to his ex-wife and excised that term from the agreement.

Notably, the disputes arising in these domestic cases pre-date enactment of Virginia's equitable distribution statute. Code § 20-107.3.

More recently, however, this Court has examined cases in which equitable distribution awards were flawed and required that interrelated aspects of the judgments be reconsidered. For example, in Johnson v. Johnson, 25 Va. App. 368, 373 (1997), the equitable distribution order erroneously awarded each party their respective retirement accounts, when the evidence showed that the wife did not have a retirement account. Id. The parties did not present credible evidence of the value of husband's retirement account, and this Court provided instruction for the lower court in determining the value of the account. Id. at 373-75. We concluded "[b]ecause the equitable distribution award must be redetermined, the spousal support must also be redetermined." Id. at 375. See also Robinette v. Robinette, 4 Va. App. 123, 130-31 (1987) (where disposition of marital property is to be reconsidered on remand, the court must necessarily reexamine support); Mitchell v. Mitchell, 4 Va. App. 113, 121 (1987) (same).

This reasoning is reflected in the Code of Virginia, which instructs courts to consider the division of marital property when determining spousal support and child support. See Code § 20-107.1 (spousal support); Code § 20-108.1 (child support). The equitable distribution and military pay award necessarily influenced the award of spousal support and child support between husband and wife. We decline to merely excise the offending indemnification clause and payment guarantee of $1,202.70 per month, as this would result in almost a $1,000 per month shortfall to wife that was never intended by either the parties or the circuit court. Because support levels, tax credit issues, and related fee questions decided below were tied to the equitable distribution award, we remand the equitable distribution and related determinations to the circuit court so that it can set the marital share of the military pension and perform any

necessary balancing of relevant factors to establish appropriate spousal support and child support levels.

D. Wife's Request for Attorney's Fees is Denied.

Wife seeks an award of appellate attorney's fees. On appeal, this Court may award all or part of the fees requested. Rule 5A:30(b)(1)-(2). "The appellate court has the opportunity to view the record in its entirety and determine whether [an] appeal is frivolous or whether other reasons exist for requiring additional payment." O'Loughlin v. O'Loughlin, 23 Va. App. 690, 695 (1996). "In determining whether to make such an award, [this Court] shall not be limited to a consideration of whether a party's position on an issue was frivolous or lacked substantial merit but shall consider all the equities of the case." Rule 5A:30(b)(3).

This was a complex appeal, and each party raised legitimate arguments. Husband's position carried substantial merit, and he has prevailed. A thorough review of the record on appeal provides no equitable basis to require husband to pay wife's fees. Each party shall bear its own fees.

IV. Conclusion

The circuit court erred in denying husband's motion for modification. We reverse the circuit court's ruling and remand the case for review of the final decree and equitable distribution order and pension division order consistent with this opinion.

Reversed and remanded.