No. 23-999

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY

Respondent's counter-statement of questions presented assumes this Court has already ruled that state law doctrines like *res judicata* or *judicial estoppel*, can be invoked to circumvent positive (and preemptive) federal law. See Respondent's Brief in Opposition (Resp. Br.), p. i, p. 5, citing *Mansell v. Mansell*, 490 U.S. 581, 585, n. 5 (1980) and *Sheldon v. Sheldon*, 456 U.S. 941 (1982). Assuming this was binding precedent, Respondent then states that "[t]he question presented is whether 38 U.S.C. § 5301 extends to the point of reversing" that ruling.

Secondly, Respondent assumes that state courts can do indirectly, what they cannot do directly, to wit, approve or force a veteran to *consider or count* federal benefits that are protected by federal law from all legal and equitable process, and even from voluntary contract, to satisfy an obligation to a former spouse in state court divorce proceedings. Resp. Br., p. i, citing *Owen v. Owen*, 14 Va. App. 623, 627-628; 419 S.E.2d 267 (1992), quoting *Holmes v. Holmes*, 7 Va. App. 472; 375 S.E.2d 387, 395 (1992), cert. denied, 493 U.S. 852 (1989).

As to the latter contention, the Virginia Court of Appeals correctly applied this Court's precedent, particularly, *Howell v. Howell*, 581 U.S. 214 (2017), ruling that state courts cannot circumvent federal law protecting veterans' disability benefits, and further, that the state has no power to do so, and thus, any such decision of a state court that would have this effect may be challenged despite an untimely appeal – principles of res judicata, estoppel, claim preclusion,

or any other convention of judicial convenience notwithstanding.

Respondent falsely claims that Petitioner misstates the law by relying on the Virginia Supreme Court's decision to avoid the federal question by reasoning that neither *Mansell* or *Howell* applied. However, it is not because the Virginia Supreme Court *avoided the reasoning* of the Court of Appeals, to wit, that federal preemption removed the power from state courts to approve contractual agreements violating federal law, that the issue is not before this Court.

"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." *Free v. Bland*, 369 U.S. 663, 666 (1962). Thus, a*ny decision* of a state court that seeks to avoid the effects of federal preemption is a decision in contravention of the Supremacy Clause. If state courts were permitted to disregard federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816) (STORY, J.).

This is why states may not "decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.'" *Id*. at

340-41. Article I legislation is the supreme law of the land. *Hines v. Lowrey*, 305 U.S. 85, 91 (1938). The Supremacy Clause dictates this "notwithstanding" state law to the contrary.

> [T]his very clause was but an expression of the necessary meaning of the former [that the Constitution and laws made in pursuance thereof shall be Supreme], introduced from abundant caution, to make its obligation more strongly felt by the state judges" and "it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." Story, *Commentaries on the Constitution*, vol II, § 1839, p. 642 (3d ed. 1858).

The state has a duty to grant the relief that federal law requires. *Yates v. Aiken*, 484 U.S. 211, 218 (1988). "[S]tate courts have the coordinate authority and consequent responsibility to enforce the Supreme Law of the Land [and] have the obligation to apply federal law to a dispute before them and may not deny a federal right." *Howlett v. Rose*, 496 U.S. 356, 369, n.16 (1990), *citing Martin*, *supra* at 340-42.

"States have no power…to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 436 (1819) (MARSHALL, C.J.). Absent such power, any attempt by state courts to impede the operation of federal law must be considered a nullity

and subject to collateral attack. *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940).

> "[S]tate courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923).

A state court that rules incorrectly on a matter that is preempted by federal law acts in excess of its authority. The Virginia Court of Appeals recognized as much in its ruling here. The circuit court's ruling was void *ab initio* and subject to collateral attack. It is of no moment that the Virginia Supreme Court avoided the federal question.

It is within this Court's "province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support." *Ward v. Bd. of Cnty. Comm'rs*, 253 U.S. 17, 22-23 (1920).

This Court has expressed this absolute rule of preemption where Congress exercises its enumerated Military Powers in the area of family law. Where a state court fails to honor federal rights and duties, the Court has "power over the state court to correct them

to the extent that they incorrectly adjudge federal rights." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981). Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.* See also, *Hillman v. Maretta*, 569 U.S. 483, 490-91, 496 (2013) (citing, *Ridgway*, *supra*, and noting that where federal benefits are concerned, Congress has preempted the entire field, even in state family law proceedings). As this Court has most recently stated, "[t]he Constitution does not erect a firewall around family law." *Haaland v. Brackeen*, 599 U.S. 255, 277 (2023). Indeed, Congress has the power to "displace the jurisdiction of state courts" in family law proceedings where federal interests are at stake and protected by Article I legislation. *Id.*

Where Congress "validly legislates pursuant to its Article I powers, conflicting state family law is preempted, notwithstanding the limited application of federal law in the field of domestic relations generally." *Id.*, citing *Ridgway*, *supra* at 54. If the states "could make alternative distributions outside the clear procedure Congress established" it would transform the narrow exceptions granted by Congress to the states concerning military benefits "into a general license for state law to override" it. *Hillman*, *supra* at 496.

Likewise, if a state court could ignore the directives of a federal statute which expressly prohibits "any legal or equitable" orders dispossessing veterans of these benefits, and which, by its plain language, declares that any agreement on the part of the beneficiary to voluntarily dispossess himself of

these 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 (1803). "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 (1824). 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 196-97.

As this Court noted in *McCarty v. McCarty*, 453 U.S. 210, 219-20, and n. 12 (1981), when assessing its "federal question" jurisdiction, appeal is proper where an appellant does not "simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the…[rule or law] was void, and therefore unenforceable."

It is not because the Virginia Supreme Court avoided the reasoning of the Court of Appeals, to wit, that federal preemption negates the power of state courts to approve contractual agreements that violate preemptive federal law, that the issue is not before this Court. The issue is squarely before the Court.

Petitioner has challenged the effects of a state contract and state law doctrine that has deprived him of his entitlement to federal benefits in contravention of federal law. 38 U.S.C. § 5301. That statute applies because it expressly prohibits state courts from invoking law or equity to dispossess veterans of their protected benefits, and *prohibits* and *voids* contractual agreements purporting to do the same.

Respondent's argument that this Court sanctioned the Virginia Supreme Court's reasoning in *Howell* is wrong. At page 3, Respondent states that this Court in *Howell*, 581 U.S. at 222, stated that "a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for *spousal support*." Respondent leaves out the citation to *Rose v. Rose*, 481 U.S. 619, 630-634, and n. 6 (1987) and 10 U.S.C. §1408(e)(6). This is because the Court's reasoning in *Howell* only addresses *statutory allowances* for some military benefits to be diverted for child or spousal support, as it must. This Court's decision in *Howell* can never be read to once again allow the state courts to equitably divest veterans of benefits where there is *no statutory authority to do so*. "*McCarty*, with its rule of federal pre-emption, still applies." *Howell*, *supra* at 218. As the Court reiterated, only Congress, through *express* grant, can allow the states to invade federal benefits, and when it does, the grant is "precise and limited." *Id*., quoting *Mansell*, 490 U.S. at 588.

This case has nothing to do with spousal support, much less the *statutory grant* that Congress may give for state courts to consider veterans' benefits in calculating a former spouse's support award. See *Rose*, *supra*. Rather, this case squarely presents the Court with an opportunity to apply an express statutory *prohibition* on the states – 38 U.S.C. § 5301 – positive law which prohibits a state's attempts at equitable redistribution of the federally protected benefit and voids contractual agreements in which the veteran voluntarily does so. Speaking directly to an anti-assignment provision similar to § 5301, the Court in *McCarty* stated that such provisions "cannot be circumvented by the simple expedient of an offsetting award." 453 U.S. at 228, n. 22.

The Virginia Supreme Court avoided application of the federal law and sanctioned an offsetting award that had the effect of violating federal law. As the Court of Appeals correctly concluded, the state court has no power or authority to do this.

Respondent also claims that "[f]ootnote 5 of the *Mansell* decision holding that the issue of res judicata is outside the jurisdiction of federal courts, is a holding that there is no federal question on the issue, and a finding of a lack of a substantial federal question is an adjudication on the merits carrying the same precedential value as a full opinion." Resp. Br., p. 5, citing, *inter alia, Sheldon v. Sheldon*, 456 U.S. 941 (1982) and *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (emphasis added).

First, footnote 5 in *Mansell* does not stand as precedent concerning a challenge to a state decree

sanctioning a consent agreement that violates positive federal law, to wit, 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C). In *Mansell*, this Court held that *McCarty's* rule of absolute preemption still applied because only Congress can affirmatively grant the states authority to divide military benefits. *Mansell*, 490 U.S. at 588-89. Since the state court attempted to credit the former spouse's share of community property by the amount of the veteran's waived portion, the Court's decision was limited to ruling that the state could not equitably adjust the veteran's obligation. *Id*. The Court specifically declined to address the argument that 38 U.S.C. § 5301 prohibited the states from forcing the veteran to use his restricted disability benefits to make up the lost portion. *Id*. at 587, n. 6 ("Because we decide that the [USFSPA] precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, § 3101 [now § 5301], independently protects such pay.").

The Court has *never ruled*, much less directly addressed whether state law doctrines of judicial convenience like *res judicata* might be invoked in the face of positive federal law, here 38 U.S.C. § 5301, which affirmatively prevents state courts from using "any legal or equitable process whatever" to dispossess a veteran of protected benefits, and which "*prohibit[s]*" and "*void[s] from inception*," any contractual agreement in which the veteran might be forced to do so.

This Court *has ruled* that § 5301(a)(1) removes from the state *the power* to vest that which it has no

authority to give. *Howell v. Howell*, 581 U.S. 214, 221-22, citing § 5301(a)(1). That is consistent with the Virginia Court of Appeals decision that the trial court lacked the power to issue a decree sanctioning a contract prohibited by federal law, and that Petitioner's challenge was not barred.

The state law issue in *Sheldon* concerned the retroactivity of *McCarty*, *supra*, and whether it was applicable to cases not final on appeal. *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 379 (1981). After *McCarty*, the former servicemember filed a petition for rehearing arguing *McCarty* compelled the state court to reverse and remand for a new division of community property and recalculation of his pension entitlement. *Id*. at 376. The court affirmed the decision of the trial court, holding that *McCarty* would not retroactively apply to the state law issue concerning the valuation of community property in California.

The veteran filed a petition in this Court, which was dismissed for lack of a substantial federal question. 456 U.S. 941 (1982). At that time, the Court had to either take the case on the merits or dismiss it. 28 USC § 1257 (1970). The burden on the Court's docket led it to interpret dismissals (as opposed to denials of certiorari) as decisions on the merits, ostensibly functioning as *binding precedent*. Cotton, "Improving Access to Justice by Enforcing the Free Speech Clause," 83 Brooklyn L. Rev. 111, 156 (Fall 2017). The statutory jurisdiction of the Court changed in 1988 to make such cases subject to certiorari review only. See Act of June 27, 1988, Pub.

L. No. 100-352, § 3, 102 Stat. 662 (codified as amended at 28 U.S.C. § 1257 (2012).

The argument advanced by Respondent is that this Court's summary dismissal of the petition in *Sheldon*, is binding precedent for the proposition that state courts can avoid federal preemption by relying on doctrines such as *res judicata*.

Petitioner's argument is that 38 U.S.C. § 5301 applies to directly prohibit state courts from vesting veterans' benefits in those not entitled to them. This statute was never at issue or considered in *McCarty*, *Sheldon*, or *Mansell*. Indeed, as noted, *Mansell* expressly declined to consider it. *Mansell*, 490 U.S. at 587, n 6.

Likewise, the state courts in *Sheldon* and *Mansell* also did not address the question of whether res judicata could bar a challenge to a consent judgment that a federal statute, as interpreted and applied by the Court in *Howell*, expressly prohibits and voids from inception. See 38 USC § 5301(a)(1) and (3); *Howell*, 137 S Ct at 1405-06. The stark disconnect between the underlying facts in *Sheldon* and *Mansell*, and the federal issue before the Court today perfectly demonstrates how dangerous it is to allow practitioners to claim that summary dismissals from this Court from over 40 years ago could even begin to address the question presented by Petitioner here. Only this Court could legitimately reject or affirm a state court ruling that res judicata bars the sweeping effects of a federal statute. See Lottery Case, 188 U.S. 321, 353-54 (1903). Any inferior court that would so conclude would be usurping the will of Congress and

thereby directly violating the supremacy clause by nullifying the broad sweep of § 5301.

The Virginia Supreme Court was faced with a statute enacted pursuant to Congress' enumerated military powers under Article I; one which this Court liberally construes in the veteran's favor and interprets to mean that the benefits protected thereby are to "remain inviolate" for the veteran's "maintenance and support", *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962); and one which nullifies "*any legal or equitable process whatever*" of state courts concerning these benefits, and prohibit[s]" and "voids from inception" contractual provisions obligating them to a non-beneficiary. See 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C), respectively.

CONCLUSION

Petitioner respectfully requests the Court to grant his petition.

Respectfully submitted,

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Dated: June 13, 2024