No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM R. LOTT,

Petitioner,

v.

MARIA V. LOTT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner comes to the Court presenting the same issue that has been presented in several other petitions brought by Counsel of Record on behalf of disabled veterans nationwide, who have had their personal right and entitlement to federal veterans' benefits stripped from them by state courts that have ignored the Supremacy Clause's absolute preemption over state law in this subject despite multiple admonitions by this Court that such benefits are off-limits and they have no authority or jurisdiction to vest these benefits in anyone other than the statutorily designated beneficiaries – the disabled veteran. See *Howell v. Howell*, 581 U.S. 214, 137 S. Ct. 1400 (2017).

In this case, the Virginia Court of Appeals ruled that Petitioner's Chapter 61 disability pay, which is non-disposable disability retirement pay, and therefore expressly and automatically *excluded* from consideration as a divisible asset in state court divorce proceedings by the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, could nonetheless be considered a disposable asset because Petitioner agreed that he would indemnify Respondent for her loss of her statutory share of Petitioner's disposable retired pay.

The question presented is as follows:

> May a state court enforce a contractual agreement entered into between a disabled veteran and his former spouse, which agreement obligates the veteran to use

restricted federal benefits to indemnify his former spouse, where there is no federal statute expressly authorizing the state to exercise jurisdiction or authority over such benefits; where a federal statute (38 U.S.C. § 5301) expressly prohibits the state court from using "any legal or equitable power whatever" to compel the veteran to abide by such an agreement; and where that same statute expressly prohibits and voids any and all such agreements?

PARTIES TO THE PROCEEDING

Petitioner, William R. Lott, was the Defendant in the lower court proceedings and Petitioner in the Virginia Court of Appeals and Virginia Supreme Court.

Respondent, Marie V. Lott, was the Plaintiff-Appellee.

RULE 29.6 DISCLOSURE STATEMENT

There are no corporate parties in these proceedings.

RELATED PROCEEDINGS

No other case is directly related to the case in this Court within the meaning of Supreme Court Rule 14.1(b)(iii).

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OPINIONS BELOW

The Virginia Court of Appeals issued an unpublished opinion reported as *William R. Lott v. Maria V. Lott*, No. 1322-22-1, 2023 Va. App. LEXIS 821 (Ct. App. Dec. 12, 2023) (App. 1a-15a).

The Circuit Court for the City of Newport News, Virginia, issued a final opinion reported as *Maria V. Lott v. William R. Lott*, 2022 Va. Cir. LEXIS 109 (Aug. 5, 2022) (App 16a – 53a).

JURISDICTION OF THE COURT

The Supreme Court of Virginia refused Petitioner's petition for a writ of certiorari on October 29, 2024 (App. 55a), and his petition for a rehearing on December 10, 2024 (App 54a).

On March 4, 2025, Chief Justice Roberts granted Petitioner's Application to extend the time to file his petition to May 9, 2025. Supreme Court Docket No. 24A835.

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction over petitions for writs of certiorari from final orders or judgments of the highest court of a state that dispose of all issues and parties, and in which any title, right, or privilege is claimed under the Constitution or laws of the United States.

Petitioner asserted below that the Circuit Court and Court of Appeals erred in interpretation and application of 10 U.S.C. § 1408 (the Uniformed Services Former Spouses Protection Act (USFSPA)) and 38 U.S.C. § 5301, particularly as those statutes apply to disposition of Petitioner's federal military retirement and disability benefits in state court divorce proceedings.

The Virginia Court of Appeals' opinion constituted a final disposition of the substantive issues raised by Petitioner and the Virginia Supreme Court's subsequent orders denying Petitioner's petitions to appeal and for rehearing constituted final disposition in Virginia's highest court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article I, section 8, clauses 11 through 17

The Congress shall have power…

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress….

U.S. Constitution, Article VI, clause 2

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

38 U.S.C. § 5301

(a)(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary…..

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

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(3)(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

STATEMENT OF THE CASE

A. Introduction

Section 5301 of Title 38 of the United States Code provides that "*except to the extent specifically authorized by law*," benefits "due or to become due" to veterans under any law administered by the Secretary of Veterans Affairs, "before or after receipt," shall not be subjected "to attachment, levy, or seizure *by or under any legal or equitable process whatever*." 38 U.S.C. § 5301(a)(1). That same provision *prohibits and voids* any contractual agreement entered into by the veteran beneficiary to pay these benefits to anyone else. 38 U.S.C. § 5301(a)(3)(A) and (C).

Another federal statute, the Uniformed Services Former Spouses Protection Act (USFSPA), expressly *authorizes* state courts to allow division of up to 50% of what the statute specifically defines as a veteran's "disposable military retirement" pay in state court divorce proceedings. 10 U.S.C. § 1408.

Chapter 61 benefits, see 10 U.S.C. § 1201 to 1222 (the benefits at issue in the instant case) are disability benefits administered by the Secretary of Veterans Affairs and provided to a veteran who has been separated from active-duty military service *due to a service-connected disability*. These benefits are *not received* on the basis of a voluntary waiver. They are automatically provided to the servicemember due to his or her service-incurred disability.

Chapter 61 benefits are not considered disposable military retirement pay under the USFSPA. See 10 U.S.C. § 1408(a)(4). Thus, they are not divisible in state court divorce proceedings. Only "disposable military retirement" under the USFSPA is available for consideration as a divisible asset in state court divorce proceedings. See *Howell*, 581 U.S. at 218 (Congress has "completely pre-empted" application of state domestic relations law to military pay). See also, *Mansell v. Mansell*, 490 U.S. 581, 589; 109 S.Ct. 2023 (1989) and *McCarty v. McCarty*, 453 U.S. 210, 232-35; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981).

The federal agency responsible for automatically distributing "disposable" benefits to former spouses (usually the Defense Finance and Accounting Service (DFAS)) *will not pay* benefits that are excluded by the USFSPA, because they can only calculate a former

spouse's entitlement under USFSPA based on available disposable retired pay.[1] This is because only the USFSPA provides states with the "express," but "limited" authority to exercise jurisdiction over these benefits. *Howell*, *supra*; *Mansell*, *supra.*

In other words, if a qualifying state-court order is presented to the federal agency, as it should be, requesting the agency to "direct pay" to the former spouse the veteran's share of disposable retired pay, the federal agency will calculate the disposable retired pay available, if any, and make the direct payment to the former spouse of her percentage share. If there is no available disposable retired pay, then the agency will send nothing to the former spouse. In most cases, where the veteran is determined to suffer from a disability and begins to receive disability pay in lieu of retired pay, the former spouse's share of this automatic payment will be reduced or discontinued altogether, triggering the former spouse to file an action in state court seeking to be made whole.

Not only will the federal agency be unable to pay direct payments to a former spouse because there are no "disposable" benefits – a sure litmus test to determine the disposition and status of a veterans' benefits vis-à-vis state authority over them, but 38

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[1] 10 U.S.C. § 1408(d) *authorizes* the Secretary of Defense (or other administering Secretary) to make direct payments of a portion of a service member's disposable retired pay to a former spouse if other conditions are met, i.e., the court order must specifically provide for the division of the veteran's disposable retired pay as property; the court order is final and properly certified; the order is served on the designated agent (usually DFAS); and the marriage lasted at least 10 years during which the member performed at least 10 years of creditable military service. 10 U.S.C. § 1408(d)(1).

U.S.C. § 5301 *also* prohibits state courts from independently exercising "*any legal or equitable*" authority over these benefits, and that statute further explicitly prohibits and voids any purported contractual agreements in which the veteran agrees to pay such benefits over to a former spouse. See 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C), respectively. See also, *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962) (wherein this Court stated that 38 U.S.C. § 3101 (renumbered as § 5301) is to be liberally construed in favor of the veteran and that these funds granted by Congress are personal entitlements for the veteran's maintenance and support and are considered "inviolate" and are not subject to any legal or equitable power of a state court).

Although the responsible federal agency will not directly pay the former spouse if there are no federally available "disposable" veterans' benefits in accordance with USFSPA, and even though a state court has *no legal or equitable* powers over such benefits, many state courts and lawyers will force the veteran to enter into a "settlement agreement" or "consent decree" wherein the veteran is forced to pay his former spouse an amount that would be equal to an amount that is arbitrarily calculated to be her "share" of the veteran's retirement pay.

Inevitably, these indemnification schemes, whether they appear as "consent decrees" or "property settlement agreements" (as in this case) force the disabled veteran to surrender the value of all or a portion of his restricted disability benefit to satisfy these *ultra vires* pronouncements of the state

tribunal. Indeed, in this case, Petitioner's "settlement agreement" specifically "obligates" non-disposable benefits – benefits that are *not considered* disposable within the meaning of the USFSPA, and which are further *excluded* from any and all state court legal or equitable authority and even from obligations under any ostensible contractual agreement.

Thus, 8 years after this Court's clear admonition in *Howell* that these benefits are to be considered off limits and the simple expedient of offsetting awards or indemnity agreements are violative of the Supremacy Clause, state courts and lawyers continue to thumb their collective nose at the Court and, more dastardly, to strong-arm and manipulate disabled veterans to use their non-disposable veterans' benefits to satisfy marital property divisions in divorce proceedings.

The very purpose behind § 5301's prohibition on contractual agreements to force veterans to dispossess themselves of these personal entitlements was to protect the funds appropriated by Congress to support the veteran beneficiary. Allowing state courts to continue to exercise legal or equitable powers to force actual or constructive seizure of these monies, or to enforce dubious "settlement agreements" in which the veteran declares that he or she will surrender these benefits, or the value thereof, in the event that the former spouse does not receive his or her perceived "share," is allowing the continued pillaging and decimation of the funds set aside by the Congress for the maintenance and support of those who have served this Nation. There has been NO advancement or improvement of the veterans' position since *Howell*

because once again, state courts and lawyers have conceived other devious schemes to misappropriate these funds and repurpose their use to one that neither serves nor respects the concept of federal supremacy of the law under the Constitution.

In this case, the Virginia Court of Appeals erred by enforcing a property settlement agreement in which Petitioner agreed to make up the difference to his former spouse of her loss of her share of his "disposable" military retirement under the USFSPA by indemnifying her using his "non-disposable," and therefore protected veterans' benefits.

There is a very simple solution to this consistently recurring scourge decimating disabled veterans and their ability to support themselves with their personal entitlement to federal benefits. If the federal agency with authority over these benefits decides that there are no "disposable benefits" to pay to the former spouse under USFSPA, then that is the end of the matter – there *are no available benefits to be* divided! The state cannot go any further – it has "no authority" to vest that which it cannot give. See *Howell*, citing 5301. It cannot use its equitable or legal powers – 38 U.S.C. § 5301(a)(1). And, if there is a purported "contract" or "agreement" by which the disabled veteran agrees to obligate his benefits or a value commensurate with the former spouse's perceived "lost share," such are void and to be declared of no force and effect. 38 U.S.C. § 5301(a)(3)(A) and (C).

In *Yourko v. Yourko*, 74 Va. App. 80, 866 S.E.2d 588 (2021), the Virginia Court of Appeals followed *Howell* and correctly ruled that a marital agreement

in which the veteran agreed to dispossess himself of federal disability pay in violation of federal law and in violation of *Howell*, was *void ab initio*. *Yourko*, 866 S.E.2d at 594, citing *Mansell*, *supra*. However, the Supreme Court of Virginia reversed, effectively holding that while the agreement by and between the veteran and his former spouse forced the veteran to dispossess himself of his federal disability pay in violation of federal law, the agreement was an enforceable contract that could not be voided, even where federal law holds that such agreements are illegal and void. See *Yourko v. Yourko*, 302 Va. 149, 884 S.E.2d 799 (2023), cert. denied, 220 L.Ed.2d 11 (2024).

In this case, following *Yourko*, *supra*, the Virginia Court of Appeals ruled that Petitioner was bound by a property settlement agreement to indemnify his former spouse using his federal veterans' benefits, even when there is no federal statute allowing such pay to be used to satisfy such agreements, and even in light of a specific federal statute that prohibits state courts from using any legal or equitable powers whatever to force the veteran beneficiary to dispose of these benefits, and which further *prohibits* and *voids* any contractual agreement in which the veteran himself ostensibly agrees to pay these benefits over to another. See 38 U.S.C. § 5301(a)(1), and (a)(3)(A) and (C), respectively.

Petitioner argued in the Circuit Court and the Court of Appeals that federal law preempted state law, that the benefits he receives are not considered "disposable" within the meaning of the USFSPA for purposes of allowing a state court to divide them in a

division of marital property in state court divorce proceedings, and that 38 U.S.C. § 5301 actually prohibited state courts from effectuating such a disposition through any legal or equitable power, and further that this same provision prohibited and voided any ostensible contract that he had entered into in which he agreed to dispossess himself of these benefits.

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. *Howell*, citing 38 U.S.C. § 5301 (a)(1). This is especially true where, as here, § 5301 explicitly prohibits contractual agreements whereby disabled veterans dispossess themselves of their personal entitlements.

The Virginia Court of Appeals erred in ruling that Petitioner's benefits were disposable retired pay subject to division, that it could exercise any legal or equitable authority whatsoever over the restricted funds, and further that state contract law could override the express prohibition against such agreements in 38 U.S.C. § 5301.

B. Background

Petitioner and Respondent were married in 1996. (App. 2a). The parties separated with the intent to

terminate the marriage on or about May 1, 2013. *Id*. Petitioner was an active-duty member of the United States Navy from December 12, 1994, until his honorable discharge on December 31, 2014. *Id*.

Prior to his retirement, the Navy determined that Petitioner had a 100% service-connected disability. Thus, he retired under Chapter 61, 10 U.S.C. § 1201, *et seq*. ("Retirement or separation for physical disability.").

The parties entered into a property settlement agreement on September 27, 2014, pursuant to which Appellee was entitled to 41% of Petitioner's "disposable military retirement pay." (App. 3a). The Separation Agreement included, *inter alia*, the following language: "If the Husband is allowed to waive any portion of his retired pay in order to receive disability pay, then the Wife's portion of the Husband's disposable retired pay shall be computed based on the amount that the Husband was to receive before any such waiver was allowed or occurred." *Id*.

This agreement also included an indemnification clause which stated, *inter alia*, that "The Husband shall pay to the Wife directly *any sums necessary in order that the Wife will not suffer any reduction in the amount due her as a result of the Husband's waiver in order to receive disability pay*." *Id*. (emphasis added).

Despite the Court of Appeals' assumption (App. 3a-4a) that Petitioner voluntarily waived his military retirement pay to receive disability pay, there is no such thing as a "waiver" for purposes of Chapter 61 disability benefits – a veteran who retires under

Chapter 61 is separated due to a service-connected disability. Thus, the language of the ostensible "settlement agreement" requiring Petitioner to pay his former spouse from his restricted disability benefits was never triggered because Petitioner never had to waive retirement pay to receive his statutorily determined and non-disposable benefit. See 10 U.S.C. § 1408(a)(4) (excluding Chapter 61 benefits from the definition of disposable retired pay).

The trial court entered a final decree of divorce on December 1, 2016. This was followed by a "Military Pension Division Order" (MPDO) on December 7, 2016, which, in accord with the separation agreement, awarded Respondent 41% of Petitioner's military pension benefits. (App. 3a). The decree ordered the following:

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> **18.** …Former Spouse is awarded Forty-one (41%) percent of Member's *disposable military retired pay***.**

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> **25.** …For purposes of calculating the Former Spouse's share…the marital property interests of the Former Spouse *shall also include a pro rata share of all amounts the Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veterans Administration or disability benefits.* In also includes a pro rata share of any sum taken

> by Member in lieu of or in addition to his disposable retired pay, including, but not limited to, exit bonuses, voluntary separation incentive pay (VSI), special separation benefit (SSB), or any other form of retirement benefits attributable to separation from military service. Such pro rata share shall be based on the same formula, percentage or amounts specified in this Order as applicable. In the event that DFAS will not pay the Former Spouse directly all or any portion of the benefits awarded to her herein, then Member shall be required to pay her directly in accordance with the terms and provisions set forth in this Order (App. 67a-70a) (emphasis added).

On January 1, 2015, Petitioner began receiving retirement benefits pursuant to 10 U.S.C. §1414(b)(1) as a Chapter 61 retiree. (App. 70a). According to a letter from the Defense Finance and Accounting Service (DFAS), on July 28, 2021, Petitioner's received $441.00 as and for "Retiree's disposable income." *Id*. By May 10, 2022, the Petitioner's gross monthly retired pay was $2324, from which DFAS deducted $1857 for Petitioner's entitlement to Chapter 61 disability, to arrive at a disposable retired pay of $467. *Id*.

Respondent filed a Motion to Show Cause concerning her entitlement to payments from Petitioner pursuant to the parties' settlement agreement.

On June 22, 2021, the Circuit Court held a hearing and heard evidence regarding the amounts of payments made to Respondent by Petitioner.

On April 13, 2022, Petitioner submitted an additional Motion to Reconsider and Brief in Support on the issues of jurisdiction and federal preemption regarding the show cause for failure to pay retirement.

On August 5, 2022, the Circuit Court issued a final opinion and order in which it ruled that since the USFSPA did not explicitly *exclude* concurrent retired disability pay (CRDP) from benefits considered "disposable retired pay" that may be subject to division as property in a state court divorce proceeding, such benefits could be considered in fixing Petitioner's obligation to Respondent under the party's property settlement agreement (App 18a- 55a).

Petitioner appealed the circuit court's judgment. Petitioner argued that state courts could not consider his federal veterans' disability pay and military retirement pay as income for purposes of establishing his financial obligations, even if there was a marital settlement agreement purporting to do so. In this latter regard, Petitioner argued, *inter alia*, that only Congress, through positive legislation, could permit state courts to include federal benefits as property or disposable income in state court divorce proceedings. Citing *Howell v. Howell*, 581 U.S. at 218, Petitioner argued further that Congress has only provided limited and precise grants of authority to the states to divide federal military benefits. Otherwise, the rule of absolute preemption enunciated by the Court in

McCarty v. McCarty, 453 U.S. 210, 224, 228 (1981), "still applies."

Petitioner also noted the case from Virginia in which this Court ruled the same with respect to benefits paid to federal employees pursuant to federal law. See, *Hillman v. Maretta*, 569 U.S. 483, 491 (2013) (noting that state laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments and citing *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981) (cleaned up)).

Finally, Petitioner argued that per 38 U.S.C. § 5301, prohibited the state court from entering any orders concerning non-disposable federal benefits paid to veterans and further that this provision prohibited contractual agreements in which the veteran beneficiaries agreed to dispossess themselves of these monies.

The Court of Appeals affirmed the Circuit Court's ruling, but for a different reason. The Court ruled that Petitioner was bound by the settlement agreement to reimburse Respondent for her loss of her federally authorized share of his disposable federal military retirement pay under the USFSPA, 10 U.S.C. § 1408, because of his waiver of such pay to receive "non-disposable" disability pay (App. 1a-15a).

The Court held that state contract law could usurp preexisting federal law that preempted state law concerning the division and disposition of military benefits. Specifically, the Court held that this rule applied even where Petitioner had agreed to indemnify Respondent if his disposable retired pay

were to be reduced by his receipt of disability pay. (App. 9a-10a).

In fact, as Petitioner submitted in the proceedings below, he is a disability retiree under Chapter 61, 10 U.S.C. § 1201 and § 1204, and thus, his benefits are not considered disposable retired pay and are therefore expressly protected from division by the USFSPA. See 10 U.S.C. § 1408(a)(4)(A)(iii). Further, the lower court erred when it found that that Petitioner had "waived" his retirement pay to receive disability pay. This is not true as there is no waiver for a chapter 61 disability retiree.

Petitioner appealed to the Virginia Supreme Court. (App. 56a-98a). Again, in his assignment of errors, as he had done in the Court of Appeals, Petitioner directly raised the issues concerning the Supremacy Clause's absolute federal preemption of state law in the area of a state court's authority vis-à-vis military benefits established by Congress pursuant to its enumerated powers (App. 57a-59a; 71a-73a; 76a-77a).

Petitioner also reiterated the effect of 38 U.S.C. § 5301 on a state court's power and authority and the prohibition contained in that prohibition voiding contractual agreements wherein the veteran beneficiary obligates the restricted federal benefits (App. 87a-90a)

Finally, Petitioner pointed out that the Court of Appeals also failed to consider the language of the settlement agreement with his former spouse, and particularly the indemnification clause. The latter

clearly states Respondent was entitled to 41 percent of "disposable retired pay" and Petitioner agreed to reimburse Respondent only if he waived retirement pay. Since he did not waive retirement pay, the indemnification clause, if properly read and applied, protected Petitioner's disability pay and could not provide for reimbursement to Respondent of the amount ultimately determined under the USFSPA (App. 76a-77a).

The Virginia Supreme Court refused Petitioner's petition to appeal the Court of Appeals' decision (App. 54a) and denied Petitioner's motion for a rehearing on December 10, 2024. (App. 55a).

REASONS FOR GRANTING THIS PETITION

A. There is No Exception to the Absolute Preemption of Federal Law in the Particular Subject Matter and Thus No State Court Decision Conflicting with Federal Law and Interfering with the Federal Benefits Can Stand

In *Howell v. Howell*, 581 U.S. 214, 221-22; 137 S. Ct. 1400 (2017), this Court ruled that federal law preempted all state law based on this Court's decisions in *Mansell v. Mansell*, 490 U.S. 581 (1989) and *McCarty v. McCarty*, 453 U.S. 210; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981), *inter alia*, and thus, state courts had *no authority*, absent express federal legislation, to order that veterans use their federal veterans' benefits to satisfy property divisions in state court divorce proceedings. In *Hillman v. Maretta*, 569 U.S. 483, 133 S. Ct. 1943 (2013), this Court ruled that with respect to statutes providing federal benefits,

Congress had occupied the entire field and thus all state law, even domestic family law, was preempted. *Id*. at 491 (citing *Ridgway v. Ridgway*, 454 U. S. 46, 55, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981) and stating "family law is not entirely insulated from conflict pre-emption principles, and so we have recognized that state laws 'governing the economic aspects of domestic relations…must give way to clearly conflicting federal enactments.'")

In *Ridgway*, a case issued alongside *McCarty*, the Court stated:

> The 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, 82 S. Ct. 1089 (1962). See also *Gibbons v. Ogden*, 9 Wheat. 1, 210-211 (1824). And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. [*McCarty, supra; Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S. Ct. 802 (1979)]. That principle is but the necessary consequence of the Supremacy Clause of our National Constitution. *Ridgway*, 454 U.S. at 54-55 (cleaned up).

The absolute preemption of federal benefits legislation over state family law has been consistently followed in cases concerning the state's jurisdiction and authority over the distribution of federal benefits

appropriated by Congress under its enumerated Article I powers. See, e.g., *Free, supra* (survivorship interests in federal savings bonds); *Hisquierdo, supra* (division of federal benefits paid under the Railroad Retirement Act of 1974); *McCarty, supra* (division of military retired pay in state divorce proceedings); *Mansell*, *supra* (division of disposable military retired pay as defined by the USFSPA, 10 U.S.C. § 1408); *Hillman*, supra (distribution of federal employee life insurance benefits in state probate proceedings); *Howell*, *supra* (state court ordered indemnification of former spouses using military veterans' disability benefits).

Veterans' retirement and disability benefits are federal benefits appropriated by Congress for a specific purpose and protected by the Supremacy Clause's sweeping preemption of all state law – including state family law. *McCarty*, *supra*; *Ridgway*, *supra*, *Mansell*, *supra*; *Howell*, *supra.*

Congress's authority over military benefits originates from its enumerated "military powers" under Article I, § 8, clauses 11 through 17 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*, 581 U.S. at 218.

In *Mansell*, *supra* at 588, as reiterated in *Howell*, this Court stated that only an express statutory grant

of authority by Congress to the states could vest the latter with authority over such federal benefits. Further, the Court noted that such grants of authority must be "express" and are necessarily "limited". *Id*. Congress must explicitly *give* the states authority and jurisdiction over military benefits and when it does so the grant is precise and limited. *Id*.

It follows that if there is no federal statute that explicitly allows the state to exercise control over the federal benefits at issue, then the state is simply preempted. See *Ridgway*, *supra*, *Hillman*, *supra*.

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, and further prohibits and voids from inception any ostensible contractual agreement in which the veteran purports to agree to dispossess himself of these benefits See 38 U.S.C. § 5301(a)(1), (a)(3)(A) and (C). Under this provision, the state has *no authority* to vest benefits in anyone other than the federally designated veteran beneficiary. *Howell*, *supra* at 221 (citing 38 U.S.C. § 5301).

Therefore, Congress must affirmatively grant the state authority over the particular benefit. 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*. 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*, *supra* at 232-235. "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*." *Id*. at 218.

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 early legislation restricting disposition of 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).

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 that is 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 v. Wissner*, 338 U.S. 655, 658-59; 70 S. Ct. 398 (1950).

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

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

Consistent with those preemption cases like *Howell*, *Hillman*, and *Ridgway*, *inter alia*, Congress' authority in this realm, carries with it "inherently the power to remedy state efforts to frustrate national aims." *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).

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, cl. 2. Preemption occurs because the states cannot legislate or adjudicate where Congress has acted affirmatively in passing legislation pursuant to and within the realm of those Article I powers. *Torres*, *supra*. See also, U.S. Const. Art. VI, cl. 2.

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* (stating that the basic reasons *McCarty* 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 and enforced.

B. The Issue Has Been Fully Explored by State Courts and There is No Clear Solution Given the Divergence of Opinion Concerning the Enforceability of Contracts Ordering a Division of Benefits Otherwise Preempted by Federal Law

Multiple state courts have addressed this issue in a variety of ways since *Howell*. There is a fair split of authority, and the issues and arguments have been fully developed, such that the controversy has reached a point that can only be resolved by this Court.

Despite this Court's ruling in *Howell*, *supra*, multiple states have already strayed from its clear instruction. See, e.g., *Jones v. Jones*, 505 P.3d 224, 226 (Alaska 2022) (holding that federal law does not preclude enforcing one spouse's promise to pay another a sum of money each month even if the source of the money is military disability pay).

In addition to this petition, undersigned has filed no less than 4 prior petitions with the Court seeking to protect disabled veterans from these errant state court rulings. *Boutte v. Boutte*, 304 So.3d 467 (La. App. 2020), cert. den'd 142 S. Ct. 220 (2021) (Docket No. 21-44); *Foster v. Foster*, 983 N.W.2d 373 (Mich. 2022), cert. den'd, 217 L.Ed.2d 15 (2023) (Docket 22-1089); *Martin v. Martin*, 520 P.3d 813 (Nev. 2022), cert. den'd, 220 L.Ed.2d 10 (2024) (Docket No. 23-605); *Yourko v. Yourko*, 884 S.E.2d 799 (Va. 2023), cert. den'd, 220 L.Ed.2d 11 (2024) (Docket No. 23-999).

In *Foster*, *supra*, after first holding that 38 U.S.C. § 5301(a)(3) 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 collaborative elements, which have been consistently (and unfortunately successfully) stealing 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 in *Yourko*, *supra*, the Michigan Supreme Court wholly ignored 38 U.S.C. § 5301(a)(3)(A) and (C), which respectively prohibits and voids from inception all contractual agreements by veterans to dispossess themselves of their federal benefits.

In *Boutte*, 304 So.3d at 472-73, the Louisiana Court of Appeals ruled that the veteran was bound by res judicata to a consent agreement to pay the previously agreed on percentage of his military retired pay even though he had become disabled and was no longer receiving such pay, but was instead receiving non-disposable combat-related special compensation under 10 U.S.C. § 1413. The Court concluded that the consent judgment was a bilateral contract in which the veteran had agreed to use his disability pay to make up the difference to his former spouse's prior share of his disposable retired pay.

In *Martin*, 520 P.3d at 818-20, the Nevada Supreme Court ruled that the parties' settlement agreement bound the veteran to use his disability pay to pay his former spouse's share of what she would have received as disposable military retired pay under USFSPA. The court concluded federal preemption did not apply to the enforcement of a contract entered into by the parties, even where the veteran would be forced to use non-disposable disability pay to satisfy the previously agreed to division of his disposable benefits. *Id*.

Ignoring the prohibition on contracts in 38 U.S.C. § 5301, the Court held that "nothing in 10 U.S.C. § 1408 addresses what contractual commitments a

veteran may make to his or her spouse in a negotiated property settlement incident to divorce" *Id*. at 818.

In *Yourko*, 884 S.E.2d at 159-60, which the Virginia Court of Appeals followed in the instant case, the Virginia Supreme Court held that neither Congress or this Court has ever placed any limits on how a veteran can use their disability pay once it has been received and stating that "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". Remarkably the Court cited 38 U.S.C. § 5301(a)(3)(B) for the proposition that the veteran was free to use his disability benefits as he saw fit – ignoring the fact that this subsection *only applies* to specific loan agreements and wholly ignoring subsections (A) and (C), respectively, which explicitly prohibit contractual assignments of a veteran's benefits to another and voids them from their inception.

In the several cases that undersigned has been involved in concerning this particular subject, suspect methods employed forcing unlawful redistribution of these exclusive federal benefits include forcing severely mentally and physically disabled veterans to dispossess themselves of their benefits by way of supposed "settlement" agreements, "indemnification" orders; other manipulative and exploitative methods, include unethical and prohibited unilateral *ex parte* communications with veterans, lawyers, 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)), including 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 acts on the part of the opposition, and in some cases, state court judges. State courts have blatantly ignored 38 U.S.C. § 5301, which removes all authority and jurisdiction from state courts to vest these restricted benefits in anyone other than the entitled veteran beneficiary.

This, even after the federal statutes and their express language have been presented to these courts for consideration. Undersigned counsel knows this because he has personally been involved in and even filed petitions on behalf of the disabled veterans in many of these cases.

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 and no contractual agreement that obligates the restricted benefits can be recognized or enforced. This is the Supreme Law to which the states should be adhering.

On the other hand, some state courts have ruled, correctly, that notwithstanding state doctrines of judicial convenience like *res judicata* and *collateral*

estoppel, or even the "sanctity of state contract law," the absolute preemption of federal law must prevail if there is to be uniformity and respect for the Constitution's inherent structural integrity embodied in the Supremacy Clause and for the exercise by Congress of its Article I powers. See, e.g., *Berberich v. Mattson*, 903 N.W.2d 233, 237 (Minn. Ct. App. 2017) (undersigned on the *amicus curiae* brief supporting the veteran's arguments); *In re Marriage of Tozer*, 2017 COA 151, 410 P.3d 835 (Colo. 2017); *Phillips v. Phillips*, 347 Ga. App. 524, 530, 820 S.E.2d 158, 163-64 (2018); *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); and *Fattore v. Fattore*, 458 N.J. Super. 75, 84-85, 203 A.3d 151, 156-57 (Super. Ct. App. Div. 2019); and *Russ v. Russ*, 2021-NMSC-014, ¶ 5, 485 P.3d 223, 225 (2021).

In *Tozer*, 410 P.3d at 837, the Court held, in direct contravention of the Court of Appeals in this case, that "if a veteran's retired pay consists of Chapter 61 disability retirement, it is not disposable retired pay under the USFSPA, and thus is not subject to division as marital property." Citing *Selitsch v. Selitsch*, 492 S.W.3d 677, 686 (Tenn. Ct. App. 2015) as in agreement, and further noting that state courts could not exercise equitable authority to force the veteran to indemnify his or her former spouse.

Two more recent decisions out of Colorado have properly extended this to the contractual context at issue in this case. See, *In re Lloyd*, No. 23CA0406, 2024 Colo. App. LEXIS 2796, at *12-13 (App. May 30, 2024) and *Appellant v. Fisher (In re Fisher)*, No.

20CA0849, 2022 Colo. App. LEXIS 2408 (App. Jan. 6, 2022).

In *Lloyd*, the Court properly noted that "[i]f federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim" and the trial court was preempted from approving that portion of a separation agreement in which the parties divided the husband's future military disability benefits. The court further reasoned that it was of no moment that the parties had entered into a separation agreement and asked the district court to approve it because they could not confer authority upon the district court concerning a matter over which the latter had *no jurisdiction*. *Id*. Thus, the trial court's order was entered *without jurisdiction* and was void. *Id*.

In *Fisher*, *supra* at *5, the Court held that state courts are "completely" preempted from ordering a spouse to reimburse or indemnify the other spouse using non-disposable benefits. The court even referenced the anti-assignment provision in the Social Security Act that mirrors the intent and purpose of 38 U.S.C. § 5301. *Id*., citing 42 U.S.C. § 407(a), which, like § 5301 precludes a state court from exercising equitable authority to divide Social Security Benefits as marital property by employing "an indirect offset" and which prohibits contractual assignments of same.

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 several petitions have been filed by undersigned to have the Court address this lingering issue, and to stop the state courts from violating federal law, this Court is content to yet again allow states to ignore the Constitution and Laws of the United States.

Will it take another two decades (*Mansell* was issued in 1989 and *Howell* was issued in 2017) 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 directly imposed upon yet another generation of disabled veterans who cannot afford to wait another two decades.

C. State Law Judgments Based on Contracts that are Declared by Federal Statute to be Illegal Assignments are Void and of No Force and Effect

As there is no express grant of authority to states over federal veterans' benefits, they are exempt from state control and protected by the sweeping prohibition in 38 U.S.C. § 5301, which applies to all federal veterans' benefits due "*under any law*

administered by the Secretary of Veterans' Affairs." 38 U.S.C. § 5301(a)(1). These benefits "shall not be assignable *except* to the extent specifically authorized by law, and such payments made to, or on the account of, a beneficiary…*shall not be liable* to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary…." *Id.*, § 5301(a)(1). The provision also clearly prohibits contracts entered into by the veteran beneficiary in which he or she agrees for consideration to part with the restricted benefit. *Id.*, § 5301(a)(3)(A). Such agreements are considered void from inception. *Id.*, § 5301(a)(3)(C).

No state court can circumvent this provision using state common-law doctrines of judicial convenience like *res judicata* or collateral estoppel, or even state contract law principles. There would be no "preemption" or supremacy of federal law if the state could simply nullify federal law by claiming that a judgment or court order that is preempted can nonetheless be 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.

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).

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 no contract at all. Black's Law Dictionary (6th ed.) (defining 'void contract' as: '[a] contract that *does not exist* at law') (emphasis added).

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).

Moreover, 38 U.S.C. § 5301, by its plain language, applies to more than just "attachments" or "garnishments," as some have argued. 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).

Of this argument, this Court stated that it "fails to give effect to the unqualified sweep of the federal statute." *Ridgway*, *supra* 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 it:

> Ensures 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*. (cleaned up).

The agreement by Petitioner to dispossess himself of his protected federal benefits is *void ab initio* and cannot be enforced or recognized by any state court.

This Court is the only authority that can correct these state courts that have thwarted the will of Congress and ignored federal law and the multiple and clear pronouncements made by this Court on this issue for the last 4 decades.

CONCLUSION

Petitioner respectfully requests the Court to grant his petition.

Respectfully submitted,

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Dated: May 9, 2025

APPENDIX

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COURT OF APPEALS OF VIRGINIA

Present: Judges Malveaux, Ortiz and Friedman
Argued at Norfolk, Virginia

WILLIAM R. LOTT

v. Record No. 1322-22-1

MEMORANDUM OPINION* BY JUDGE DANIEL E. ORTIZ
DECEMBER 12, 2023

MARIA V. LOTT

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS
Gary A. Mills, Judge

Katherine D. Currin (Morris, Crawford & Currin P.C., on briefs), for appellant.

Jessica R. Casey (Casey Legal, P.C., on brief), for appellee.

The trial court's award of payments representing wife's portion of husband's military retirement pay was proper under the indemnification clause of the Lotts' property settlement agreement. Because at the time of the final order the Supreme Court had yet to affirm the enforceability of indemnification clauses in relation to military retirement pay, the trial judge devised its award of disability pay based on a complicated parsing of the type of pay at issue. That

* This opinion is not designated for publication. See Code § 17.1-413(A).

consideration is not necessary in light of the Supreme Court's decision in *Yourko v. Yourko*, ___ Va. ___ (Mar. 30, 2023) (*Yourko II*), *rev'g Yourko v. Yourko*, 74 Va. App. 80 (2021) (*Yourko I*).

Even still, because the amount awarded to wife representing husband's disability pay was proper under the indemnification clause, we hold that the trial court did not err, and thus partially affirm the trial court's treatment of husband's disability pay under the right-for-a-different-reason doctrine.

Because wife's assignment of cross-error as to the exact amount was not timely filed in accordance with Rule 5A:25(d), we decline to consider it. Finally, we find that the trial court erred when it decided the amount of spousal support owed without a hearing on the issue, in violation of Rule 4:15, and remand for further proceedings as to the spousal support arrearages.

BACKGROUND

William Lott ("husband") and Maria Lott ("wife") married in 1996 and separated with the intent to terminate their marriage in 2013. Before and during the marriage, husband was an active-duty member of the United States Navy, serving for just over twenty years before his honorable discharge in 2014. Husband was determined to have a service-connected disability and retired under Chapter 61.[1]

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[1] Retired military service members may be eligible to receive disability-related retirement pay based on injuries sustained during their service, based on statutory criteria laid out in 10

In September 2014, the parties entered into a property settlement agreement ("PSA"), under which wife was entitled to 41% of husband's "disposable military retirement pay."[2] The PSA further stated:

> If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the [w]ife's portion of the [h]usband's disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver was allowed or occurred. The [h]usband shall pay to the [w]ife directly any sums necessary in order that the [w]ife will not suffer any reduction in the amount due to her as a result of the [h]usband's waiver in order to receive disability pay.

The trial court entered a final decree of divorce and a military pension division order ("MPDO") in December 2016. The MPDO referenced the PSA and awarded wife "forty-one percent (41%) of the value of [husband's] military pension benefits."

Husband began receiving military retirement benefits on January 1, 2015. At that time, he elected to waive a portion of his retirement pay in order to

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U.S.C. §§ 1201-1202. This status and associated benefits are colloquially referred to as "Chapter 61 retirement."

[2] Both the PSA and legal authorities use "retirement pay" and "retired pay" interchangeably. Throughout this opinion, we use the term "retirement pay," unless quoting another source or referring to "disposable retired pay" as a statutory term of art.

receive tax-exempt disability pay for which he was eligible. Though the distribution of the remaining retirement pay is not at issue here, the parties dispute the proper classification of the disability pay and thus whether distribution of the payments to wife would violate federal law. *See Howell v. Howell*, 581 U.S. 214, 215, 221-23 (2017) (holding that a court could not order a veteran to indemnify their former spouse for the reduction in retirement pay associated with a waiver).

In September 2019, husband filed a motion to establish arrears and/or credits, challenging the sums that wife had received as her share of his disability pay. He claimed that as a result of his overpayment of his military retirement benefits, he had actually paid off all of his spousal support and attorney fees arrearages and was owed approximately $5,000. In response, wife filed a motion to show cause arguing that husband had not paid her the sums owed for military retirement and attorney fees.[3] Wife later filed another motion to show cause which included an alleged failure to pay $11,400 of spousal support as well.[4]

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[3] Wife had previously filed two similar motions alleging failure to pay spousal support, military benefits, and arrearages on attorney fees, as well as addressing various miscellaneous disputes. Neither of those earlier motions are at issue here.

[4] The trial court transcript from August 27, 2021, suggests that wife's failure to include spousal support in her initial motion was in error. As a combined result of wife's late filing and husband's insistence that his overpayment of retirement benefits would more than compensate for any arrearages in spousal support, the court's interlocutory order did not discuss spousal support, and subsequent hearings consistently delayed any discussion of the

Over the course of two years, the court held multiple hearings and entertained several rounds of briefing from the parties to determine the appropriate classification and division of the disability pay here. On July 12, 2021, the court issued an interlocutory order, finding that husband's disability pay was divisible and *Howell* did not apply. In a July 6, 2022 hearing, the court orally indicated a likely ruling for husband on the disability pay issue and continued the hearing until October 12, 2022, primarily to allow the parties to reach agreement on whether wife would repay husband for her alleged overpayment since the time of the divorce decree. Counsel also asserted the need to discuss spousal support arrearages in the next hearing.

On August 5, 2022, the court issued a final order harmonizing the relevant federal statutes and regulations and parsing husband's retirement pay accordingly. The court ultimately found that most of husband's pay was "disposable retired pay" under 10 U.S.C. § 1408(a)(4) and therefore subject to division. The court awarded wife payments of $841.41 per month, over husband's objection.[5] The court also found that husband owed wife $11,400 in spousal

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exact amount owed in spousal support. Wife's filing on June 13, 2022, suggested that past-due spousal support as of that date had increased to $13,200.

[5] Specifically, the court found that husband was receiving $2,195 of concurrent retirement and disability pay ("CRDP") each month, all of which qualified as divisible "disposable retired pay" rather than disability pay, but that his disposable retired pay should be reduced by $142.77 to account for his survivor benefits coverage ("SBP"). The court thus declared that wife was entitled to 41% of $2,052.23, or $841.41 per month.

support but declined to hold him in contempt for nonpayment. The court cancelled the October 12 hearing on the issue of spousal support owed, instead including all issues in its August order. This appeal followed.

ANALYSIS

I. Legal Context

The complexity of the issues presented in the matter compel us to review the ever-evolving legal landscape in this arena. We begin with an overview of the existing federal statutes and the relevant cases interpreting them. Federal law provides for multiple sources of payment to military veterans upon their retirement. *See, e.g.*, 10 U.S.C. § 8327 (retirement benefits received after at least 20 years of service); 10 U.S.C. §§ 1201-1202 (disability pay); 10 U.S.C. § 1414 (concurrent retired and disability pay). In certain cases, a disabled veteran may elect to waive a portion of their retirement pay and instead receive the same amount of disability pay, which is exempt from federal, state, and local income taxes. *Mansell v. Mansell*, 490 U.S. 581, 583-84 (1989). The Uniformed Services Former Spouses' Protection Act ("the Act") allows courts to divide veterans' "disposable retired" pay in divorce cases. *See id.* at 584-85. Shortly after the Act's passage, the United States Supreme Court noted that: "'Disposable retired . . . pay' is defined as 'the total monthly retired or retainer pay to which a military member is entitled,' minus certain deductions. Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits." *Id.* at 584-85

(quoting 10 U.S.C. § 1408(a)(4)). Thus, upon divorce, a court may order the division of a veteran's retirement pay but not their disability pay.

In *Howell*, the Court further held that a court could not perform an end-run around the Act's requirements by ordering a veteran to indemnify their ex-spouse for any reduction in the ex-spouse's portion of the veteran's retirement pay because of a waiver. *See Howell*, 581 U.S. at 222. The Court did not address whether parties could independently agree to an indemnification provision in a property settlement agreement or other contract. *See Yourko II*, ___ Va. at ___.

While the Lotts' case was pending before the trial court, a similar case, *Yourko v. Yourko*, wound its way through the Virginia court system. *See Yourko I*, 74 Va. App. 80, *rev'd*, *Yourko II*, ___ Va. ___. In *Yourko I*, this Court held that court enforcement of an indemnification clause that had the practical effect of dividing disability retirement pay was pre-empted by federal law. *See Yourko I*, 74 Va. App. at 96-101. The trial court's final order relied on the holding in *Yourko I* to explicitly rule out any practical effect of the indemnification clause in this case. However, earlier this year, the Supreme Court reversed that holding, finding that courts can enforce indemnification clauses related to military disability pay, if they stem from the parties' voluntary agreement. See *Yourko II*, ___ Va. at ___. Accordingly, we revisit the significance of the indemnification provision here, apply the guidance set forth in *Yourko II*, and find that the provision applies to resolve husband's claims as to assignments of error one through four.

II. Indemnification Clause Enforceability

"[W]e review the trial court's statutory interpretations and legal conclusions de novo." *Chaney v. Karabaic-Chaney*, 71 Va. App. 431, 434 (2020) (alteration in original) (quoting *Navas v. Navas*, 43 Va. App. 484, 487 (2004)). Similarly, we review the trial court's interpretation of the PSA de novo. *Price v. Peek*, 72 Va. App. 640, 646 (2020).

We find that the trial court reached the right result as to the amount due to wife, but base our holding on alternative grounds — that the indemnification clause in the Lotts' PSA should be enforced. Under the right-result-different-reason principle, an appellate court "do[es] not hesitate, in a proper case, where the correct conclusion has been reached but [a different] reason [is] given, to sustain the result [on an alternative] ground." *Vandyke v. Commonwealth*, 71 Va. App. 723, 731 (2020) (alterations in original) (quoting *Banks v. Commonwealth*, 280 Va. 612, 617 (2010)). A court must establish two conditions before applying this "right-result-different-reason" approach. *Id*. at 731-32. First, the court "must show that all evidence necessary to that alternate ground was before the trial court…. If additional factual findings would be necessary to support the alternative ground for decision, the doctrine may not be applied." *Id*. at 732. Second, the evidence necessary "must have been undisputed." *Id*.

The right-result-different-reason doctrine applies here because our analysis turns entirely on

the legal question of the enforceability of the indemnification clause in the Lotts' PSA. The existence and contents of the PSA, including the indemnification clause, are not in dispute; the parties dispute only their legal significance. Further, the trial court made factual findings about the amount and type of husband's military retirement benefits. No other factual findings are required here.

The indemnification clause in the Lotts' PSA is legally enforceable and provides for the outcome in this case. In *Yourko II*, the Supreme Court determined that "federal law does not bar courts from upholding [indemnification] agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties." *Yourko II*, ___ Va. at ___. The Court noted that although Congress intended to shelter veterans' disability pay from division upon divorce, "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." *Id*. at ___. Rather, indemnification clauses within property settlement agreements should be given the same treatment as contracts in general, notwithstanding the unique relationship of the contracting parties. *Id*. at ___.

Here, the Lotts' PSA first provides that wife would receive 41% of husband's "disposable military retirement pay." The PSA then provides that husband must indemnify wife should he elect to waive his retirement pay in favor of disability pay: "If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the

[w]ife's portion of the [h]usband's disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver . . . occurred." The agreement further requires that husband pay wife directly any amount necessary to maintain her payment levels as if he had not elected disability pay. There is no suggestion that the PSA was anything less than a privately negotiated agreement. Unlike in *Howell*, in which a court was imposing an indemnification agreement upon the parties contrary to federal law, this is simply a private contract, determining how the parties are to distribute husband's disability pay after it is received. See *Howell*, 581 U.S. at 219, 222-23. We thus hold that the indemnification clause here is enforceable.

Under the indemnification clause, husband must pay wife any amount she would have received as retirement pay but which she does not receive because of his waiver and election of disability pay. The PSA describes that baseline amount as 41% of husband's "disposable military retirement pay." The trial court found that, as of the time of its order, husband was receiving $2,195 per month of concurrent retirement and disability pay ("CRDP"), which, absent husband's waiver, would have been treated as retirement pay. Because the indemnity clause requires husband to reimburse wife for any reduction in his retirement pay as a result of his waiver, the specific statutory treatment of the CRDP at issue, discussed at length by the trial court, is not relevant. The indemnity clause requires husband to pay wife the value of 41% of the CRDP payments because whether the CRDP is retirement pay or disability pay under the statute,

wife would have received that portion of the payments absent husband's waiver.

From the CRDP, the court subtracted $142.77 of survivor benefits coverage ("SBP") to reach $2,052.33 of disposable retired pay. In her assignment of cross-error, wife asserts that the trial court erred in requiring her to pay for husband's survivor benefit plan when she was no longer listed as a beneficiary. Thus, she argues, the court erred in deducting the SBP from husband's disposable retired pay. But wife's assignment of cross-error was not timely filed in accordance with Rule 5A:25(d), and as such, we will not consider it.[6] See *Blue Ridge Poultry & Egg Co. v. Clark*, 211 Va. 139, 141 (1970) (refusing to consider an assignment of cross-error that was not timely filed in accordance with the rule). We thus rely on the trial court's factual findings and calculations, which establish that husband's disposable retirement pay is $2,052.33 per month. Wife is thus eligible under the PSA for 41% of $2,052.33, or $841.41 per month.

Though the trial court reached its conclusion without considering the indemnification clause, noting this Court's previous holding in *Yourko I*, the court nonetheless determined that husband owed wife the same amount after parsing the federal statutes and case law on military benefits. Because we hold that the indemnification clause is enforceable and applies here, we decline to address whether the trial

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[6] While ordinarily wife's claims would be treated separately, we address them here, as they are necessary to understanding the proper amount of payments due under the indemnification clause.

court accurately interpreted and applied federal law in categorizing husband's retirement benefits. *See Commonwealth v. White*, 293 Va. 411, 419 (2017) ("[T]he doctrine of judicial restraint dictates that we decide cases 'on the best and narrowest grounds available.'" (quoting *Commonwealth v. Swann*, 290 Va. 194, 196 (2015))). We therefore affirm the value of the trial court's award of payments to wife, albeit for a different reason than that reached by the trial court.

We note that because the trial court found the payments at issue to be "divisible and distributable CRDP under 10 U.S.C. § 1408," the trial court's order may have been enforceable by direct payments from the federal agency. *See* 10 U.S.C. § 1408(d). The trial court also provided that husband was to supplement the agency's payments, as needed, to ensure that wife received the full value owed her under the PSA. Because we rest our holding on the alternative grounds that the indemnification clause requires such payments by husband regardless of the classification of the military benefits, on remand the trial court should amend its order to require husband to make the payments directly to wife, rather than via agency withholding.

III. Spousal Support Arrearages

Finally, husband alleges that the trial court denied him due process and violated Rule 4:15 when it ruled on wife's motions to show cause without providing a hearing on the amount of spousal support owed.[7] At the hearing on July 6, 2022, the trial court

[7] This claim constitutes husband's assignment of error five. We

heard arguments on the military pay issues, indicated orally that it would rule in favor of husband, and continued the hearing until October 12, 2022, directing the parties to confer over whether wife would refund husband the amount he allegedly overpaid her for military benefits. At the July 6 hearing, wife's counsel asserted several times that the court also needed to address the show cause motion related to spousal support. Though the court did not directly respond to counsel's assertions, it implicitly postponed such discussion until the October hearing. Despite the court's oral indications that it would find for husband on the issue of military pay, the court's final order on August 5, 2022, found that husband in fact owed wife approximately $841.41 each month in retirement pay, as discussed above. The trial court also found that husband owed wife $11,400 in spousal support under the original divorce decree and declined to find husband in contempt. The trial court then cancelled the scheduled hearing. In its cancellation letter, the court asserted that "it previously had heard argument regarding the issue of the Show Cause, prior to the interlocutory order of July 12, 2021," yet at that time the issue of spousal support was not properly before the court and the record shows that the trial court declined to address the amount of arrearages due.[8]

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also note here that husband withdrew his appeal as to assignment of error six in his opening brief.

[8] It appears that the relevant hearing in fact occurred on August 27, 2021, after the interlocutory order finding in wife's favor had been issued.

Rule 4:15(d) provides that, except in limited cases, a trial court "will hear oral argument on a motion" at the request of any party.[9] See also *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 119 (2012). Though a court may postpone a hearing in order to ensure fairness and allow for the filing of written briefs or limit the length of oral argument, a court may not altogether dispense with oral argument if requested by a party. *See* Rule 4:15(d). In this case, where the record includes no meaningful discussion of the amount of spousal support arrearages even over the course of multiple hearings and where both parties believed the issue was to be discussed in the October hearing, the trial court erred in ruling on the amount owed without holding a hearing on the issue. Further, given that the trial court's finding establishes husband's obligations, the violation of which may subject him to civil contempt, we cannot say that such error was harmless. *See* Code § 8.01-678. The absence of any hearing at all on the amount owed precludes us from finding that "the parties have had a fair trial on the merits and substantial justice has been reached." *Id.* As a result, we reverse the trial court's decision establishing the amount of spousal support arrearages owed and remand for a hearing on the issue, as requested by both parties before the court's August 5, 2022 order.[10]

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[9] The rule limits oral argument "on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record" unless requested by the court. Rule 4:15(d). Neither exception is applicable here.

[10] Because we find that Rule 4:15(d) requires a hearing in this case, we decline to reach husband's related due process claims. *See White*, 293 Va. at 419 (discussing judicial constraint).

CONCLUSION

The trial court's award of $841.41 of husband's military retirement benefits equal the amount that wife would have received absent husband's waiver of his retirement pay. Thus, under the indemnification clause of the Lotts' PSA, wife should receive $841.41. Although the trial court reached the amount through different analysis, we affirm in part the trial court's award under the right-result-different-reason doctrine and remand for the trial court to enter an order requiring husband to make these monthly payments. As to assignment of error five, we remand for the trial court to hold a hearing on the amount of spousal support arrearages due. Further, because wife's assignment of cross-error was not timely filed, we do not consider it and make no ruling on it here.

Affirmed in part, reversed in part, and remanded in part.

In the Circuit Court of the City of Newport News, Virginia

August 5, 2022, Decided

Case Nos.: CL1403206V-04; CL1903206V-99; CL1903206V-99

Maria V. Lott, Plaintiff

v.

William R. Lott, Defendant.

OPINION AND ORDER

THIS matter originally came before the Court upon Plaintiff Maria Lott's Motion to Show Cause, filed on May 4, 2017, and Defendant William Lott's Motion to Establish Arrears and/or Credits, filed on September 24, 2019. Since these initial filings, a great deal of new information has trickled in subsequent to this Court's Interlocutory Opinion and Order on July 12, 2021. Throughout this entire matter, the Court has remained adamant to apply the correct law to the known facts, despite the complexities of dividing military retirement pay in a divorce situation. The pendency of this matter, however, has continued far too long.

This Order is final on the substance of the matters herein.

For the sake of the record, the parties, and counsel, the Court will reiterate relevant information

from its prior Orders and will incorporate any new relevant sections, applicable new findings, and nuances of form.[1]

I. BACKGROUND

The Court incorporates the Factual Background, Section III, of its July 12th Interlocutory Opinion and Order via reference in its entirety. Order, CL140326V-04; CL1903206V-99, 2021 WL 3931259, at *8-11 (Newport News Cty. July 12, 2022).

The Court finds that Plaintiff and Defendant married in 1996. Final Divorce Decree, CL14-03206V-04, at * 1 (Dec. 1, 2016). Defendant was an active-duty service member of the United States Navy, from a period of December 12, 1994, until he received an honorable discharge on December 31, 2014.[2] Defendant retired with a military disability rating of forty percent (40%) on January 1, 2015.[3] On or about

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[1] The Court graciously acknowledges the assistance and excellent research of Judicial Law Clerk Geoffrey R. Grau, Esq., of whom diligently assisted the Court in these matters subsequent to the entry of its July 12, 2021, Interlocutory Opinion and Order. The Court also acknowledges the assistance of Judicial Law Clerk Hannah M. Hempstead, Esq., of whom assisted the Court in these matters through its July 12, 2021, Interlocutory Opinion and Order.

[2] See Letter from Cheryl J. Rawls, Assistant Deputy Under Secretary for Field Operations, Dep't of Veterans Affairs, to Bill R. Lott (February 24, 2020) (on file with the Court).

[3] *See* Letter from Jennifer R. Madden, writing for John T. Votaw, Chief of Staff, Deputy Director, Operations, Defense Finance and Accounting Service, to the Honorable United States

May 1, 2013, the parties separated with the intent to terminate the marriage. Final Divorce Decree, CL14-03206V-04, at *1-2. On September 27, 2014, the parties entered into a property settlement agreement ("PSA") of which Plaintiff was entitled to 41% of Defendant's "disposable military retirement pay." Separation Agreement, CL14-03206V-04, at *4-5 (Jan. 29, 2015).[4] The PSA was "incorporated, ratified, and confirmed, but not merged" into a Final Divorce Decree A Vinculo Matrimonii on December 1, 2016. Final Divorce Decree, CL14-03206V-04, at *2, 9. Based upon incorporation of the PSA, Defendant owed Plaintiff $778.00 per month. Order, CL14-03206V-04, at *3 (Oct. 14, 2016).[5] Defendant's non-payment led to the immediate action, commenced upon Plaintiff's Motion to Show Cause, filed on May 4, 2017, effectively re-opening the matter, followed by Defendant's Motion to Establish Arrears and/or Credits, filed on September 24, 2019.

Oral arguments began on January 14, 2020, whereupon the crux of the matter appeared: whether the parties property settlement agreement ("PSA") impermissibly divided Defendant's military retirement payments per United States Supreme

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Representative Michael R. Turner (May 10, 2022) (on file with the Court); Letter, Defense Finance and Accounting Service, to the Honorable United States Senator Rob Portman (Apr. 29, 2022) (on file with the Court). Both letters are herein referred as "Madden/Votaw DFAS Letters" in tandem.

[4] The Court includes the filing date of January 29, 2015, for reference, noting that PSA was signed on the September 27, 2014, by the parties.

[5] This Court additionally entered a Military Pension Division Order on December 7, 2016.

Court precedent *Howell v. Howell*, 581 U.S. 214, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017). The issue was briefed by both sides and additional oral arguments were presented on March 12, 2020. At the request of Plaintiff, however, the Court stayed its Final Order to allow further research for a better understanding how Defense Finance and Accounting Service ("DFAS") calculates disability pay and retirement pay for military service members. The Court acquiesced to apply the most thorough and well-developed application of the laws and facts. That initial stay, however, was then exacerbated by the onset of the Covid-19 pandemic, State of Emergency in Virginia,[6] and the Virginia Supreme Court's Declaration of Judicial Emergency on March 16, 2020.[7]

A hearing was finally set on June 22, 2021, whereupon the Court issued its July 12, 2021, Interlocutory Opinion and Order. Though once a matter of great contention, this Court found that Defendant is in fact receiving Concurrent Retirement Disability Pay ("CRDP"), wherein the Court incorporates the same finding herein:

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[6] Press Release, Ralph Northam, Governor Northam Declares State of Emergency, Outlines Additional Measures to Combat COVID-19 (March 12, 2020), https://www.governor.virginia.gov/newsroom / all releases / 2020 / march / headline-853537-en.html (last visited July 8, 2022).

[7] Order from the Supreme Court of Virginia, In Re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency (March 16, 2020), http://www.courts.state.va.us/news /items /covid / 2020_0317_supreme_court_of_virginia.pdf (last visited July 8, 2022).

> In this case, the parties agree that Plaintiff is entitled to 41% of Defendant's disposable military retirement pay pursuant to the PSA. According to the letter the parties submitted to the Court from DFAS, Defendant is receiving CRDP, which is considered military retirement pay and not disability pay pursuant to 10 U.S.C. § 1414. CRDP is clearly divisible with a former spouse as military retirement pay. Thus, the Court finds that Defendant is not receiving disability pay and Howell does not control this case. Defendant's CRDP is divisible pursuant to the property settlement agreement.

Order, 2021 WL 3931259, at *7 (footnote omitted). Via letter, the parties were instructed to submit a proposed Order, with noted objections for appellate preservation, for entry. In response, counsel for Defendant, Romeo Lumaban, Esq., requested additional time to review the filings and to possibly come to an agreement with opposing counsel after speaking in conference with Mark Sullivan, Esquire, on October 1, 2021.[8] Mr. Lumaban indicated via his October 8, 2021, letter that Mr. Sullivan believed

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[8] Mr. Sullivan contacted the Court, offering his assistance concerning his knowledge of CRDP after reading this Court's July 12, 2021, Interlocutory Opinion and Order. At that point in time, the Court could not communicate *ex parte* with Mr. Sullivan. Via conference call with permission of the parties on September 16, 2021, the Court forwarded their information to Mr. Sullivan. Each party's counsel contacted Mr. Sullivan a number of times from that point forward.

additional relevant documentation of Defendant's military disability retirement status was necessary to properly classify Defendant's military retirement pay. The unfortunate passing of Mr. Lumaban stalled any future discussions, however. Plaintiff filed another Motion and Rule to Show Cause on April 5, 2022,[9] upon which the Court issued on April 7, 2022. An April 27, 2022, hearing was scheduled and was later continued to July 6, 2022.

In the meanwhile, Defendant retained Katherine Currin, Esq., and filed a Motion to Reconsider and Brief in Support on April 18, 2022. The substance of that brief remains the spark upon which further reconsideration was warranted: that new information indicated that Defendant was on the Permanent Disability Retired List ("PDRL") and was in fact a "Chapter 61"[10] retiree that was unfit for duty with a permanent disability rating of at least thirty percent (30%) or higher, incurred in the line of duty, and had served at least twenty (20) years of service. See Mot. to Recons., at *10 (Apr. 18, 2022). A response brief was filed by Plaintiff on June 16, 2022. A final rebuttal brief was filed by Defendant, enclosed with Madden/Votaw DFAS Letters that remain a distinct basis for concluding Defendant's Chapter 61 disability retiree status, filed on July 1, 2022.[11] Only after the July 1, 2022, filing, however, did the Court have a

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[9] This Motion to Show Cause is filed in addition to a previously filed Motion to Show Cause on April 6, 2021.

[10] *See* 10 U.S.C. §§ 1201-1222. The Court will detail this status herein, *infra*.

[11] Madden/Votaw DFAS Letters, *supra* note 3.

complete picture of the matter, including now relevant use of this Chapter 61 retirement status, a status previously deemed irrelevant to the matter.

On July 6, 2022, the Court held a hearing delving into Defendant's Motion for Reconsideration. The Court was made aware that Defendant was in fact a Chapter 61 disability retiree, and, based on that status, the Court made an oral ruling that it did not have the ability to divide an amount of retired pay calculated based on the Chapter 61 disability percentage, but only the longevity amount in excess, citing 10 U.S.C. § 1408(a)(4)(A)(iii). The Court also instructed the parties that a written opinion was to follow.

The Court continued to grapple with the complex issues at bar, particularly drawn to Plaintiff's use of an opinion from the Federal Claims Appeals Board ("CAB") that effectively found that 10 U.S.C. 1414(b)(1) allowed division of disposable retirement pay under CRDP despite Chapter 61 retiree status. See In Re: [REDACTED] Claimant, Claims Case No. 2016-CL-091608.3, 2022 WL 1568835, at *6 (D.O.H.A.C.A.B. Mar. 1, 2022). The Court also took note of a recent June 7, 2022, article entitled "MDRP and CRDP: A Sea of Change" and authored by Mr. Sullivan emphasizing the effects this March 1st CAB opinion would have in the future.[12] This matter, however, still stands upon a razor's edge, and despite

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[12] Mark E. Sullivan, *MDRP and CRDP: A Sea Change*, https://www.lawyersmutualnc.com/risk-management-resources/articles/mdrp-and-crdp-a-sea-change (last visited July 8, 2022).

its oral ruling, the Court now enumerates its final ruling in the matter.[13]

II. LEGAL BACKGROUND & STANDARD

The Court incorporates the Legal Background, Section II, of its July 12th Interlocutory Opinion and Order via reference in its entirety, Order, 2021 WL 3931259, at *2-8, and the Legal Standard, Section IV, of its July 12th Interlocutory Opinion and Order via reference in its entirety, *id.* at *11-12.

To reiterate, state law utilized by this Court is preempted under the Uniformed Services Former

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[13] The Court was also prepared to utilize newly published Canon II(1)(d) of the Canons of Judicial Conduct for the Commonwealth of Virginia to seek the advice of Mr. Sullivan as a disinterested expert on the law applicable to the proceeding at bar. On July 14, 2022, the Court originally contacted the Judicial Inquiry and Review Commission ("JIRC") and was properly advised on the use and applicability of Canon II(1)(d) at bar. A letter was sent to the parties that day advising them of the subject matter of advice sought, while also giving a reasonable opportunity to respond by July 22, 2022. The Court forwarded a draft opinion to Mr. Sullivan on July 20, 2022. Counsel for Defendant objected to such advice on July 22, 2022. Before the Court could receive Mr. Sullivan's edits, the Court became aware that Mr. Sullivan had discussed the matter with counsel for Plaintiff previously. The Court contacted JIRC again on July 25, 2022, and while the Court was assuaged Mr. Sullivan remained disinterested despite his contact with counsel for Plaintiff, out of an abundance of caution, the Court declined to receive Mr. Sullivan's advice on its draft order beyond the inclusion of consideration of Survivor Benefits Coverage ("SBP") in its final calculation. An additional hearing, via conference call, was conducted on July 26, 2022, to that end. The Court ultimately acknowledges Mr. Sullivan gracious willingness to assist pro bono in these complex military divorce matters.

Spouses' Protection Act ("USFSPA")[14] from ordering any division of military "disposable retired pay" in a divorce context. 10 U.S.C. § 1408(a)(4)(A), (c)(1).[15] Facially, a court has the ability to divide a veteran's "disposable retired pay," which remains "the total monthly retired pay to which a member is entitled[,]" 10 U.S.C. § 1408(a)(4)(A).[16] Disability benefits, however, are specifically excluded from such division, whereas longevity payments remain divisible. See 10 U.S.C. § 1408(a)(4)(A)(ii)-(m). (B)(i); see also 38 U.S.C. §§ 5304, 5305.[17] As expounded upon greatly in its July 12th Interlocutory Opinion and Order, a court may not impermissibly reimburse or indemnify payment of

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[14] *See* 10 U.S.C. § 1408.

[15] The USFSPA does allow this Court to deem military disposable retirement benefits as community property. 10 U.S.C. § 1408(c)(1).

[16] "Disposable retirement pay" upon division includes, for example, "the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation" See 10 U.S.C. § 1408(a)(4)(B)(i).
[17] Thus, 38 U.S.C. § 5304(a)(1) prevents infamous "double dipping" of military retirement pay and VA benefits, unless the 38 U.S.C. § 5305 waiver applies. See 38 U.S.C. § 5304(a)(1) ("[N]ot more than one award of pension [or] compensation . . . shall be made concurrently to any person based on such person's own service…."); 38 U.S.C. § 5305 ("Except as provided in [10 U.S.C. § 1414], any person who is receiving [military retirement pay] pursuant to any provision of law providing retired or retirement pay . . . and who would be eligible to receive . . . [VA disability compensation] . . . if such person were not receiving such retired or retirement pay, shall be entitled to receive such . . . [VA disability compensation] upon the filing . . . of a waiver of so much of such person's retired or retirement pay as is equal in amount to such . . . . [VA disability compensation]….").

disability to a former spouse, either directly or indirectly,[18] as precise and discrete limitations exist on any such division. 10 U.S.C. § 1408.

As one means to compensate a servicemember for disability incurred during active service, servicemembers are eligible for disability compensation for service-connected injuries from the United States Department of Veterans Affairs ("VA")[19] See 38 U.S.C. § 1110. VA payments are ultimately elective, 38 C.F.R. § 3.750,[20] and remain

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[18] The matter of military disability indemnification provisions has been recently addressed and further solidified in Virginia by the Virginia Court of Appeals in *Yourko v. Yourko*, wherein it is reiterated that Virginia courts are prohibited from "issu[ing] orders that require . . . servicemembers to make contracts,' guarantees,' or' indemnification' promises to formers spouses in contravention of *Howell*." *Yourko v. Yourko*, 74 Va. App. 80, 96, 866 S.E.2d 588, 596 (2021) (citing *Howell*, 137 S.Ct. at 1405-06, 197 L.Ed.2d 781) ("[S]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."); *see also Leo v. Leo*, 2022 Va. App. LEXIS 24, 2022 WL 287027, at *2 (Va. Ct. App. Feb. 1, 2022).

[19] 2 Mark E. Sullivan, The Military Divorce Handbook: A Practical Guide To Representing Military Personnel And Their Families 668-69 (3d ed. 2019) ("The Department of Defense compensates individuals in the armed forces who are determined "unfit for duty," . . . . The VA compensates veterans who have "service-connected illness, wound, condition, or disability.") (emphasis in original); see also DisabilityEntitlements, Defense Finance and Accounting Service, https://www.dfas.mil/RetiredMilitary / disability / VA-Waiver-and-Retired-Pay-CRDP-CRSC / (last visited July 8, 2022).

[20] *Eligibility for VA disability benefits*, U.S. Department of Veterans Affairs, https://www.va.gov/disability/eligibility/ (last

tied to a rating derived from the VA, 38 U.S.C. §§ 1114-1115. In the context of receiving both VA disability benefits and Chapter 61 retirement pay: "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that [the servicemember] waives a corresponding amount of [the servicemember's] military retirement pay." *Mansell v. Mansell*, 490 U.S. 581, 583, 109 S. Ct. 2023, 2026, 104 L. Ed. 2d 675 (1989); 38 U.S.C. §§ 5304-5305. Indeed, waiver provides an increase in after-tax income as disability benefits remain exempt from federal, state, and local taxation. *Id*. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d 675 (citing 26 U.S.C. § 3101(a)).

Separate from disability compensation,[21] Navy retirement pay comes about in two general forms. First, longevity retirement requires at least twenty

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visited July 8, 2022); *see* Sullivan, *The Military Divorce Handbook*, 669 ("VA payments are elective. One has to apply for payment and that choice means there will be a dollar-for-dollar reduction, in general, in earning capacity for money received by the VA. The military medical disability is mandatory; no choice is involved as to discharge or continued service, although an individual may contest a decision by the [Physical Evaluation Board] and appeal it.").

[21] "[M]ilitary disability rating measures his fitness to perform his military duties. The VA rating (based on service-connected disabilities) measures his ability to hold down a job and earn a living. John could have a 40% military disability rating and a 100% VA rating, since they measure different capabilities and impairments." Mark E. Sullivan, *Silent Partner Q&A – Military Disability Retired Pay*, at *2, https://www.nclamp.gov/media/730645/qa-military-disability-retired-pay.pdf (last visited July 8, 2022).

(20) years of service. See 10 U.S.C § 8327(a)(2). Second, 10 U.S.C. Chapter 61 alternatively provides criteria for a servicemember to receive disability retirement pay based on injury garnered during service. See 10 U.S.C. § 1201. Chapter 61 status is achieved when the following occurs: a servicemember maintains a permanent physical disability, is unfit for duty, and is then placed on the temporary disability retired list ("TDRL"). See 10 U.S.C. §§ 1201(a), 1202.[22] That servicemember then qualifies for Chapter 61 retirement if their disability rating is at least thirty percent (30%) or they were a member for at least twenty (20) years when placed on the Permanent Disability Retired List("PDRL"),[23] 10 U.S.C. § 1210(b)-(f). and receive disability retirement based upon 10 U.S.C. 1401(a)-(b).[24] It stands that a

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[22] See 10 U.S.C. § 1201(a) ("Upon a determination . . . that a member . . . is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay . . . , the Secretary may retire the member with retired pay computed under [10 U.S.C. § 1401]").

[23] As clarified by DFAS: "If at any time you are found fit for duty, you may be removed from the TDRL and returned to active duty. If your disability stabilizes and is rated at 30 percent or greater, you will be transferred to the Permanent Disability Retired List (PDRL). If your disability stabilizes and is rated at less than 30 percent and you do not have 20 years of service, you will be discharged from the TDRL with severance pay." *See Qualifying for a Disability Retirement*, Defense Finance and Accounting Service, https://www.dfas.mil / retiredmilitary / disability / disability/#:~:text=If%20your%20disability%20is%20found,Disability%20Retired%20List%20(PDRL) (last visited July 8, 2022).

[24] While there are multiple formulas, in summation, a servicemember receives the higher disability retirement pay based off the higher calculation between years of service or the

servicemember may receive either entirely longevity pay if not placed on the TDRL at any point, entirely disability pay if classified as one-hundred percent (100%) disabled, or a mixture of the two if eligible for both payment avenues. 10 U.S.C. § 1401(a). A Chapter 61 retiree is then able to collect the "most favorable formula" entitled to him or her, based on either longevity or disability. See 10 U.S.C. § 1401(b). As recognized as the crux of July 6th-hearing at bar, 10 U.S.C. § 1408(a)(4)(A)(iii) facially prohibits the division of disability pay derived under 10 U.S.C. Chapter 61:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—[] in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)[.]

10 U.S.C. § 1408(a)(4)(A)(iii) (omitted subsection indicator). Utilization of 10 U.S.C. § 1408(a)(4)(A)(iii) with Chapter 61 status facially indicates that

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member's disability, not to exceed seventy-five percent (75%). 10 U.S.C. 1401(a). In either case, both options are multiplied with the servicemember's calculated based base pay. See 10 U.S.C. § 1409(b)-(c). DFAS has also provided an analysis of the process online. See Qualifying for a Disability Retirement, Defense Finance and Accounting Service, *supra* note 23.

"disposable retirement pay" excludes any amount of disabled pay calculated. *Id*. See also Sullivan, The Military Divorce Handbook, 667 (citing *Bullis v. Bullis*, 22 Va. App. 24, 36, 467 S.E.2d 830, 836 (1996)). Under this reading, where a servicemember is eligible for both a portion of longevity retirement and disability retirement under Chapter 61, while he or she may be entitled to the "most favorable formula" based on either longevity or disability, 10 U.S.C. § 1401(b), any amount divisible in a divorce context seemingly excludes any disability amount included in the calculation for "disposable retirement pay" completely, 10 U.S.C. § 1408(a)(4)(A)(iii).[25]

As recent as 2004, Military disability pay has evolved to where a servicemember maintains the ability to "concurrently" receive both a portion of retired pay and monthly benefits from the VA, 10 U.S.C. § 1414(a)-(b), deemed a restoration of retired pay and subject to division with a former spouse, 10 U.S.C. § 1408.[26] This restoration is classified as

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[25] *Bullis*, 22 Va. App. at 36, 467 S.E.2d at 836 ("The amended version of the USFSPA therefore exempts only that portion of Chapter 61 benefits which corresponds to the retiree's disability percentage rating at the time of retirement. If, for example, a service member retires with 60% disability under Chapter 61, then 60% of the member's retirement benefits are excluded from the definition of 'disposable retired pay.' The remaining 40% of the member's benefits may be judicially apportioned under state community property laws.").

[26] The Court declines to delve into the specifics of Combat-Related Special Compensation ("CRSC") at this time, as it had previously ruled Defendant was receiving CRDP in its July 12th Interlocutory Opinion and Order, *see* Order, 2021 WL 3931259, at *7, and will clarify its finding herein, *see* Section III.A., *infra*.

CRDP. *Id.* DFAS remains the ultimate authority in CRDP, delegated from the Department of Defense ("DOD"). *Haddock v. United States*, 135 Fed. Cl. 82, 84 (2017). What occurs is described as a ten-year "phase-in" system, see 10 U.S.C. § 1414(c),[27] whereupon a "qualified [disabled] retiree" is restored amounts of retirement pay previously waived for VA disability compensation, see 10 U.S.C. § 1414(a), so as to prevent double dipping as dictated by Mansell, see 490 U.S. at 583, 109 S. Ct. at 2026, 104 L. Ed. 2d 675; 38 U.S.C. §§ 5304-5305. Eligibility for CRDP must be met, however, and a thorough reading of 10 U.S.C. § 1414 indicates several avenues to attain said military retirement pay,[28] but lack of clarity in this provision remains one issue of note. A base reading shows that a servicemember must have at least twenty (20) years of service and a VA disability rating of at least fifty

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[27] This "phase in system" was determined on a ten-year period beginning on January 1, 2004, and ending on December 31, 2013. 10 U.S.C. § 1414(c).

[28] As provided by DFAS: either (1) a "retiree" with a VA disability rating of at least fifty percent (50%); (2) a reserve retiree that retired with twenty (20) years of service that has a VA disability rating of at least fifty percent (50%); (3) a retiree under Temporary Early Retirement Act ("TERA") that has a VA disability rating of at least fifty percent (50%); and (4) a disability retiree who earned entitlement to retired pay under any provision of law, other than solely by disability, that has a VA disability rating of at least fifty percent (50%). *See Concurrent Retirement and Disability Pay (CRDP)*, Defense Finance and Accounting Service, https://www.dfas.mil/retiredmilitary/disability/crdp/#:~.text=Under%20these%20rules%2C%20you%20may,who%20has%20reached%20retirement%20age (last visited July 8, 2022).

percent (50%)[29] to receive both VA disability compensation and CRDP.[30] See *Vlach v. Vlach*, 556 S.W.3d 219, 225 n.4 (Tenn. Ct. App. 2017) ("Under the Act, beginning on January 1, 2004, a service member with at least 20 years of service and a disability rating of at least 50% could receive disability pay without a corresponding reduction in retired pay.").[31] Again, a clear exception to the prohibition against duplication of benefits exists in this code section. See 38 U.S.C. § 5304(a)(1) ("Except as provided in section 1414 of title 10 . . . .").

For Chapter 61 retirees with CRDP, more directly on point with the case at hand, 10 U.S.C. § 1414(b)(1) indicates a rather simple two-fold CRDP attainment with the VA disability offset:[32] a retiree

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[29] 10 U.S.C. § 1414(a)(2) ("In this section, the term 'qualifying service-connected disability' means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.").

[30] 10 U.S.C. § 1414(a)(1) ("[A] member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability . . . is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38. During the period beginning January 1, 2004, and ending on December 31, 2013, payment of retired pay to such a qualified retiree is subject to subsection (c)"); *see also* Sullivan, *The Military Divorce Handbook*, 673.

[31] *See Concurrent Retirement and Disability Pay (CRDP)*, Defense Finance and Accounting Service, *supra* note 28.

[32] VA waiver is also known as the "VA offset." Understanding the VA Waiver and Retired Pay/CRDP/CRSC Adjustments, Defense

must be classified as Chapter 61 retiree and have at least twenty (20) years of service.[33] 10 U.S.C. § 1414(b)(1). This understanding is further nurtured by the fact that retired pay and compensation under 10 U.S.C. § 1414(a) remains caveated "[s]ubject to subsection (b)" in due course. In addition, subsection (b) sets forth "special rules," indicative more than merely a statutory exception to subsection (a), but its own classification for Chapter 61 retirees:

> Career retirees.—The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under [10 U.S.C. § 1405, years of service], or at least 20 years of service computed under [10 U.S.C. § 12732, computation of years of service], at the time of the member's retirement is subject to reduction under sections [38 U.S.C. § 5304, preventing double dipping of military retirement pay and VA benefits] and [38 U.S.C. § 5305, allowing waiver for retired pay for VA disability payments to avoid double dipping], but only to the extent that the amount of the member's retired pay

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Finance and Accounting Service, https://www.dfas.mil/RetiredMilitary/disability%VA-Waiver-and-Retired-Pay-CRDP-CRSC#:~:text=The%20law%20requires%20that%20a,waiver%20(or%20VA%20offset) (last visited July 8, 2022).

[33] CRDP "includes" Chapter 61 servicemembers that reach the longevity retirement status stage of twenty (20) years, 10 U.S.C. § 1414(b)(1), and have a service-related disability rating of at least fifty percent (50%). 10 U.S.C. § 1414(a)(2). *See also* Sullivan, *The Military Divorce Handbook*, 673.

> under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

10 U.S.C. § 1414(b)(1). Ultimately, such a novel application of that code provision remained a key matter in contention at the July 6th *ore tenus* hearing, and the Court will address that contention in turn, *infra*.

III. DISCUSSION

This matter has simply limped on far too long, and, even when faced with delay after delay, Mr. Lott has failed to provide relevant information to this Court. Whether said failure to disclose was inadvertent or rather intended, the Court does not definitively know. The Court does, however, emphasize the complexities involved in this matter and that it did not have a relatively clear picture of relevant facts prior to receiving additional filings on July 1, 2022, five days before the final hearing on the matter. With every new piece of information, the equation changes. Despite an oral ruling on July 6, 2022, the Court now finds and orders that pursuant to 10 U.S.C. § 1414(b)(1), a relevant portion, if not all, of Defendant's CRDP is not disability pay despite technical classification of Chapter 61 status. The Court will address the actual division and CRDP owed to Ms. Lott herein, *infra*.

A. VA DISABILITY COMPENSATION, CHAPTER 61 STATUS, AND CRDP

The Court utilizes the following baseline in its final analysis:

First, Defendant certainly received VA disability compensation to be later eligible for CRDP. Defendant makes a clear proffer that "Mr. Lott received a 40% military disability rating along with a 100% Veterans Affairs disability rating." Def.'s Mot. to Recons., at *3 (Apr. 18, 2022).[34]

Second, evidence in the record demonstrates that Defendant was indeed medically retired under

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[34] In its July 12, 2021, Interlocutory Opinion and Order, the Court stated that "Exhibit A in Plaintiff's Supplement Brief shows that Defendant is not receiving a VA Waiver on his Retiree Account Statement." Order, 2021 WL 3931259, at *7. This finding was erroneous, as the Exhibit showed Defendant's VA waiver as $1,754.00. Def.'s Mot. Recons., Ex. A (Aug. 13, 2021). That evidence also indicates that both Mr. Lott's VA disability benefits and his CRDP benefits were awarded after he retired from the military. *Id.*

The Court again emphasizes how muddled the facts presented as the matter proceeded. It was clear early on that Defendant had a forty percent (40%) military disability rating. *See* Summary of Retired Pay Account from Retired Pay Department to Bill R. Lott 1 (January 20, 2015) (on file with the Court). At the March 12, 2020, hearing, however, Defendant claimed to be one-hundred percent (100%) disabled, now known to be his VA disability rating. While these ratings are not the same, *see* Sullivan, *Silent Partner Q&A - Military Disability Retired Pay*, at *2, only after the July 6, 2022, hearing did the Court have conclusive findings on said ratings.

Chapter 61 and was therefore receiving disability retirement pay as a result.[35] Defendant offers the Madden/Votaw DFAS Letters, both detailing the verbatim phrase: "CPO Lott retired on January 1, 2015, under retirement law 1201, with a military disability rating of 40 percent. This is also called Chapter 61 disability retirement."[36] Defendant also provided that on his "Certificate of Release or Discharge from Active Duty," narrative reasons for discharge read "Disability, Permanent" on Block 28 of that form. Def.'s Mot. to Recons., at *2 (Apr. 18, 2022) (on file with the Court).[37] The Court takes due weight from these filings, and beyond DFAS's clear written confirmation of Defendant's Chapter 61 status, the Court finds that Defendant: had a disability rating more than percent (30%); was a servicemember for twenty (20) years and twenty (20) days, excluding the

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[35] Defendant asserted his Chapter 61 status per his April 18, 2022, filing, and Plaintiff additionally does not dispute that Defendant is a Chapter 61 retiree. PL's Resp. and Brief to Def.'s Mot. to Recons., at *7 ("[Mr. Lott] retired as a Chapter 61 retiree. Given what the Defendant DD form 214 states, it appears as if that statement is correct.").

[36] Madden/Votaw DFAS Letters, *supra* note 3. The most recent letters from DFAS shed light on what Defendant was receiving and the methodology DFAS was utilizing to calculate Defendant's gross disposable income. The evidence provided indicates that Defendant received a permanent disability rating of forty percent (40%), and the "most favorable formula" entitled to him, between either longevity or disability, was the 10 U.S.C. § 1401(b) longevity formula. *Id*.

[37] *See Qualifying for a Disability Retirement*, Defense Finance and Accounting Service, *supra* note 23 (recognizing that with a 40% disability rating, Defendant would have to be placed on the PDRL).

end date; and was placed under permanent disability status. See 10 U.S.C. § 1201. Based upon the totality of these factors, the evidence demonstrates that Defendant was indeed medically retired under Chapter 61. See 10 U.S.C. §§ 1201(a), 1202, 1210(b)-(f), 1401(a)-(b).

Third, it remains clear upon the totality of the circumstances that Defendant currently receives CRDP, utilizing either metric of 10 U.S.C. § 1414(a)(1) or 10 U.S.C. § 1414(b)(1). Since its July 12, 2021, Interlocutory Opinion and Order, the Court has had additional time to reflect upon its finding that Defendant received CRDP. Through either newly attained or clarified information, the Court has been able to apply the correct statutory guidelines, despite lack of clarity in the law on this matter. Defendant's DFAS Retiree Account Statement ("RAS")[38] clearly includes: "YOUR CONCURRENT RETIREMENT DISABILITY PAY(CRDP) AMOUNT is $2,195.00." Pl.'s Resp. Def.'s Mot. Recons., Ex. D.[39] This finding is understood by the Court as based upon his retirement that exceeded twenty (20) years of active-duty service, in addition to one of the following two possibilities:

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[38] "Retiree Account Statement (RAS) is a two-page document issued by DFAS that summarizes your pay, benefits and deductions at a specific point in time. It is a description of what you can expect on the next pay date." *Retiree Account Statement*, Defense Finance and Accounting Service, https://www.dfas.mil/retiredmilitary/manage/ras/ (last visited on July 8, 2022).

[39] The Court additionally considers a letter from DFAS claiming Defendant's retirement pay as CRDP. *See* Order, 2021 WL 3931259, at *5 (citing Letter from D.J. Cloud-Steele, Paralegal Specialist, Defense Finance and Accounting Service, to Bill R. Lott (June 26, 2019) (on file with the Court)).

that he had one-hundred percent (100%) VA disability rating relevant under 10 U.S.C. § 1414(a)(1), or he was simply a Chapter 61 retiree relevant under 10 U.S.C. § 1414(b)(1). While the filings to date do not directly state which methodology was utilized by DFAS, the Madden/Votaw DFAS Letters indicate it was most likely the latter 10 U.S.C. § 1414(b)(1) classification, indicated by including specific "Chapter 61 disability retirement" status, but not his VA disability rating. See Madden/Votaw DFAS Letters, supra note 3. To that end, under a calculation for his CRDP, the Madden/Votaw Letters directly reference "Method B" calculations, referring to longevity retirement based upon the finding that Defendant received a permanent disability rating of forty percent (40%) and the "most favorable formula" was therefore the 10 U.S.C. § 1401(b) longevity formula.[40] *Id.* Further, there is a clear 38 U.S.C. § 5305 VA offset listed in the Madden/Votaw DFAS Letter, further indicating this retirement pay is CRDP. See Madden/Votaw DFAS Letters, supra note 3 ("CPO Lott's gross retired pay is $2,324, less his disability pay of $1,857, equals his disposable income of $467. His former spouse is entitled to 41 percent of his disposable pay ($467 x 0.41 = $191.47).").

In conclusion, based on this full assessment, Defendant: remains a Chapter 61 retiree; retired after twenty (20) years of active-duty service; has a forty percent (40%) disability rating; was receiving VA

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[40] *See Qualifying for a Disability Retirement*, Defense Finance and Accounting Service, *supra* note 23 (referencing "Method B" as retired pay calculable for years of service for both PDRL and TDRL).

disability compensation; and is now receiving CRDP. The division of his "disposable retirement pay" in turn remains the final issue in contention.

B. DIVISION OF "DISPOSABLE RETIREMENT PAY"

At the July 6, 2022, *ore* terms hearing, this Court initially believed that it did not have the ability to divide an amount of retired pay calculated based upon the Chapter 61 disability percentage, but only the longevity amount in excess. 10 U.S.C. § 1408(a)(4)(A)(iii).

The Court now comes to a different and final conclusion based upon 10 U.S.C. § 1414(b)(1).

I. PROHIBITIONS ON "DISPOSABLE RETIRED PAY"

The Court acknowledges these basic suppositions. This Court is bound by the USFSPA regarding "disposable retired pay" division. 10 U.S.C. § 1408(a)(4)(A), (c)(1). This Court may not divide "total retirement pay," see 10 U.S.C. § 1408(a)(4)(B)(i), but only "disposable retirement pay," 10 U.S.C. § 1408(a)(4)(A); Mansell, 490 U.S. at 588-89, 109 S. Ct. at 2026, 104 L. Ed. 2d 675. This Court must also not enforce any indemnification provisions of the PSA that allow a loophole for a former spouse to receive military retirement pay waived in lieu of disability compensation under *Mansell*, 490 U.S. at 589, 109 S. Ct. at 2028-29, 104 L.Ed.2d 675. See *id.*; *Howell*, 137 S. Ct. at 1405, 197 L.Ed.2d 781.

As Defendant argued *ore tenus* on July 6, 2022,[41] 10 U.S.C. § 1408(a)4)(A)(iii) remains the dispositive factor at bar, for that provision facially excludes the division of any Chapter 61 disability retirement pay allotment[42] so that Court is then only allowed to divide any possible longevity pay in excess of the disability pay presented.[43] The late introduction of Defendant's Chapter 61 status swayed this Court for a period of time, and the Court was originally in agreement with this finding on July 6, 2022, for the clear language of 10 U.S.C. § 1408(a)(4)(A)(iii) importantly reads:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which-[] in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the

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[41] Defendant's most recent July 1, 2022, brief also enumerates same and that Mr. Lott did not receive CRDP, then he would only receive his Disability retirement pay of $1857. CRDP restored Mr. Lott's retirement to what it would have been if he had retired due to longevity instead of disability, which allows him to receive $2324 instead of the $1857 that he would have been entitled to."). Def.'s Rebuttal Br., ¶ 3. (July 1, 2022).

[42] Whereas, for example, 10 U.S.C. § 1408(a)(4)(A)(ii) also excludes the division of any VA disability compensation.

[43] Noting that CRDP is generally divisible otherwise, as per this Court's July 12, 2021, Interlocutory Opinion and Order. Order, 2021 WL 3931259, at *7; *see also Comparing CRSC and CRDP*, Defense Finance and Accounting Service, https://www.dfas.mil/retiredmilitary/disability/comparison.html (last visited July 8, 2022).

> percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)[.]

10 U.S.C. § 1408(a)(4)(A)(iii) (omitted subsection indicator). Utilization of 10 U.S.C. § 1408(a)(4)(A)(iii) with Defendant's Chapter 61 status strongly indicates that his "disposable retirement pay" excludes any amount of disabled pay calculated, Id. This finding also remains the conclusion in the Madden/Votaw DFAS Letters, for DFAS excluded all disability pay indicated. See *supra* note 3.[44]

Further, the Court was compelled by the few cases it could find on the matter that indicated the very same: Chapter 61 disability pay derived is not divisible pursuant to 10 U.S.C. § 1408(a)(4)(A)(iii). See, e.g., *Chaidez v. Grant*, 252 Ariz. 578, 506 P.3d 807, 811 (Ariz. 2022) ("Even if the member opts to receive benefits calculated based on length of service, the member's disability-based amount is nevertheless excluded from 'disposable retired pay' under 10 U.S.C. § 1408(a)(4)(A)(iii)."); *Guerrero v. Guerrero*, 362 P.3d 432, 442 (Alaska 2021) ("Because Juan's military benefits consist entirely of Chapter 61 retirement and VA disability, the superior court did not err when concluding that none of Juan's military benefits were disposable retired pay."); *Brown v. Brown*, 260 So.3d

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[44] Madden/Votaw DFAS Letters, *supra* note 3. DFAS calculated Defendant's gross retired pay as $2,324.00; his disability pay as $1,857.00; his disposable income yielded $467.00 of divisible CRDP; and therefore, DFAS allocated forty-one percent (41%) of his "disposable retirement pay" as $191.47. *Id.*

851, 855-56 (Ala. Civ. App. 2018) (appearing to classify the husband as a Chapter 61 retiree, the Court found that the husband's TDRL benefits were not divisible per § 1408(a)(4)(A)(iii) when one-hundred percent (100%) of the retirement pay from the DFAS consisted of TDRL benefits); *Marriage of Tozer and Tozer*, 410 P.3d 835, 837, 2017 COA 151 (Colo. Ct. App. 2017) ("So, if a veteran's retired pay consists of Chapter 61 disability retirement, it is not disposable retired pay under the USFSPA, and thus is not subject to division as marital property."); *Selitsch v. Selitsch*, 492 S.W.3d 677, 686 (Tenn. Ct. App. 2015) (" The USFSPA precludes the percentage of retirement pay received under United States Code Title 10, Chapter 61, that is based on disability from being considered "disposable retired pay.") (citing 10 U.S.C. § 1408(a)(4)(C)).

2. THE MARCH 1ST CAB DECISION

On the other hand, Plaintiff cites to a recent CAB opinion that effectively found that 10 U.S.C. 1414(b)(1) allows a permissible division of disposable retirement pay under CRDP despite a Chapter 61 retiree status and Chapter 61 disability pay. See *In Re: [REDACTED] Claimant*, 2022 WL 1568835, at *6. The Court extensively took note, as Plaintiff ardently argued, that the facts of that case closely mirrored this one, for both claimants: are Chapter 61 retirees under 10 U.S.C. 1201; retired after twenty (20) years of active service; retired with permanent disability; were receiving VA disability compensation; and were then receiving CRDP.[45] Similar to the cases cited in Section

[45] The Court takes note one minor difference between these two

III.B.1. of this Opinion, supra, DFAS found that "when the member began receiving CRDP, he was essentially still receiving Chapter 61 disability retired pay which is not divisible under USFSPA pursuant to 10 U.S.C. § 1408(a)(4)(A)(iii)." *Id*. However, an opposite finding was issued by the three-member panel, wherein they stated:

> As a restoration of retired pay, CRDP is considered disposable retired pay under 10 U.S.C. § 1408, the USFSPA, and subject to the laws and regulations governing military retired pay. See DoDFMR, Volume 7B, Chapter 64, paragraph 640502. The express language contained in the CRDP statute specifically includes members who are retired under Chapter 61 with 20 years or more of service and defines the amount of CRDP they are entitled to receive as the amount of retired pay to which they would be entitled if they had not retired for disability. *Therefore, a member retired under Chapter 61, with more than 20 years of service, is no longer receiving Chapter 61 retired pay as calculated under 10 U.S.C. § 1201(b)(3); but is being paid CRDP based on the principles and calculations under 10 U.S.C. § 1414.* Thus, the exception to disposable retired pay contained in 10 U.S.C. § 1408(a)(4)(A)(iii) does not apply.

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cases: the claimant in the March 1st CAB opinion retired with one-hundred percent (100%) military disability and chose to have his retired base pay multiplied by the percentage of his disability, not longevity. *See In Re: [REDACTED] Claimant*, 2022 WL 1568835, at *2-3.

Id. (emphasis added). The Court was originally unconvinced of this rational on July 6, 2022, based upon the weight of the persuasive caselaw and seemingly clear language of 10 U.S.C. § 1408(a)(4)(A)(iii), hence its oral ruling then. This finding was further strengthened by the fact that while the Defense Office of Hearings and Appeals ("DOHA") Claims Appeals Board Decisions remains the final administrative decision in that single matter,[46] they state in the opinion that "DOHA does not have the authority to make policy determinations," id. at *3, and it should be further known that "the Board issues published decisions . . . which may be cited as precedent. An appeal decision has no value as precedent[,]" Frequently Asked Questions Claims Division, Defense Office of Hearings and Appeals, *supra* note 46.

3. DEFENDANT IS RECEIVING DIVISIBLE CRDP DESPITE CHAPTER 61 STATUS

The Court after further research and study agrees with the conclusion of the March 1st CAB opinion, based upon similar facts, that where Defendant retired with a Chapter 61 status with more than 20 years of active-duty service, per 10 U.S.C. 1414(b)(1), Defendant is now no longer actually

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[46] "The Board's decision on the request for reconsideration is the final Department of Defense action in the matter. No further review under DOHA's process is available." *Frequently Asked Questions Claims Division*, Defense Office of Hearings and Appeals, https://doha.ogc.osd.mil/CLAIMS-DIVISION/Frequently-Asked-Questions-Claims-Division/ (last visited July 8, 2022).

receiving a portion of Chapter 61 retired pay, but instead a portion of divisible and distributable CRDP under 10 U.S.C. § 1408.

This Court's finding is ultimately caveated on the statutory exception language included in subsections (b)(1) and (e)(4)(B).

First, 10 U.S.C. § 1414 dictates two specific means of calculating CRDP with subsections (a) and (b).[47] Subsection (a) details its own CRDP eligibility standards, but then begins with the phrase: "[s]ubject to subsection (b)," indicative of the exceptions wrought with Chapter 61 retirement status for CRDP restoration of retired pay. 10 U.S.C. § 1414(a)(1).

Subsection (b) then sets forth its own "Special Rules for Chapter 61 Disability Retirees[,]" and expounds in full:

> Career retirees.—The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under [10 U.S.C. § 1405, years of service], or at least 20 years of service computed under [10 U.S.C. § 12732, computation of years of service], at the time of the member's retirement is subject to reduction under sections [38 U.S.C. § 5304 preventing double dipping of

[47] The remaining subsections of 10 U.S.C. § 1414 deal not with payment eligibility, but the "phase in process" in subsection (c), and coordination with CRSC in subsection (d), and additional definitions in subsection (e).

> military retirement pay and VA benefits] and [38 U.S.C. § 5305 allowing waiver for retired pay for VA disability payments to avoid double dipping], but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

10 U.S.C. § 1414(b)(1) (emphasis added). The Court is tasked with interpreting the plain language of this code section,[48] and a situation emerges for a Chapter 61 retiree who has at least twenty (20) years of service before retirement: DFAS is to only reduce, per waiver to prevent double dipping, any amount of disability pay that a servicemember would receive beyond what they would have gotten if they just retired via

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[48] The Court recognizes that it must "search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *Smith v. Commonwealth*, 66 Va. App. 382, 389, 785 S.E.2d 500, 503 (2016) (quoting *Marshall v. Commonwealth*, 58 Va. App. 210, 215, 708 S.E.2d 253, 255 (2011)). Furthermore, "[t]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." *Id.* at 387, 785 S.E.2d at 502 (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)). Legislative intent therefore guides, "unless a literal construction would involve a manifest absurdity." *HCA Health Servs. of Virginia, Inc. v. Levin*, 260 Va. 215, 220, 530 S.E.2d 417, 420 (2000).

longevity alone. The Court is further convinced with the language "if the member had not been retired under chapter 61 of this title." Id. Subsection (b)(1), taken as a whole, therefore indicates, as the CAB opinion found, only the disability pay Defendant would have received in excess of his projected pure longevity retirement pay is then not considered Chapter 61 disability for purposes of 10 U.S.C. § 1408(a)(4)(A)(iii). That portion of pay that Defendant would have been receiving under longevity anyways, technically given under his Chapter 61 status, is therefore divisible CRDP considered disposable retired pay under 10 U.S.C. § 1408.

As the CAB opinion also indicated, see *In Re: [REDACTED] Claimant*, 2022 WL 1568835, at *7 n.3, additional language in 10 U.S.C. § 1414(e)(4)(B) clarifies the matter further:

> Applicable retired pay.- In subparagraph (A), the term "applicable retired pay" for a qualified retiree means the amount of monthly retired pay to which the qualified retiree is entitled, determined without regard to this section or sections 5304 and 5305 of title 38, except that in the case of such a retiree who was retired under chapter 61 of this title, such amount is the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

10 U.S.C. § 1414(e)(4)(B) (emphasis added). Subsection (e)(4)(B), further, makes direct note of excluding portions of pay that Defendant would have been receiving under longevity anyways, technically given under this Chapter 61 status, id., in the specific context of this Court's ability to permissibly divide "disposable retirement pay," 10 U.S.C. § 1408(a)(4)(A), pursuant to 10 U.S.C. §§ 1408(a)(4)(A), (c)(1).

Based on subsections (b)(1) and (e)(4)(B) of 10 U.S.C. § 1414, the Court agrees with the conclusion of the March 1st CAB opinion, based upon similar facts and circumstances, that where Defendant retired with Chapter 61 status with more than 20 years of active-duty service, per 10 U.S.C. 1414(b)(1), Defendant is now no longer actually receiving a portion of Chapter 61 retired pay, but instead divisible and distributable CRDP under 10 U.S.C. § 1408.[49]

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[49] The Court also considers the practical effect of this Court's interpretation of 10 U.S.C. § 1414(b)(1). *Mansell* found "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *See* 490 U.S. at 594-95, 109 S. Ct. at 2024, 104 L. Ed. 2d 675. The Court finds the rationality in the supposition that "disposable retirement pay" should include any measure of pay Defendant would have would have received if he had not been physically impaired and placed on the TDRL because it would have been Defendant's via longevity in any other case. Hence, 10 U.S.C. § 1414(b)(1) sets forth the exception of treating only the excess disability pay as actual disability pay.

The Court further considers additional reasoning from the March 1st CAB opinion: "We further note that if Congress had intended Chapter 61 disability retirees receiving CRDP to be exempt from the provisions of the USFSPA, Congress would have done so by clear direction in the statute, as Congress did for Combat-

Based upon most recent information provided in Mr. Lott's RAS,[50] Mr. Lott has a calculated CRDP of $2,195.00; this amount is divisible retirement longevity pay per 10 U.S.C. § 1414(b)(1); Ms. Lott is entitled to forty-one percent (41%) of: (1) that divisible retirement longevity pay (2) less Survivor Benefits Coverage ("SBP"), see supra note 13;[51] SBP coverage

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Related Special Compensation (CRSC) under 10 U.S.C. § 1413a. The CRSC statute, like the CRDP statute, contains special rules for Chapter 61 disability retirees. *See* 10 U.S.C. § 1413a(b)(3). However, subsection (g) of 10 U.S.C. § 1413a(g) specifically states that CRSC payments are not retired pay. *See also*, DoDFMR, Volume 7B, Chapter 63, paragraph 630101(C) (stating that CRSC is not retired pay and is not subject to the USFSPA relating to payment of retired pay in compliance with court orders). Unless the plain language of a statute clearly conflicts with its intent, we will construe a statute consistent with its explicit terms. *See* [71 Comp. Gen. 125 (1991)]; and [56 Comp. Gen. 943 (1977)]. In this case, the member retired under Chapter 61 and subsequently became entitled to receive CDRP. The restoration of his retired pay under the statute authorizing CRDP, 10 U.S.C. § 1414, is subject to division under the USFSPA. CRDP is a restoration of retired pay based on longevity, which is 20 years of service. It is divisible under the USFSPA. The USFSPA is consistent with the CRDP statute and the implementing regulations contained in Chapter 64 of Volume 7B of the DoDFMR. Any contrary interpretation would provide the member with an entitlement or benefit that was not explicitly authorized by Congress." *In Re: [REDACTED] Claimant*, 2022 WL 1568835, at *7.

[50] The Court recognizes a different amount in the Madden/Votaw DFAS letters, *see, supra* note 3, and relies upon the most recent RAS statement.

[51] 10 U.S.C. § 1408(a)(4) (deductions including previous overpayments and recoupments under subsection (a)(4)(A)(i); deductions from forfeitures under a court-martial or the VA disability/retirement pay waiver under (a)(4)(A)(ii); deductions

totals $142.77; therefore, Ms. Lott is entitled to 41% of $2052.23, which equals $841.41 per month.[52]

IV. ADDITIONAL ISSUES

A. SHOW CAUSE FOR NONPAYMENT

The Court now addresses the matter of Defendant's nonpayment of support, upon which was noticed with this Court on April 5, 2022. The Final Decree of Divorce entered December 6, 2018, in relevant part, required Defendant to pay Plaintiff the sum of (1) $600.00 per month for the support and maintenance of Plaintiff; (2) $831.89 for her marital share of Defendant's military retirement; and (3) $100.00 as payment of arrearages granted in the Final Decree. See Mot. for Show Cause Summons, Ex. A, at *3-4 (Dec. 6, 2018). Plaintiff subsequently filed multiple petitions for show cause rulings based on Defendant's continued nonpayment, the most recent of which states: "The Respondent is not abiding by this Court's Order by failing to pay to the Spousal Support as Ordered and has failed to make payments from September 2020 until the present for a total delinquent amount of $11,400.00 as of the date of filing this motion." Pl.'s Mot. to Show Cause, at *1 (Apr. 5, 2022). Plaintiff further seeks a finding of contempt against Defendant. *Id*.

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for Chapter 61 disability under (a)(4)(A)(iii); and deductions for "election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section[]" under (a)(4)(A)(iv)).

[52] *See* Pl.'s Resp. Def.'s Mot. Recons., Ex. D.

Taking the most recent calculation of nonpayment proffered by Plaintiff, the totality of the filings at bar, and evidence provided ore tenus, the Court finds that Defendant has not paid Plaintiff in the amount eleven-thousand four-hundred dollars ($11,400.00) in violation of the Final Divorce Decree.

The Court reserves a ruling of contempt following either: (1) the deadline to file an appeal has ended and neither party has perfected an appeal; or (2) the pendency of an appeal before the Virginia Court of Appeals.[53] "A trial court may hold a support obligor in contempt for failure to pay where such failure is based on unwillingness, not inability, to pay. Once nonpayment is established, the burden is on the obligor to provide justification for the failure to comply." *Barnhill v. Brooks*, 15 Va. App. 696, 704, 427 S.E.2d 209, 215, 9 Va. Law Rep. 869 (1993).[54] To that end, the Court acknowledges the vast complexities in this matter to date and therefore reserves any contempt ruling until an appellate court is given opportunity to rule.[55]

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[53] The Virginia Supreme Court has previously held that it nor the Court of Appeals may review a circuit court's decision *not* to hold a litigant in contempt. *See Jenkins v. Mehra*, 281 Va. 37, 50, 704 S.E.2d 577, 585 (2011).

[54] Necessarily then, the "inability to pay is a defense to a charge of contempt." *Street v. Street*, 24 Va. App. 14, 20, 480 S.E.2d 118, 121 (1997).

[55] Rule of the Supreme Court of Virginia 1:1B ("Rule 1:1B") establishes this Court's jurisdiction after any Notice of Appeal. Va. Sup. Ct. R. 1:1B. Particularly, subsection (a)(3) relates to any filed Notice of Appeal in that "the circuit court retains limited,

B. ATTORNEY'S FEES

"An award of attorney fees is discretionary with the court after considering the circumstances and equities of the entire case and is reviewable only for an abuse of discretion." Gamer v. Gamer, 16 Va. App. 335, 346, 429 S.E.2d 618, 626, 9 Va. Law Rep. 1320 (1993) (citing Ellington v. Ellington, 8 Va. App. 48, 58, 378 S.E.2d 626, 631, 5 Va. Law Rep. 2100 (1989)). In its decision to award attorney's fees, a court must consider reasonableness under the facts of the case under all the circumstances. See McGinnis v. McGinnis, 1 Va. App. 272, 277, 338 S.E.2d 159, 162 (1985). The Court finds that each party shall bear their own attorney's costs, considering the complexity of the law in this matter necessitated the prolonged duration.[56]

V. CONCLUSION

The Court again emphasizes that this is the Final Opinion and Order on the matters addressed herein, and the Court ORDERS and DIRECTS that:

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concurrent jurisdiction during the pendency of the appeal solely for the purposes of . . . *addressing motions to enforce a final judgment."* Va. Sup. Ct. R 1:1B(a)(3)(F) (emphasis added). Concurrent jurisdiction ultimately exists between this Court and the Court of Appeals, if an appeal is taken, in order to specifically enforce its rulings on orders for payments or arrearages herein. Va. Sup Ct. R. 1:1B(a)(3)(F).

[56] Failure to award attorney's fees is not an abuse of discretion where financial considerations are considered by the court. *Rowlee v. Rowlee*, 211 Va. 689, 690, 179 S.E.2d 461, 462 (1971).

1) Pursuant to 10 U.S.C. § 1414(b)(1), where Mr. Lott retired with Chapter 61 status with more than 20 years of service, Defendant is no longer actually receiving a portion of Chapter 61 retired pay, but instead divisible and distributable CRDP under 10 U.S.C. § 1408;

2) The Court is bound by divisibility measures in the PSA that dictates Plaintiff is entitled to forty-one percent (41%)[57] of Defendant's disposable military retirement pay, which is in this case remains: total retired pay less only the SBP premium attributable to coverage of the former spouse.[58]

3) Ms. Lott is now entitled to $841.41: forty-one percent (41%) of divisible retirement longevity CRDP, $2,195.00, less SBP coverage of $142.77;

4) Mr. Lott is to supplement, via check payable to Ms. Lott, any amounts owed to Ms. Lott if not paid directly from DFAS;[59]

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[57] *See* 10 U.S.C. § 1408(e)(1) ("The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.").

[58] *See* Sullivan, *The Military Divorce Handbook*, 761.

[59] *See* 10 U.S.C. § 1408(e)(6) ("Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable

5) Any amount of newly allotted divisible CRDP calculated per 10 U.S.C. § 1414(b)(1) in this case is ultimately not governed by *Howell*;

6) Defendant owes Plaintiff $11,400.00 in Spousal Support, ordered via its December 1, 2016, Final Decree of Divorce, but stays any Contempt Order until either the perfection of, or pendency of, an appeal, and reserves a ruling on any issue of nonpayment pending that stay;

7) Each party shall bear their own attorney's costs.

The Clerk is directed to mail attested copies of this Order to all interested parties, including DFAS.

ENTERED this 5th day of August, 2022

/s/ Gary A. Mills

Gary A. Mills, Judge

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retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.").

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 10th day of December, 2024.

WILLIAM R. LOTT, APPELLANT,

against

MARIA R. LOTT, APPELLEE.

Record No. 240218
Court of Appeals No. 1322-22-1

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellant to set aside the judgment rendered herein on October 29, 2024, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
Muriel-Theresa Pitney, Clerk
By: [signature]
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 29th day of October, 2024.

WILLIAM R. LOTT, APPELLANT,

against

MARIA R. LOTT, APPELLEE.

Record No. 240218
Court of Appeals No. 1322-22-1

FROM THE COURT OF APPEALS OF VIRGINIA

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
Muriel-Theresa Pitney, Clerk
By: [signature]
Deputy Clerk

IN THE
SUPREME COURT
OF VIRGINIA

COURT OF APPEALS RECORD No. 132222
CIRCUIT COURT DOCKET Nos. CL 1403206V-04,
CL 1703206V-99, CL 1903206V-99

WILLIAM R. LOTT, APPELLANT

v.

MARIA R. LOTT, APPELLEE.

PETITION FOR APPEAL

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U.S.C. §1408. [Issue preserved at R. 895, 896, 942, 970, 1313].

III. THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO STRIKE THE INDEMNIFICATION CLAUSE IN THE PARTIES' SEPARATION AGREEMENT, AS THE INDEMNIFICATION CLAUSE VIOLATES THE FEDERAL CODE AND CASE LAW. [Issue preserved at R. 898, 970, 975, 1314, 1316-1317).

IV. THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO ORDER DEFENDANT'S OVERPAYMENTS OF RETIREMENT BE RETURNED TO THE DEFENDANT BY PLAINTIFF. [Issue preserved at R. 943, 1314 I 1315 I 1316-1 317].

V. THE COURT OF APPEALS ERRED BY FINDING THAT THE APPELLANT HAD "WAIVED" ANY PORTION OF HIS RETIREMENT IN ORDER TO RECEIVE DISABILITY PAYMENTS, THUS REDUCING THE AMOUNT OF RETIREMENT THAT THE APPELLEE WAS ENTITLED TO, AS THE APPELLANT NEVER SIGNED ANY WAIVER TO RECEIVE VETERAN'S ADMINISTRATION DISABILITY, BECAUSE THE DISABILITY TO BE DEDUCTED FROM THE APPELLANT'S GROSS RETIREMENT IN ORDER TO CALCULATE THE APPELLANT'S DISPOSABLE RETIRED PAY" WAS DISABILITY PAY TO WHICH THE DEFENDANT WAS ENTITELD DUE TO HIS

TABLE OF AUTHORITIES

FEDERAL CASES

MATERIAL PROCEEDINGS IN THE TRIAL COURT

This appeal arises from a case in the Newport News Circuit Court. The matter originally came before the Circuit Court on May 4, 2017 on two post-trial Motions following the parties' divorce - first, a Motion to Show Cause by Appellee Maria V. Lott and next, a Motion to Establish Arrears and/or Credits was by Defendant William R. Lott on September 24, 2019. Both motions demanded a calculation of what had been paid, and what was owed to the Appellee by the Appellant.

On June 22, 2021, the Court heard evidence from both parties regarding the Appellant's payment amounts regarding retirement benefits and spousal support. The Court entered an Interlocutory Opinion and Order on July 12, 2021. The Appellant filed a Motion to Reconsider the Court's Interlocutory Opinion and Order on August 13, 2021. Later, at an *ore tenus* hearing on August 27, 2021, the Court clarified the Opinion and Order.

On April 13, 2022, Counsel for the Appellant submitted an additional Motion to Reconsider and Brief in Support on the issues of jurisdiction and federal preemption, arguing that the parties' Military Pension Division Order calculated the Appellant's obligation inaccurately, because it failed to use the lawful definition of "disposable retired pay" as it is given in The Former Spouses Protection Act. On July 6, 2022, the Court heard final argument on the show cause regarding retirement payments and gave a preliminary oral ruling that the Appellant's

interpretation of correctly calculating Appellant's "disposable retired pay" was accurate, and indicated, without actually calculating the overpayment of retirement benefits, that an overpayment was likely. Appellant requested at this hearing that the Court rule that the trial Court lacked jurisdiction to enter the Military Pension Division Order, because it used the incorrect definition of "disposable retired pay" to calculate his payment. Appellant requested that the trial court also strike the "indemnification clause" in the party's separation agreement and argued that once calculated, the Appellant's be credited any overpayments which were made under the threat of fine or imprisonment. At the July 6, 2022 hearing, an additional hearing was scheduled for October 12, 2022 for the parties to present information regarding the show cause for failure to pay spousal support and return for final disposition on the show cause regarding retirement and the Appellant's motion. On August 5, 2022 the Court entered its Final Order in the case, and removed the October 12, 2022 hearing from the docket, both over the objection of the Appellant.

The Appellant timely appealed to the Virginia Court of Appeals on September 1, 2022. Material changes to law and policy occurred during the pendency of the appeal before the Court of Appeals, including the Virginia Supreme Court decision, *Yourko v. Yourko*, _ Va. _ (March 30, 2023) (*Yourko II*) which overruled *Yourko v. Yourko*, 74 Va. App. 80 (2021) (*Yourko I*), and an update to the Department of Defense Financial Management Regulation (DoDFMR), Volume 78, Chapters 29 and 64. *Yourko II*

favors the Appellee's position, and the update to DoDFMR favors the Appellant's position.

The Virginia Court of Appeals affirmed in part, and reversed and remanded in part, on December 12, 2023. The Appellant filed a Petition for Rehearing by 3-judge panel or en bane on December 27, 2023, both of which were denied on January 16, 2024. This appeal follows.

STATEMENT OF FACTS

William R. Lott ("Appellant") and Maria V. Lott ("Appellee") were married on December 31, 1996 in Newport News, Virginia. (R. 740). They had one child together, William E. Lott, born April 23, 1998. *Id*. The parties separated with the intent to terminate the marriage on or about May 1, 2013. (R. 741). was an active-duty member of the United States Navy from December 12, 1994 until his honorable discharge on December 31, 2014. (R. 740-741). Appellant was determined to have a 100% service-connected disability, and he retired under Chapter 61 "Retirement or separation for physical disability." (R. 545, 1012).

The parties entered into a property settlement agreement ("Settlement Agreement") on September 27, 2014, pursuant to which Appellee was entitled to 41% of Appellant's "disposable military retirement pay." (R. 16). The Separation Agreement included, *inter alia*, the following language: "If the Husband is allowed to waive any portion of his retired pay in order to receive disability pay, then the Wife's portion of the Husband's disposable retired pay shall be computed

based on the amount that the Husband was to receive before any such waiver was allowed or occurred." *Id*. It also included an indemnification clause which stated, *inter alia*, that "The Husband shall pay to the Wife directly any sums necessary in order that the Wife will not suffer any reduction in the amount due her as a result of the Husband's waiver in order to receive disability pay." *Id*. The separation agreement also required the Appellant to pay to the Appellee Spousal support in the amount of $600 per month. (R. 14)

A Final Divorce Decree A Vinculo Matrimonii was entered on December 1, 2016. (R. 741). This was followed by a "Military Pension Division Order" on December 7, 2016 which "pursuant to paragraph titled 'Retirement Benefits' on page 4 of the Separation Agreement" awarded Appellee "forty-one percent (41%) of the value of Defendant's military pension benefits." (R. 294,741). The decree ordered the following:

> 6. Military Pension: That pursuant to paragraph titled "Retirement Benefits" on page 4 of the Separation Agreement dated the 27th day of September, 2014, attached hereto and made a part here as Exhibit "1", the Defendant's military pension benefits shall be divided in accordance with §20-107.3 (G) of the Code of Virginia, 1950, as amended, and the Plaintiff is awarded forty-one percent (41%) of the value of Defendant's military pension benefits, and that Defendant shall fully cooperate with Plaintiff in executing all documents

> necessary to effectuate the transfer of Plaintiffs 41% share of the Defendant's military pension benefits. (R. 299)

The Military Pension Division Order decreed, in pertinent part, as follows:

> **18. Amount of Payments:** Former Spouse is awarded Forty-one (41%) percent of Member's disposable military retired pay.
>
> […]
>
> **25. Definition of Military Retirement:** For the purposes of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied. For purposes of calculating the Former Spouse's share of the benefits awarded to her by the Court, the marital property interests of the Former Spouse shall also include a pro rata share of all amounts the Member actually or constructively waives or forfeits in any manner and for any reason or purpose, including, but not limited to, any waiver made in order to qualify for Veterans Administration or disability benefits. In also

includes a pro rata share of any sum taken by Member in lieu of or in addition to his disposable retired pay, including, but not limited to, exit bonuses, voluntary separation incentive pay (VSI), special separation benefit (SSB), or any other form of retirement benefits attributable to separation from military service. Such pro rata share shall be based on the same formula, percentage or amounts specified in this Order as applicable. In the event that DFAS will not pay the Former Spouse directly all or any portion of the benefits awarded to her herein, then Member shall be required to pay her directly in accordance with the terms and provisions set forth in this Order.

26. No Reduction to Former Spouse's Share: Without limiting the grant of continuing jurisdiction set forth hereinafter, the parties specifically consent to the Court retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Member should waive military retired pay in favor of disability compensation or take any other action (such as receipt of severance pay, bonuses or an early out payment) which reduces Former Spouse's share or amount herein. This retention of jurisdiction is to allow the Court to adjust the Former Spouse's share or amount to the pre-reduction level, to reconfigure the property division, and/or to award compensatory

> alimony or damages so as to carry out the original intent of the Court. (R. 321-322)

On January 1, 2015, Appellant began receiving retirement benefits pursuant to 10 U.S.C. §1414(b)(1) as a Chapter 61 retiree. (R. 545). According to a letter from the Defense Finance and Accounting Service (DFAS), on July 28, 2021, Appellant's received $441.00 as and for "Retiree's disposable income." By May 10, 2022, the Appellant's gross monthly retired pay was $2324, from which DFAS deducted $1857 for Appellant's entitlement to Chapter 61 disability, to arrive at a disposable retired pay of $467. (R. 953).

In its August 5, 2022 Final Order the Court calculated the forty-one percent (41%) of Appellant's retirement payment to be $841.41 a month, refusing to deduct any amount for the pay which the Appellant is entitled to due to his qualification as a Chapter 61 Retiree, using a different source of income than the DFAS letters. (R. 1040). The Court accepts Appellant's Chapter 61 disability retiree status, but found that the Appellant's receipt of Concurrent Retirement and Disability Pay (CRDP) qualified all of the Appellant's pay to be "retirement pay," and thus available for division by a state court through the party's separation agreement and Divorce decree. (R. 1012 and 1034). Appellant contends that the Court is mistaken in the qualification of these payments as "disposable retired pay"; the receipt of CRDP has no bearing at all on the calculation of the "disposable retired pay" which the Court has jurisdiction to divide, and the receipt of CRDP as disability pay is confirmed in the letter from Cloud-Steel which the Court references as a confirmation of the Appellant's receipt

of CRDP. (R. 621 and 1034.). The Court also ordered $11,400 to be in arrears for Spousal Support with each side bearing the cost of their own attorney's fees. (1042-1043).

ASSIGNMENTS OF ERROR

1. THE COURT OF APPEALS ERRED BY AFFIRMING AS "RIGHT-FOR-A-DIFFERENT-REASON" THE TRIAL COURT'S FAILURE TO USE THE DEFINITION OF "DISPOSABLE RETIRED PAY" AS DEFINED BY 10 U.S.C. §1408 TO DETERMINE THE AMOUNT THAT DEFENDANT SHOULD PAY TO PLAINTIFF AS AND FOR HER MARITAL PORTION OF THE DEFENDANT'S MILITARY RETIREMENT. [Issue preserved at R. 553,699, 892-893,894,895-896,941, 942, 1224, 1252, 1279-1280, 1297-1298, 1305, 1312, 1316-1317, 1320, 1331-1332, 1334].

2. THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO DECLARE THE PARTIES' MILITARY PENSION DIVISION ORDER VOID AB INITIO, AS THE ORDER EXCEEDED THE JURISDICTIONAL AUTHORITY BY PROVIDING A DEFINITION OF DISPOSABLE RETIRED PAY WHICH EXCEEDED THE COURT'S AUTHORITY CONFERRED BY 10 U.S.C. §1408. (Issue preserved at R. 895, 896, 942, 970, 1313].

3. THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO STRIKE THE INDEMNIFICATION CLAUSE IN THE PARTIES' SEPARATION AGREEMENT, AS

THE INDEMNIFICATION CLAUSE VIOLATES THE FEDERAL CODE AND CASE LAW. [Issue preserved at R. 898,970, 975, 1314, 1316-1317].

4. THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO ORDER DEFENDANT'S OVERPAYMENTS OF RETIREMENT BE RETURNED TO THE DEFENDANT BY PLAINTIFF. [Issue preserved at R. 943, 1314, 1315, 1316-1317].

5. THE COURT OF APPEALS ERRED BY FINDING THAT THE APPELLANT HAD "WAIVED" ANY PORTION OF HIS RETIREMENT IN ORDER TO RECEIVE DISABILITY PAYMENTS, THUS REDUCING THE AMOUNT OF RETIREMENT THAT THE APPELLEE WAS ENTITLED TO, AS THE APPELLANT NEVER SIGNED ANY WAIVER TO RECEIVE VETERAN'S ADMINISTRATION DISABILITY, BECAUSE THE DISABILITY TO BE DEDUCTED FROM THE APPELLANT'S GROSS RETIREMENT IN ORDER TO CALCULATE THE APPELLANT'S DISPOSABLE RETIRED PAY" WAS DISABILITY PAY TO WHICH THE DEFENDANT WAS ENTITELD DUE TO HIS RETIREMENT STATUS AS A CHAPTER 61 RETIREE, AND NOT DUE TO ANY WAIVER. [ISSUE PRESERVED THROUGH APPELLANT'S PETITION FOR REHEARING, FILED 12-26-2023].

6. THE COURT OF APPEALS ERRED BY FINDING THAT THE APPELLANT HAD THE ABILITY TO ASSIGN ANY PORTION OF HIS RETIREMENT PAYMENTS THROUGH A CONTRACT IN VIOLATION OF 38 U.S.C. § 5301 (a)(1). [ISSUE

PRESERVED THROUGH APPELLANT'S PETITION FOR REHEARING, FILED 12-26-2023].

ARGUMENT

ASSIGNMENT OF ERROR NUMBER ONE

THE COURT OF APPEALS ERRED BY AFFIRMING AS "RIGHT-FORA-DIFFERENT-REASON" THE TRIAL COURT'S FAILURE TO USE THE DEFINITION OF "DISPOSABLE RETIRED PAY" AS DEFINED BY 10 U.S.C. §1408 TO DETERMINE THE AMOUNT THAT DEFENDANT SHOULD PAY TO PLAINTIFF AS AND FOR HER MARITAL PORTION OF THE DEFENDANT'S MILITARY RETIREMENT.

Standard of Review

The question of interpretation of statutes is reviewed de nova. *Belew v. Commonwealth of Virginia*, 284 Va. 173 at 726 S.E.2d 257, 259 (2012).

10 U.S.C. §1408, or the Uniformed Services Former Spouses Protection Act (USFSPA), is a federal law which defines the circumstances and conditions under which a portion of military retirement benefits - referred to as "disposable retired pay" - of service members is divisible by state courts in divorce proceedings. *Mansell v. Mansell*, 490 U.S. 581, 584, 109 S.Ct. 2023, 2026, 104 L.Ed.2d 675 (1989). Specifically, 10 U.S.C. §1408(c)(1) states that a court only has jurisdiction to "treat *disposable retired pay*…either as property solely of the member or as property of the member and his spouse in accordance

with the law of the jurisdiction of such court." (emphasis added(

In the case of the Appellant, a retiree under Chapter 61 "Retirement or separation for physical disability", § 1408(a)(4)(A)(iii) defines their disposable retired pay as: "the total monthly retired pay to which a member is entitled less amounts…equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)."

On January 1, 2004 Congress passed legislation allowing service member retirees to receive both longevity and disability pay which is known as Concurrent Retirement and Disability Pay (CRDP). 10 U.S.C §1414. *Green v. Green*, 2020 OK CIV APP 12,471 P.3d 82, 83 (2020).

Applying the above law to the instant case, Appellant's USFSPA disposable retired pay can be calculated by deducting the amount given in the formula in §1408(a)(4)(A)(iii) from the payments he is receiving pursuant to the CRDP statute. This is the definition of Appellant's disposable retired pay required by federal law and is, thus, the one the Court should have used.

The Court, however, erroneously used a different definition and treated all of Appellant's retired pay as disposable retired pay ruling that the formula in §1408(a)(4)(A)(iii) did not apply in Appellant's case because he was receiving CRDP (R. 1016, 1018).

Relying on an incorrect and nonprecedential March 1, 2022 Defense Office of Hearings and Appeals (DOHA) Claims Appeals Board (hereinafter referred to as "C.A.B." or "the Board") decision, the Court stated:

> Based on subsections (b)(1) and (E)(4)(E) of 10 U.S.C. 1414, *the Court agrees with the conclusion of the March 1st C.A.B. opinion, based upon similar facts and circumstances*, that where Defendant retired with Chapter 61 status with more than 20 years of active-duty service, per 10 U.S.C. 1414(b)(1), Defendant is now no longer actually receiving a portion of *Chapter 61 retired pay*, but instead *divisible and distributable* CRDP under 10 U.S.C. 1408." (R. 1017-1018) (emphasis added)

The Court also quotes the following portion of the C.A.B. opinion which informed its decision:

> As a restoration of retired pay, CRDP is considered disposable retired pay under 10 U.S.C. 1408, the USFSPA, and subject to the laws and regulations governing military retired pay. See DoDFMR, Volume 78, Chapter 64, paragraph 640502. The express language contained in the CRDP statute specifically includes members who are retired under Chapter 61 with 20 years or more of service and defines the amount of CRDP they are entitled to receive as the amount of retired pay to which they would be entitled if they had not retired for disability. Therefore, a member retired

> under Chapter 61, with more than 20 years of service, is no longer receiving Chapter 61 retired pay as calculated under 10 U.S.C. 1201(b)(3)i but is being paid CRDP based on the principles and calculations under 10 U.S.C. 1414. Thus, the exception to disposable retired pay contained in 10 U.S.C. 1408(a)(4)(A)(iii) does not apply. C.A.B. March 1st decision as quoted by Court (R. 1016).

In the above passage quoted by the Court, the C.A.B. characterizes CRDP payments pursuant to 10 U.S.C. §1414(b)(1) as a "restoration of retired pay based on longevity, which is 20 years of service," and concludes that "As retired pay, it is divisible under the USFSPA." 2016-CL-091608.3 at 7. The Board reaches this conclusion by noting that under 10 U.S.C. §1414(b)(1) the calculation of the retired pay for Chapter 61 retirees now refers to "principles and calculations" under the CRDP statute itself, not to Chapter 61 as the C.A.B. seems to suppose is required by §1408(a)(4)(A)(iii). It concludes that, therefore, "the exception to disposable retired pay contained in 10 U.S.C. §1408(a)(4)(A)(iii) does not apply." Id at 7.

This reading is flawed as 10 U.S.C. §1408(a)(4)(A)(iii) is not an exception to calculating disposable retired pay, but is in fact the definition of disposable retired pay. Nowhere in the text of §1408(a)(4)(A)(iii) does it require that a specific statutory provision be the basis of computation of the actual retired pay received by the Chapter 61 retiree. §1408(a)(4)(A)(iii) refers to the computation of the *deduction* from retired pay to be made to determine

the disposable retired pay of Chapter 61 retirees. And this is done only for the purposes of the USFSPA *disposable retired pay* calculation, and-as noted earlier-is entirely unconcerned with how the total military retired pay is calculated or labelled. The court has confused two statutes with very different purposes. 10 U.S.C. §1408 is concerned with what portion of a retiree's pay the state court has jurisdiction to divide between spouses at a divorce. 10 U.S.C. §1414 is concerned with how to calculate and label a retiree's gross retirement pay

Chapter 61 retirees receiving CROP pursuant to 10 U.S.C. §1414(b)(1) receive it as Chapter 61 retirees, with § 1414(b) applying by its own terms to members "retired under chapter 61 of this title." The Court's misapplication of this law is shown when the Court concedes the point that §1414(b)(1) is an entitlement specific to active Chapter 61 retiree status stating in reference to § 1414(b)(1) that the "portion of pay that Defendant would have been receiving under longevity anyways, *technically given under his Chapter 61 status,* is therefore divisible CROP considered disposable retired pay under 10 U.S.C. §1408." (R. 1039) (emphasis added). In actuality, the portion the court is referring to here - the amount of longevity pay which is restored, above and beyond what the Appellant would have been entitled to under solely his Chapter 61 status - is the "disposable retired pay" of which the Appellee is entitled to 41%.

For Appellant and similarly situated retirees, the fact that their retired pay is now being calculated according to the CRDP statute as opposed to U.S.C. §1201(b)(3) (detailing how to calculate Disability

Retirement payments) does not prejudice their Chapter 61 retiree status under § 1408(a)(4)(A)(iii). Nothing in the text of the CROP statute changes their status as Chapter 61 retirees. And as such their USFSPA disposable retired pay continues to be calculated as specified for Chapter 61 retirees i.e. according to the formula specified in §1408(a)(4)(A)(iii). Any amount of retired pay received per the §1414(b)(1) calculation that is in excess of that specified by §1408(a)(4)(A)(iii) is disposable retired pay and any amount equal to or less is non-divisible exempt pay - which is exactly what the text of 10 U.S.C. §1408 specifies. Indeed, this is the established practice of Defense Finance and Accounting Services (DFAS) which breaks payments made pursuant to 10 U.S.C. §1414(b)(1) into disposable and non-disposable parts. (R. 848). The update that the DoDFMR made during the pendency of this Appeal also makes clear that a Chapter 61 Retiree's receipt of CRDP does not change the category of Disability compensation in any way to "restore" it back to being retirement pay, instead of disability pay. (Appellant's New Authority Letter, filed on May 18, 2023).

The reasoning behind this is easy to understand: Chapter 61 Disability Retirees have left service due to a physical impact on their body due to their service which has left them incapable of continuing to serve. While retirement benefits are generally considered divisible in a divorce no matter one's occupation, because the sacrifice of working that job was one born by the couple together, a payment for an injury to one's body is compensation for the loss of that body part or its use - a burden that no one bears except the actual service member. Congress has determined that

compensation for this burden should be specifically exempt from being accessible by a former spouse by writing the definition of "disposable retired pay" as they have. It should be noted that there is no other code section giving a different definition of "disposable retired pay" in the related U.S. Code, nor is there any other authority in the U.S. Code giving a state court authority to divide Concurrent Disability and Retirement Pay. The only authority that Congress bestows on state courts is that given in 10 U.S.C. §1408, discussed above.

In fact, pursuant to *Mansell,* only Congress can designate when a particular federal benefit is subject to state court process. *Mansell,* 490 U.S. at 584 (Congress must authorize the states to garnish or effect legal process over federal benefits). And, as the *Mansell* Court noted, when Congress does so, the grant is both "precise and limited". *Id.* at 588. See also, *Howell v. Howell,* 137 S. Ct. at 1404 (the USFSPA "provided a 'precise and limited' grant of power to divide federal military retirement pay.). Otherwise, the rule of absolute preemption still applies. *Id.,* citing *McCarty v. McCarty,* 453 U.S. 210, 224, 228 (1981). See also *Hillman v. Maretta,* 569 U.S. 483,491 (2013) (noting that "state laws 'governing the economic aspects of domestic relations ... must give way to clearly conflicting federal enactments.' *Ridgway v. Ridgway,* 454 U.S. 46, 55 (1981).").

Ridgway, supra, provides the most succinct yet comprehensive summary of Congress' authority on the scope and breadth of legislation concerning military affairs vis-a-vis state family law. Citing, inter

alia, *McCarty,* supra, and *Wissner v. Wissner,* 338 U.S. 655 (1950), 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 prevail. 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. *(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. Thus, the enumerated power of Congress in Article I to raise and

maintain the armed forces "is complete in itself'. *Torres v. Texas Dep't of Pub. Safety,* 142 S. Ct. 2455 (2022). This "power" includes providing the benefits to veterans after their service to the nation renders them disabled. *McCarty,* 453 U.S. at 232-33 (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 (1981); *United States v. O'Brien,* 391 U.S. 367,377 (1968) (also cited in *Torres,* supra).

The trial court was misled by the non-precedential C.A.B. decision, and based upon this erroneous definition of "disposable retired pay," the trial court calculated the Appellee's portion of the Appellant's retired pay incorrectly, using his entire retired pay, instead of disposable retired pay, which is the only pay that state court has jurisdiction to divide. This error is prejudicial to the Appellant because its use results in a sum which is astronomically higher than what he would be required to pay if the correct definition of disposable retired pay was used. Appellant prays that this Court will reverse the decision of the trial court on these grounds with instructions for the trial court to calculate the disposable retired income using the formula in 10 U.S.C. §1408, which would affirm the DFAS calculations presented by Appellant at trial.

ASSIGNMENT OF ERROR NUMBER TWO

THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO DECLARE THE PARTIES' MILITARY PENSION DIVISION ORDER VOID AB INITIO, AS THE ORDER EXCEEDED THE JURISDICTIONAL AUTHORITY BY PROVIDING A DEFINITION OF DISPOSABLE RETIRED PAY WHICH EXCEEDED THE COURT'S AUTHORITY CONFERRED BY 10 U.S.C. §1408.

Standard of Review

A de novo standard applies in appellate review when an assignment of error asserts that a final order of the court was void ab initio, raising questions solely of law. See *Collins v. Shepherd,* 274 Va. 390, 649 SE 2d 672, 675 (2007) citing *Janvier v. Arminio,* 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

An order is void *ab initio* when (1) entered without subject matter jurisdiction, (2) "if the character of the order is such that the court had no power to render it," or (3) if the procedure used by the court was not such that the court could "lawfully adopt." *Yourko I* at 97. "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 'transcends the power conferred by law.'" *Windsor v. McVeigh,* 93 U.S. 274,282 (1876).

In the area of divisibility of military retirement pay, federal law preempts state law, as the United

States Supreme Court has ruled in a long line of cases. *McCarty,* 453 U.S. at 232, *Mansell,* 490 U.S. at 591, *Howell,* 581 U.S. at 214. As such, any state court order that contradicts the applicable federal law, the USFSPA, 10 U.S.C. § 1408, is void. Such an invalid order can be attacked beyond the twenty-one- day cut-off period as it is void *ab initio. Yourko I,* 74 Va. App. at 92. The Va. Court of Appeals in *Yourko I,* following the precedent set by the U.S. Supreme Court in *Howell,* found that an order to reimburse a spouse for a waiver of military retired pay to receive disability pay in violation of 10 U.S.C. §1408 was void *ab initio. Id.* at 1405 (citing 38 U.S.C. § 5301 (a)(1) and ruling that state courts have no authority to vest these benefits in anyone other than the designated beneficiary) and *Torres*, 142 S. Ct. at 2460, 2464 (per Congress' enumerated military powers under Article I, the state surrendered all sovereignty and jurisdiction to meddle in matters of national military policy and may not obstruct federal military benefits legislation). The Virginia Supreme Court overruled the Court of Appeals in *Yourko II*, finding that an agreed indemnification clause would allow a state court to exercise jurisdiction over funds which would otherwise be outside of their subject matter jurisdiction through contract law. In this case, we are asking the Supreme Court to accept this petition in order to rectify Virginia precedent by correctly applying federal preemption to any pay outside of "disposable retired pay," following Mansell and Howell.

In the parties' December 7, 2016 Military Pension Division Order, the trial court specifically incorporated a calculation for pay to the Appellee

which was in direct contradiction to 10 U.S.C. §1408. (R. 320). In paragraph 25 of the order, titled "Definition of Military Retirement," it states, inter alia, that:

> For purposes of calculating the Former Spouse's share of the benefits awarded to her by the Court, the marital property interests of the Former Spouse shall also include a pro rata share of all amounts the Member actually or constructively waives or forfeits...including…any waiver made in order to qualify for Veterans Administration or disability benefits ... (R. 321-322)

This definition of "Military Retirement" is in direct opposition to the definition of disposable retired pay in 10 U.S.C. §1408. Specifically, for Chapter 61 retirees, a deduction from retired pay is made of the benefits they are entitled to under Chapter 61 to arrive at the disposable retired pay. 10 U.S.C. §1408(a)(4)(A)(iii). In addition to the federal code's definition of what can be divided by a state court in a divorce, 38 U.S.C. §5301(a)(1) provides that "disability benefits are generally nonassignable." *Howell,* 581 U.S. at 221, 137 S. Ct. at 1405. The order has the effect of dividing waived or disability pay between spouses, which is specifically not allowed by federal law. *Id.* The trial court's December 7, 2016 military division order is thus in violation of federal law and void *ab initio.* In fact, 38 U.S.C. § 5301 (a)(1) specifically prohibits the state from using *"any* legal of equitable process *whatever'* to divest the beneficiary of these restricted federal disability benefits "whether *before*

or *after* receipt by the beneficiary.") (emphasis added). Accord *Howell, supra.*

In fact, the order of the court is not only void due to the violation of federal law, but it also violates Va. Code § 20-107.3(G)(1), which states in pertinent part:

> The court may direct payment of a percentage of the marital share of any pension…or retirement benefits…. No such payment shall exceed 50 percent of the marital share of the cash benefits actually received by the party against whom such award is made…. Any determination of military retirement benefits shall be in accordance with the federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408 et seq.).

DFAS has applied the clear and unambiguous language of the USFSPA to the Appellant's military retired pay, most recently determining that the Appellant's total disposable retired pay is $467 (R. 1015). The total amount ordered to be paid by the trial court for the Appellee's marital portion of Appellant's retirement exceeds not only fifty percent (50%) of Appellant's disposable retired pay, but exceeds *the entirety* of his disposable retired pay.

This error is prejudicial to the Appellant because he is threatened with fines or jail based upon his noncompliance with this illegal order. The Appellant prays that this Court will reverse the trial court's decision on this matter, and remand the matter with instructions that a new Military Pension Division

Order be entered to accurately reflect the federal law, namely that the Appellee should be paid 41 % of the disposable retired pay of the Appellant, and nothing more.

ASSIGNMENT OF ERROR NUMBER THREE

THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO STRIKE THE INDEMNIFICATION CLAUSE IN THE PARTIES' SEPARATION AGREEMENT, AS THE INDEMNIFICATION CLAUSE VIOLATES THE FEDERAL CODE AND CASE LAW.

Standard of Review

The trial court's interpretation of the Separation Agreement and of federal statutes and applicable case law is reviewed de novo. *Perel v. Brannan,* 267 Va. 691, 594 SE 2d 899, 903 (2004) ("[W]e review the trial court's interpretation of covenants and other written documents de nova") citing *Wilson v. Holyfield,* 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984); *Yourko I,* 74 Va. App. at 866 S.E.2d at 591 (holding that assignments of error involving interpretation of federal and state statutes and case law to be reviewed de novo) citing *Eley v. Commonwealth,* 70 Va. App. 158, 12, 826 S.E.2d 321 (2019); *Commonwealth v. Greer,* 63 Va. App. 561, 568, 760 S.E.2d 132 (2014).

The Separation Agreement is a contract between the parties. Contracts are enforceable on their own terms, and must be interpreted only on the four corners of the document, except if the contract violates the law, in which case the contract would become

unenforceable. *Pocahontas Mining Ltd. Liab.* Co. *v. CNX Gas* Co., *Ltd. Liab.* Co., 276 Va. 346, 353-54, 666 S.E.2d 527, 531 (2008) ("When the writing, considered as a whole, is clear, unambiguous, and explicit, a court asked to interpret such a document should look no further than the four corners of the instrument.") citing *Virginia Elec. & Power Co.*, 270 Va. at 316, 618 S.E.2d at 326; *Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491,498,442 S.E.2d 669, 675 (1994); *Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319,325,321 S.E.2d 667,670 (1984); *Massie v. Dudley*, 173 Va. 42, 51, 3 S.E.2d 176, 180 (1939) ("In this State, we have followed the general rule that a contract made in violation of a statute is void"). The only exception is when the document itself allows for the striking of a term that is deemed illegal, allowing the rest of the contract to stand. See *Duggan v. Krevonick*, 169 Va. 57, 67, 192 S.E. 737, 740 (1937) (Contract provision, though void for uncertainty, is severable and thus does not render unenforceable the remainder of the contract).

38 U.S.C. § 5301 (a)(3) specifically prohibits any agreements for consideration in which a veteran beneficiary agrees to dispossess himself or herself of these funds. It provides, in pertinent part, as follows:

> [l]in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or

> dependency and indemnity compensation, as the case may be...such agreement shall be deemed to be an assignment and is prohibited.

The provision goes on to provide that "[a]ny agreement...prohibited under subparagraph (A)…is void from its inception." 38 U.S.C. § 5301 (a)(3)(C). The United States Supreme Court noted long ago that this provision is to be liberally construed "to protect the funds granted by the Congress for the maintenance and support of the beneficiaries thereof" and these benefits "should remain inviolate." *Porter v. Aetna Gas. Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (renumbered as currently at 38 U.S.C. § 5301).

The parties' Separation Agreement requires that if Appellant takes any action to waive portions of his retired pay, he must indemnify Appellee for those reductions (R. 16). This includes waivers of longevity pay in order to receive disability pay. *Id.* (Although the Appellant asks this Honorable Court to note that the disability pay that the Appellant has received was not due to a "waiver" in a later assignment of error.) This indemnification requirement is void as it is in direct violation of federal law which does not allow for the assignment of disability payments received in lieu of waived military retirement payments. *Howell*, 581 U.S. at 221 137 S. Ct. at 1405-1406 197 L.Ed.2d 781. In *Yourko I*, the Court of Appeals specifically forbade Virginia courts from issuing orders in contravention of *Howell*. *Yourko I* at 596 ("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*).

Appellant contends that the Court of Appeals was correct in this determination and that the Virginia Supreme Court's overturning of the Court of Appeals' decision in *Yourko I* does not address the existence of 38 U.S.C. §5301 at all. The parties' indemnity clause clearly violates this section, which prohibits such agreements and makes them void from inception. 38 U.S.C. § 5301 (a)(3)(A) and (C). See also *Foster v. Foster,* 505 Mich. 151, 172-173; 949 N.W.2d 102, 112-113 (2020) (holding that a consent judgment in which the former spouse acquired for consideration the right to receive an amount equivalent to what she would have received had the defendant veteran not waived retirement pay to receive disability benefits was an "impermissible 'assignment'" under 38 U.S.C. § 5301 (a)(3)(A).").

The parties' Separation Agreement has a severability clause allowing invalid portions to be struck on their own and the rest of the agreement to remain in effect. (R. 20). "A contract is either entire, meaning all its provisions are integral to the agreement of the parties, or severable." *Schuiling v. Harris,* 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013) citing *Eschner v. Eschner,* 146 Va. 417, 422, 131 S.E. 800, 802 (1926); accord *Budge v. Post,* 544 F.Supp. 370, 381-82 (N.D.Tex.1982). The intention of the parties determines whether a contract provision is severable, and it is a question of construction from the contract's language and subject matter. *Id* citing *Eschner,* 146 Va. at 422, 131 S.E. at 802.

The presence of a severability clause in the Separation Agreement indicates that the parties' contemplated the possibility that a provision in the agreement's might be deemed unenforceable. Given the subject matter of the contract - an extensive marital property division agreement with numerous items and provisions - it is clear that the parties' intended for the agreement to survive the presence of an unenforceable provision such as that of the indemnification clause, as evidenced by the severability clause's unambiguous wording. The Appellant prays that this Court will remand the case to the trial court with instructions that the court strike the indemnification clause and interpret the parties' separation agreement as if the illegal clause never existed.

ASSIGNMENT OF ERROR NUMBER FOUR

THE COURT OF APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO ORDER DEFENDANTS OVERPAYMENT OF RETIREMENT BE RETURNED TO THE DEFENDANT BY PLAINTIFF

Standard of Review

Questions of law are reviewed de novo. *Eure v. Norfolk Shipbuilding & Drydock,* 263 Va. 624, 561 SE 2d 663, 667 (2002) citing *Langman v. Alumni Assn of the Univ. of Va.,* 247 Va. 491,498,442 S.E.2d 669,674 (1994). As for questions of fact, the appeals court "will only reverse the finding of the trial court if it is plainly wrong or without evidence to support it." Id. citing *W.S. Carnes, Inc. v. Board of Supervisors,* 252 Va. 377,

385, 478 S.E.2d 295, 301 (1996). The trial court's failure to return the Appellant's property to him was a direct result of the erroneous interpretation of the federal statute defining "disposable retired pay," and erroneous action by the trial court to divide the parties' property. The trial court's error in calculation resulted in the court finding that Appellant was required to pay a much larger sum than allowed under federal law to the Appellee. The Appellant does not take issue with the facts found regarding the payments he made, only the court's erroneous interpretation of the law as it regards calculating what he owed.

At the hearing on June 17, 2019, the Court accepted the Appellant's facts as regards the payments made towards retirement and spousal support, resulting in the Court's finding that the Appellant was current on retirement payments and spousal support. (R. 1207). In actuality, at that point, the Appellant had overpaid the Appellee greatly, doing so in order to comply with illegal orders at the threat of fine or imprisonment. The benefits for which Appellant is eligible are outlined in what the Court cites as the MaddenNotaw DFAS letters. (R. 1013). These letters state Appellant's total monthly retirement as $2324. Pursuant to 10 U.S.C. §1408(a)(4)(A)(iii), the Chapter 61 amount is deducted from the retired pay, which yields a monthly disposable retired pay of $467. *Id*. Per the parties' Separation Agreement Appellee is entitled to 41% of this which comes out to $191.47. Thus DFAS has calculated Appellee's portion correctly by deducting eligibility for Chapter 61 payments in order arrive at

Appellant's disposable retired pay, as required by §1408(a)(4)(A)(iii)- the applicable law.

Given this, the trial court should have found that DFAS has been paying Appellee correctly all along, and all amounts above and beyond the amount which DFAS had calculated were forced by an illegal order. Any payments made by the Appellant under the duress of fine or imprisonment should have been returned to the Appellant by order of the trial court. In keeping with the parties' Separation Agreement, the Appellant's costs of court, attorneys' fees and interest should have been ordered to be paid by the Appellee as well. (R. 20). The Appellant prays this court will remand the matter with instructions for the trial court to apply the law as indicated in the previous assignments of error, and after the calculations of appropriate payments are made under the correct definition of "disposable retired pay," the Appellant prays the trial court will be instructed to order any overpayment made by the Appellant under threat of imprisonment or fine to be returned to the Appellant.

ASSIGNMENT OF ERROR NUMBER FIVE

THE COURT OF APPEALS ERRED BY FINDING THAT THE APPELLANT HAD "WAIVED" A PORTION OF HIS RETIREMENT IN ORDER TO RECEIVE VETERANS ADMINISTRATION DISABILITY PAYMENTS, THUS REDUCING THE AMOUNT OF RETIREMENT THAT THE APPELLEE WAS ENTITLED TO; THE APPELLANT NEVER SIGNED ANY WAIVER TO RECEIVE VETERAN'S ADMINISTRATION DISABILITY,

BECAUSE THE DISABILITY TO BE DEDUCTED FROM THE APPELLANT'S GROSS RETIREMENT IN ORDER TO CALCULATE THE APPELLANT'S "DISPOSABLE RETIRED PAY" WAS DISABILITY PAY TO WHICH THE DEFENDANT WAS ENTITELD DUE TO HIS RETIREMENT STATUS AS A CHAPTER 61 RETIREE, AND WAS NOT DUE TO ANY WAIVER.

Standard of Review

Questions of law are reviewed de nova. *Eure v. Norfolk Shipbuilding* & *Drydock,* 263 Va. 624, 561 SE 2d 663, 667 (2002) citing *Langman v. Alumni* Assn *of the Univ. of Va.,* 247 Va. 491, 498,442 S.E.2d 669,674 (1994). As for questions of fact, the appeals court "will only reverse the finding of the trial court if it is plainly wrong or without evidence to support it." Id. citing *W.S. Carnes, Inc. v. Board of Supervisors,* 252 Va. 377, 385, 478 S.E.2d 295, 301 (1996). In this matter, the Court of Appeals made a new finding of fact outside the findings made by the trial court that the Appellant was receiving VA Disability payments - a finding which is unsupported by the record. This error still resulted in an error of law as well, however, and therefore the fact is plainly wrong and without evidence, but even if it were correct, the Court has still erroneously applied that fact to the existing law, which should be reviewed de novo.

The Court of Appeals found that "[h]usband began receiving military retirement benefits on January 1, 2015. At that time, he elected to waive a portion of his retirement pay in order to receive tax-exempt disability pay for which he was eligible." *Lott*

v. Lott __ Va App. __ Record No. 1322-22-1 (Decided December 12, 2023). This is not a fact which was found by the trial court. The Court of Appeals baselessly assumes that the disability to which the Appellant is entitled is due to a waiver to receive VA disability, despite the trial court accepting the Appellant's Chapter 61 Disability Retiree status. (R. 1012). The Appellant's Chapter 61 Disability status is the only basis in the record for his receipt of disability payments. The Appellant maintains that the amount that should be deducted from his gross retirement is the amount that he is entitled to receive based upon his Chapter 61 retiree status. However, even if the court were correct regarding this fact, the Court would still be making an error of law, as any amount which is received by the Appellant due to payments waived in lieu of retirement to receive a Veterans' Affairs Disability payment is also exempt from the calculation of disposable retired pay under 10 U.S.C. §1408(a)(4)(A)(ii) ("The term disposable retired pay means the total monthly retired pay to which a member is entitled less amount which are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;"), which is discussed in detail in Assignment of Error Number One.

ASSIGNMENT OF ERROR NUMBER SIX

THE COURT OF APPEALS ERRED BY FINDING THAT THE APPELLANT HAD THE ABILITY TO ASSIGN ANY PORTION OF HIS RETIREMENT PAYMENTS THROUGH A CONTRACT IN VIOLATION OF 38 U.S.C. § 5301 (a)(1).

Standard of Review

The trial court's interpretation of the Separation Agreement and of federal statutes and applicable case law is reviewed de nova. *Perel v. Brannan,* 267 Va. 691, 594 SE 2d 899, 903 (2004)("[W]e review the trial court's interpretation of covenants and other written documents de novo") citing *Wilson v. Holyfield,* 227 Va. 184, 187-88, 313 S.E.2d 396,398 (1984);*Yourko I*, 74 Va. App. 80, 866 S.E.2d 588, 591 (2021) (holding that assignments of error involving interpretation of federal and state statutes and case law to be reviewed de novo) citing *Eley v. Commonwealth,* 70 Va. App. 158, 12,826 S.E.2d 321 (2019); *Commonwealth v. Greer,* 63 Va. App. 561, 568, 760 S.E.2d 132 (2014).

The Court of Appeals erred in their application of *Howell,* which error is most clearly stated on page five, which states as follows:

> In Howell, the Court further held that a court could not perform an end-run around the Act's requirements by ordering a veteran to indemnify their ex-spouse for any reduction in the ex-spouse's portion of the veteran's retirement pay because of a waiver. See Howell, 581 U.S. at 222. The Court did not address whether parties could independently agree to an indemnification provision in a property settlement agreement or other contract. See *Yourko II*, ___ Va. at ___.

The Court of Appeals recognizes that *Howell* is the most recent in a line of cases clarifying the duties and

powers of state courts as it relates to the division of federal benefits. However, in the same opinion the Court of Appeals fails to acknowledge that although *Howell* struck down a court order to indemnify, *Mansell,* an earlier case in the same line, strikes down an agreement to indemnify. *(Mansell* at 586, stating "Mrs. Mansell and Major Mansell entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits."). Despite this factual similarity between *Mansell* and *Lott,* the Court of Appeals ruled against the Appellant's request to strike the indemnification clause in the instant separation agreement.

The Appellant therefore prays that the Virginia Supreme Court will rectify this error by finding that the preemption doctrine applied in *Mansell* is equally applicable to the instant case, and strike the parties' indemnification clause.

CONCLUSION

Wherefore, the Appellant prays that the Virginia Supreme Court will reverse the Court of Appeal's finding of right-result-wrong-reason on both the Appellee's show cause and the Appellant's Motion to Establish Arrears and/or Credits. The Appellant acknowledges that should the Court agree with the Appellant in this case, the Court will need to overrule or distinguish its' own ruling in *Yourko II.* However, while *Yourko II* is the best justification for the state of domestic relations law as it relates to federal benefits

in Virginia, it made a distinction without a difference. *Yourko II* makes no mention of 38 U.S.C. §5301, nor does it discuss the fact that the Appellant in *Mansell* had an indemnification clause by agreement in a separation agreement, which was overruled on the same principles which are argued by the Appellant in this case. Federal law does not treat the receipt of disability through the VA or through Chapter 61 differently - both are deducted in order to reach the definition of disposable retired pay. State courts only have jurisdiction to divide disposable retired pay in the context of a domestic order such as a divorce decree. Because this is a jurisdictional power conveyed by Congress to give jurisdiction over an otherwise solely federal subject, that jurisdiction is strictly construed by the language of the statutes enumerating those powers. The separation agreement, divorce decree and MPDO in the Lotts' divorce all convey property rights to the Appellee that federal legislation and case law clearly preempt.

For these reasons, the trial court should have dismissed both the show cause for failure to pay military retirement benefits as well as the show cause for failure to pay spousal support, declared the parties' Military Pension Division order void, and ordered that any payments above 41 % of the correctly calculated disposable retired income be returned to the Appellant. The Appellant now asks that the Virginia Supreme Court remand the matter to the trial court with instructions to do the following:

1. Enter a new Military Pension Division Order which complies with the definition of disposable retired pay in 10 U.S.C. §1408;

2. Strike the indemnification clause from the parties' separation agreement, and make a new calculation of monies owed to the Appellant by the Appellee in order to correct the overpayment made by the Appellant to the Appellee for retirement benefits; and

3. Order that the Appellee repay to the Appellant any overpayment calculated on a schedule to be determined by the trial court.

Respectively Submitted,

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