STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff / Appellee,

v

RAY JAMES FOSTER

Defendant / Appellant / Counter-Plaintiff.

SCT Docket No.157705
COA Docket No. 324853
Circuit Court No. 07-15064-DM

APPELLANT'S REPLY TO APPELLE'S ANSWER PER MCR 7.305(E)

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INTRODUCTION

The United States Supreme Court has unanimously confirmed federal law *has always* preempted state courts from asserting jurisdiction or authority over veterans' benefits.[1] State courts may not now, and never could, require veterans to pay disability benefits to former spouses to satisfy marital property divisions in divorce proceedings. Decisions, including those in Michigan,[2] which had employed a variety of legal fictions to evade the federal mandate have been resoundingly abrogated.[3] By adhering to *Megee*, the Court of Appeals continues to defy federal

[1] *Howell v Howell*, 581 US ___; 137 S Ct 1400, 1404, 1405-1406; 197 L Ed 2d 781 (2017) (emphasizing that "*McCarty [v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981)], with its rule of federal preemption, *still applies*" and citing 38 USC 5301(a)(1) as the federal statute that prohibits state courts from exercising jurisdiction or authority over *any* veterans' benefits other than those explicitly allowed for by Congress. "State courts cannot 'vest' that which (under governing federal law) they *lack the authority to give*. Cf. 38 USC 5301(a)(1)." *Id*. at 1406. (emphasis added).

[2] *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010).

[3] The Court in *Howell* was compelled to declare federal law had always preempted state law in this particular subject matter because many state courts virtually ignored federal preemption after the Uniformed Services Former Spouses Protection Act (USFSPA) was passed in 1982. In that act, Congress excluded from this absolute preemption only a small portion of "disposable" military retirement benefits. See 10 USC 1408(c)(1). All other benefits remained off limits when it came to division of marital property. 10 USC 1408(a)(4)(A)(ii). Despite *McCarty's* cautioning that "States must tread with caution in this area, lest they disrupt the federal scheme," post-USFSPA, many state courts nonetheless saw the USFSPA as a complete rescission of this preexisting federal preemption. States then took liberties to craft workarounds to escape the federal prohibition that remained in place precluding state courts from forcing veterans to part with their non-disposable retirement and disability benefits. *McCarty*, 453 US at 223, n 16. See also 38 USC 5301(a)(1). Even after *Mansell v Mansell*, 490 US 581, 588-595; 109 S Ct 2023; 104 L Ed 2d 675 (1989), in which the Court confirmed that *McCarty's* rule of preemption *still applied*, and states could not divide anything other than *disposable* retired pay as defined in the USFSPA, a majority of states, including Michigan, continued to find ways to avoid federal law by enforcing "indemnity" agreements or "offsetting" awards. This was so despite the Court's repeated admonitions that "offsetting awards" were equally violative of the Supremacy Clause when they concerned the division of non-disposable benefits as marital property in divorce. *McCarty*, 435 US at 228, n 22.

law,[4] depriving Petitioner of his constitutional rights[5] in and personal entitlement to his federally protected benefits.[6]

In his initial appeal, Petitioner presented the exact arguments presented to the Supreme Court in *Howell*, and yet, the Court of Appeals ignored federal law. Even after the Supreme Court unanimously agreed with Petitioner's arguments, and after this Court vacated the Court of Appeals' judgment, the panel obstinately reprinted most of its original opinion, virtually ignoring this Court's command to reconsider Petitioner's case. The two derisory paragraphs the panel did add in feigning a response to that instruction merely reasserted *Megee* as controlling law and ruled that since Petitioner's benefits are not explicitly excluded from consideration by the USFSPA there was no pre-emption if the trial court did not specifically identify that these benefits were to be used to pay Respondent. The Court of Appeals ruled this way despite the fact that *Howell* directly

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[4] States that had previously strayed from the federal rule have begun to overrule their errant case law. *Brown v Brown*, 2018 Ala Civ App LEXIS 54 (2018); *In re Merrill* (*On Remand from the Arizona Supreme Court via Remand from the United States Supreme Court*) Ariz Sup Ct, Case No DR-1991-092542 (March 7, 2018); *In re Cassinelli, (On Remand from the United States Supreme Court)*, 2018 Cal App LEXIS 177 (2018); *In re Marriage of Tozer*, 410 P3d 835 (Colo App 2017); *Hurt v Jones-Hurt*, 233 Md App 610; 168 A3d 992 (2017); *Vlach v Vlach*, 2017 Tenn App LEXIS 717 (2017); *Roberts v Roberts*, 2018 Tenn App LEXIS 195 (2018); and *Berberich v Mattson*, 903 NW2d 233 (Minn Ct App 2017), *lv den* 2017 Minn LEXIS 694 (December 27, 2017). Of course, there are states that had always respected federal law. *Ryan v Ryan*, 257 Neb 682; 600 NW2d 739 (1999) (that part of trial court's order dividing veteran's non-disposable benefits in contravention of federal law was *void and subject to collateral attack* and principles of *res judicata* did not apply because the court never had jurisdiction to contravene the Supremacy Clause); *Youngbluth v Youngbluth*, 188 Vt 53, 70; 6 A 3d 677 (2010) ("[S]tate trial courts have *no jurisdiction over disability benefits received by a veteran*…[and] the court *may not do indirectly what it cannot do directly*") (emphasis added); and *Mallard v Burkart*, 95 So 3d 1264, 1273 (Miss 2012) ("Federal law preempts state law, thus *precluding* state courts from distributing military disability benefits to the nonmilitary spouse.").

[5] See, e.g., *Cushman v Shinseki*, 576 F 3d 1290, 1296-1297 (Fed Cir 2009) (veterans' benefits are constitutionally protected property rights).

[6] *Howell*, 137 S Ct at 1403 (citing *McCarty*, 453 US at 224, and describing "military retirement pay as a 'personal entitlement'").

addressed, and explicitly rejected, *Megee's* reasoning, holding that offsetting awards ordering the veteran to "reimburse" or "indemnify" the former spouse in anticipating any future reduction in the former spouse's share of disposable retired pay are and always have been prohibited, and that this absolute pre-emption applies to all disability pay and non-disposable retirement pay.[7] "All such orders are thus preempted".[8]

Petitioner's only income is non-disposable Combat Related Special Compensation (CRSC). Since this is disability pay and not retired pay, the trial court's judgment and orders are, and always have been, pre-empted by federal law.

Like the Court of Appeals' most recent opinion, the balance of Respondent's Answer is a virtual reprint of her answer to Petitioner's first application. As a result, Respondent does not address *Howell's* clear directives and ignores the effects of pre-emptive federal law on the trial court's judgment. The answer dismisses the primacy of federal law governing property divisions in state court divorce proceedings; ignores the jurisdictional bar springing from this pre-emption, which *prima facie* deprives state courts of authority to force veterans to part with their protected benefits and automatically voids that part of any judgment that so requires; and, astoundingly, like the Court of Appeals, declares with confidence that *Megee* is still good law, despite the Supreme Court's explicit rejection of *Megee's* reasoning.

Respondent's Answer can be divided into the follow arguments:

(1) Petitioner's Application is an untimely collateral attack on the 2008 judgment and all subsequent contempt orders and he should not be allowed to relitigate "*state law issues*".[9]

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[7] *Id*. at 1406.

[8] *Id*.

[9] Respondent's Answer, p 32 (emphasis added). In this same vein, Respondent also claims Petitioner's appeal is barred by law of the case. However, the doctrine only applies where an appellate court is presented with an issue of law already determined by a *prior appeal* in the same

(2) 38 USC 5301 cannot be asserted to interfere with Respondent's "vested" rights.[10]

(3) *Megee* controls this case and *Howell* does not prohibit state court orders that allow indemnity or offsets to the extent such orders do not explicitly identify non-disposable benefits.[11]

PETITIONER'S REPLY

1. A State Court Judgment is Void if the Subject Matter It Rules Upon is Preempted by Federal Law and Therefore the Judgment May Be Collaterally Attacked

This Court is not being asked to address "state law issues", but rather the federal question of whether federal law pre-empts state courts from forcing veterans to part with their federal benefits.[12] Such questions must be answered by reference to the prevailing opinions of the United States Supreme Court.[13] Moreover, where federal law pre-empts state law state courts lack subject-matter jurisdiction to enter a contrary ruling.[14] Where subject-matter jurisdiction is lacking, any judgments and orders entered in contravention of the prevailing federal law are void and subject to collateral attack, notwithstanding consent of the parties or the length of time that has passed

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case. *Grievance Adm'r v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). In any event, its application is discretionary and does not preclude a court from considering constitutional issues, which are certainly present here. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991).

[10] *Id*., p 35.

[11] *Id.*, pp 32, 36-38.

[12] *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994).

[13] *Id*.

[14] See, *inter alia*, *Arbuckle v GM LLC*, 499 Mich 521; 885 NW2d 232 (2015); *Henry v Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014); *Ryan v Brunswick Corp*, 454 Mich 20; 557 NW2d 541 (1997), abrogated as stated in *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002); *Town & Country Motors Inc v Local Union No 328*, 355 Mich 26; 94 NW2d 442 (1959).

since such judgments or orders were entered.[15] This "principle is but the necessary consequence of the Supremacy Clause of the National Constitution."[16]

Of course, in ordinary state cases, addressing ordinary state law issues, it is an ordinary proposition that a judgment may not be collaterally attacked. Volumes of Michigan cases so hold. Like the Court of Appeals, Respondent cited *Kosch v Kosch*, [17] a divorce case in which the Court of Appeals ruled that a party could not collaterally attack a trial court's earlier judgment even though the court had deviated from the formalities of a *state statute*. However, an exception to this rule exists where laws passed by Congress under its enumerated Article I powers pre-empt state law.[18] In such cases, the state court lacks subject-matter jurisdiction and the extent of its authority is limited by the prevailing federal rule.[19] The state court may not encroach upon the federal realm.[20] The very fact that it lacks jurisdiction over the subject matter means that its orders, to the extent they exceed its authority, are *void ab initio* and may be challenged at any time.[21]

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[15] *Henry*, 495 Mich at 287 n 82 ("preemption is a question of subject-matter jurisdiction"; "as such this Court must consider it"; and "preemption is a claim that the state court has no power to adjudicate the subject matter of the case").

[16] *Ridgway v Ridgway*, 454 US 46, 55; 102 S Ct 49; 70 L Ed 2d 39 (1981), citing US Const, Art VI, cl 2.

[17] 233 Mich App 346, 352-353; 592 NW2d 434 (1999).

[18] *Kalb v Feuerstein*, 308 US 433, 440 n 12; 60 S Ct 343; 84 L Ed 370 (1940).

[19] *Henry*, 495 Mich at 287 n 82. See also *Town & Country Motors Inc*, 355 Mich at 54-55 (state court judgments upholding laws preempted by Congress's Article I powers under the Commerce Clause could not stand and were therefore void).

[20] *Town & Country Motors Inc*, *supra*.

[21] *Kalb*, *supra*; *Henry*, *supra*.

Since providing veterans' benefits is a function reserved for Congress under Article I of the Constitution,[22] this case involves more than the ordinary jurisdiction of a state court presiding over divorce proceedings in which there are no constitutionally protected property rights. Here, the vitiating defect lies at the very heart of the state court's assumption of authority over a subject within the sole realm of Congress, premises deemed to be among the most respected of those within which Congress exercises its limited, but reserved powers.[23] "[P]erhaps in no other area has the Court accorded Congress greater deference."[24] As with all matters of federal preemption, where Congress acts in furtherance of its constitutional powers under Article I, state law must yield.[25]

Simply put, the state has no authority or jurisdiction over federally protected veterans' benefits. Since the Constitution first delegated to Congress the authority to provide for national defense, "Congress has directly and specifically legislated in the area" concerning the division of veterans' benefits as property.[26] The provisioning of these benefits has been deemed by the Court as "a legitimate one within the congressional powers over national defense".[27] Thus, "a state divorce

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[22] *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1950); *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Johnson v. Robison*, 415 U.S. 361, 376, 385; 94 S Ct 1160; 39 L Ed 2d 389 (1974); *McCarty*, 453 US at 236.

[23] *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981).

[24] *Rostker*, *supra*.

[25] *Ridgway*, 454 US at 55.

[26] *United States v Oregon*, 366 US at 649. See also *Mansell*, 490 US at 587.

[27] *Wissner*, 338 US at 660-661.

decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments."[28]

State law is and always has been preempted by federal law in this specific subject.[29] The Supreme Court has repeatedly recognized that while "[t]he whole subject of the domestic relations of husband and wife…belongs to the law of the States and not to the laws of the United States…the application [by state courts] of community property law conflicts with the federal military retirement scheme."[30] State law is overridden in these cases because to recognize state authority over these benefits does "major damage" to "clear and substantial federal interests."[31] The Court has reiterated this principle in each of its successive cases addressing state court jurisdiction over funds designated by Congress for the sole benefit of veterans.[32] And, in each instance, the Court has concluded state courts were preempted by pervasive federal laws protecting these benefits.[33]

In *Ridgway*, for example, the Court noted that "[n]otwithstanding the limited application of Federal law in the field of domestic relations generally, this Court even in that area, has not

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[28] *Ridgway*, 454 US at 55. See also *Hillman v Maretta*, 569 US 483, 491; 133 S Ct 1943; 186 L Ed 2d 43 (2013) (same).

[29] *McCarty*, 453 US at 220, citing *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979) and *In re Burris*, 136 US 586, 593-94; 10 S Ct 850; 34 L Ed 500 (1890). See also *Wissner*, 338 US at 660-661.

[30] *Id*.

[31] *Ridgway*, 454 US at 54.

[32] See, *inter alia*, *Wissner*, *supra*; *McCarty, supra*; *Ridgway, supra*; *Rose v Rose*, 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987); *Mansell, supra*; *Howell, supra*.

[33] *Howell*, 137 S Ct at 1404-1406. For a descriptive history of United States Supreme Court case law and Congressional provision of veterans' benefits legislation, its constitutional basis rooted in Congress's Article I "Military Powers", and consistent preemption of state attempts at disposition and diversion of such benefits as "property" to anyone other than the express beneficiaries, see *Morris v Shinseki*, 26 Vet App 494, 501-507 (2014).

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."[34] Pointing out that applicable federal law gave the servicemember the absolute right over his benefits, the Supreme 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."[35]

A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system."[36] "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."[37] "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[38] Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and subject to collateral attack.[39]

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[34] *Ridgway*, 454 US at 54.

[35] *Id*. at 54-55, citing *Free v Bland*, 369 US 663, 665; 82 S Ct 1089; 8 L Ed 2d 180 (1962).

[36] *Kalb*, 308 US at 440 n 12.

[37] *Id*. at 439.

[38] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (emphasis added).

[39] *Kalb*, *supra*.

"[S]tate courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept *as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds*."[40] Where a state court fails to honor federal rights and duties, the United States Supreme Court has "power over the state court to correct them *to the extent that they incorrectly adjudge federal rights.*"[41] Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments."[42]

Michigan follows, as it must. "[W]here congress have exercised a power over a particular subject given them by the Constitution, it is not competent for [the State] to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared as by what it has expressed"[43] In such cases, the "power of the State *ceases to exist*."[44] Justice Cooley observed that the Supremacy Clause requires "[a] State

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[40] *Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added).

[41] *Ridgway*, 454 US at 55 (emphasis added), citing *Herb v Pitcairn*, 324 US 117, 125-26; 65 S Ct 459; 89 L Ed 789 (1945).

[42] *Id*.

[43] *Petranek v Minneapolis, S P & SS M R Co*, 240 Mich 655, 660; 216 NW 467 (1927), citing *Houston v Moore*, 18 US 1; 5 L Ed 19 (1820).

[44] *Id*. (emphasis added), quoting *Erie R Co v New York*, 233 US 671, 681; 34 S Ct 756; 58 L Ed 1149 (1914).

law [to] yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision."[45]

This is why "the propriety of permitting collateral attacks [of federally pre-empted judgments] is premised upon the issue of subject-matter jurisdiction."[46] "[C]ourts…can only redress wrongs *within their jurisdiction*."[47] The term jurisdiction refers *both* to the authority a court has to hear and determine a case *and the power of the court to act*.[48] When a court is without jurisdiction of the subject matter, its subsequent acts are of no force and validity; they are void.[49] Thus, a judgment or order entered without jurisdiction may be challenged collaterally as well as directly.[50] Such a challenge can be raised at any time, even on appeal, and even after a case is concluded.[51] Defects in jurisdiction cannot be waived.[52]

It is important to point out that there are three jurisdictional defects that void a court's actions. There has been a tendency in some cases to oversimplify the inquiry and ask only whether a court

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[45] Cooley, Constitutional Law (1880), p 32.

[46] *In re Waite*, 188 Mich App 189, 196; 468 NW2d 912 (1991).

[47] *Cameron v Adams*, 31 Mich 426, 429 (1875) (CAMPBELL, J.) (emphasis added).

[48] *Waite*, 188 Mich App at 196-197, citing *State Highway Comm'r v Gulf Oil Corp*, 377 Mich 309, 312-313; 140 NW2d 500 (1966).

[49] *In re Hague*, 412 Mich 532, 544; 315 NW2d 524 (1982); *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965).

[50] *Shane v Hackney*, 341 Mich 91; 67 NW2d 256 (1954); *Attorney General v Ambassador Ins Co*, 166 Mich App 687, 696; 421 NW2d 271 (1988).

[51] *Henry*, 495 Mich at 287 n 82.

[52] *Travelers v Detroit Edison*, 465 Mich 185, 204; 631 NW2d 733 (2001) (citing *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992) and stating "[a] court either has, or does not have, subject-matter jurisdiction over a particular case.").

has subject matter jurisdiction and personal jurisdiction. If it is seen as having both, then its judgment and orders, even if wrong, cannot be collaterally attacked. At least, this is the facile iteration.[53] The more refined approach, which, as explained, is followed by Michigan despite the gross overgeneralizations, is that certain aspects of a judgment or order entered by a court that undoubtedly has general subject matter jurisdiction may still be unauthorized, and will, as a result, be considered *void ab initio*.[54] As recognized by this Court, federal preemption, which applies here, demonstrates this nuanced, but very substantive, distinction.[55]

"There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person *and the power or authority to render the particular judgment*."[56] "It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered *though the court may have had jurisdiction over the subject matter and the parties*."[57] If a judgment is, in part, beyond the

[53] See, e.g., *Dir of Workers Comp Agency v Macdonald's Indus Prods*, 305 Mich App 460, 477; 853 NW2d 467 (2014) (collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter").

[54] A proper, although perhaps less than clear, statement is found in *Bowie*, *supra* at 54. However, *Bowie* did not concern a question of federal preemption. Further, with approval, the Court cited *Ward v Hunter Machinery Co*, 263 Mich 445, 449; 248 NW 864 (1933), which, as explained herein, follows the more refined approach of requiring jurisdiction over person, subject matter (generally), *and* authority over the particular issue. And, in keeping with this tripartite inquiry, the Court recognized that the circuit court could not act beyond its authority despite having properly assumed jurisdiction over the case. *Id*.

[55] *Henry*, 495 Mich at 287 n 82.

[56] 1 Freeman, Judgments (5th ed) (1925) § 226, pp 444-445 (emphasis added).

[57] *Id*., § 354, p 733 (emphasis added).

power of the court to render, it is void as to the excess.[58] "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue."[59]

As noted, Michigan adheres to these three general jurisdictional elements, and thus, is in accord with the susceptibility to collateral attack of judgments rendered in contravention of the third element, to wit, judgments rendered on matters which are beyond the court's authority. Relying upon United States Supreme Court authority, this Court stated:

> It is a general rule that the judgment of a court having jurisdiction of the *subject-matter* and of the parties is, unless appealed from, final and conclusive. By jurisdiction is meant the authority which the court has to hear and determine a case. Jurisdiction lies at the foundation of all legal adjudications. The court must have [1] cognizance of the class of cases to which the one to be adjudicated belongs; [2] it must have jurisdiction of the parties, and [3] *the question decided must be within the issue*.[60]

In a case issued the very same term, Justice Potter, again, further explained:

> Jurisdiction, in its fullest sense, is not restricted to the subject-matter and the parties. If the court *lacks jurisdiction to render*, or *exceeds its jurisdiction in rendering*, the *particular judgment in the particular case*, such judgment is subject to collateral attack, *even though the court had jurisdiction of the parties and of the subject-matter*. The supreme court of the United States, the ultimate authority, has so ruled in *Windsor* v. *McVeigh*, 93 U.S. 274; *Ex Parte Rowland*, 104 U.S. 604; *Ex Parte Lange*, 18 Wall. (85 U.S.) 163.
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[58] *Ex Parte Rowland*, 104 US 604, 612; 26 L Ed 861 (1881) ("[I]f the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements." See also, Freeman, *supra*, § 226, p 443 ("[T]he court may strike from the judgment *any portion of it which is wholly void*.") (emphasis added).

[59] *Semmes v United States*, 91 US 21, 27; 23 L Ed 193 (1875). See also *Barney v Barney*, 216 Mich 224, 228; 184 NW 860 (1921) and *Koepke v Dyer*, 80 Mich 311, 312; 45 NW 143 (1890) (the latter cited in Freeman, *supra*, § 324, pp 648-649 (discussing the severability of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)).

[60] *Ward v Hunter Machine Co*, 263 Mich 445, 449; 248 NW 864 (1933) (POTTER, J.) (emphasis added), citing *Reynolds v Stockton*, 140 US 254; 11 S Ct 773; 35 L Ed 464 (1891).

> [I]t is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, *and does not transcend, in the extent or character of its judgment, the law which is applicable to it*.[61]

While *Driver* was an evenly split decision, the ruling was that the probate court had *statutory jurisdiction* to decide the matter and a *procedural irregularity*, i.e., failure to appoint a guardian *ad litem*, did not void the judgment and subject it to collateral attack. The case did not involve the state court's authority to pass upon an issue of controlling federal law.

Later cases in Michigan confirm the view expressed in both *Ward* and *Driver* concerning the efficacy of state court orders entered in excess of their authority.[62] This principle is followed where pre-emptive federal law controls the issue. State courts do not have jurisdiction, i.e., authority, to incorrectly adjudicate those issues.[63]

Regarding the exposure of such judgments to collateral attack, the Supreme Court has stated: "The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority…."[64]. In an earlier case, the Court stated of such judgments:

> [T]hey…form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings…. [T]he rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical

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[61] *Driver v Union Indus Trust & Savings Bank*, 264 Mich 42, 50-51; 249 NW 459 (1933) (POTTER, J.) (emphasis added) (some internal citations omitted).

[62] *Bowie*, 441 Mich at 54, citing *Ward*, *supra*.

[63] See, *inter alia*, *Henry*, 495 Mich at 287 n 82.

[64] *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876).

> court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States.[65]

This Court has stated its agreement with the limitations on a lower court's authority and jurisdiction over a particular subject and the inevitable consequence of a ruling made with respect to that subject which exceeds or is otherwise beyond the court's province.[66]

Two additional principles stem from this proper view of jurisdiction and of void judgments based on a lack thereof, and they respond directly to the Respondent's and Court of Appeals' flawed reasoning concerning collateral attack. First, parties cannot consent to exercise by a court of jurisdiction where it has none over the particular question.[67] "The jurisdiction of a court arises by law, not by the consent of the parties."[68] Justice Cooley spoke directly to whether one could consent to the judgment of a court which exceeds its authority in its rendering and said of such courts: "If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and the *rights of property cannot be divested by means of them*."[69] "[C]onsent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court *to act upon subjects which are not submitted to its determination and judgment by the law*."[70]

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[65] *Lessee of Hickey v Stewart*, 44 US (3 How) 750, 762; 11 L Ed 814 (1845). See also *In re Sawyer*, 124 US 200, 221-222; 8 S Ct 482; 31 L Ed 402 (1888); Freeman, *supra*, § 322, pp 643-645.

[66] *Ward*, 263 Mich at 449; *Driver*, 264 Mich at 51; *Bowie*, 441 Mich at 56.

[67] *Bowie*, *supra*.

[68] *Id*., citing *Straus v Barbee*, 262 Mich 113, 114; 247 NW 125 (1933). See also *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939) ("Jurisdiction cannot rest on waiver or consent.").

[69] Cooley, Constitutional Limitations (7th ed) (1903), p 575 (emphasis added).

[70] *Id*., p 575-576 (emphasis added).

> [W]here a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of *at any stage of the case*; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, *but a total want of power to act at all*…. [T]here can be no waiver of rights by laches in a case where consent would be altogether nugatory.[71]

Thus, Petitioner's "consent" to the 2008 judgment (which contained the federally preempted anticipatory language wherein Petitioner was to indemnify Respondent using his disability pay), and his "consent" to the subsequent contempt orders forcing him to indemnify or otherwise reimburse Respondent using these monies mean nothing because the state court, as confirmed by *Howell*, never had jurisdiction to enter a judgment that violated preexisting federal law.[72]

Moreover, in 2008, the controlling case law was the United States Supreme Court's decisions in *McCarty* and *Mansell*, which, when applied, as they must be,[73] absolutely preempted the language of the judgment purporting to require Petitioner to divest himself of his disability pay at some point in the future. *Megee*, with its errant reasoning, did not even exist and the USFSPA, as confirmed by *Mansell*, only gave state courts authority over *disposable* retired pay. Therefore, the state court had no jurisdiction to enter a judgment contrary to then-existing federal law.

Second, and directly to the point of post-judgment orders, where the original judgment of a court is void, subsequent orders dependent upon the ostensible legitimacy of the original order will

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[71] *Id*., p 576 (emphasis added).

[72] *Howell*, 137 S Ct at 1405 (stating "*McCarty* with its rule of preemption still applies.").

[73] *Brooks & Perkins*, 446 Mich at 276.

not be sustained.[74] "Where the order which is alleged to have been violated was made without jurisdiction, and required what the court had no right to require as a matter of legal authority, of course it has no force…."[75]

> Whether the court lacked power to act in the first instance by reason of its failure to acquire jurisdiction over the subject matter or the parties, or *having been invested with such power*, proceeded to make a determination outside or beyond the legitimate scope thereof, *the result is the same*. In either case, the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment. Hence, *though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightfully exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction…*. [76]

Therefore, the subsequent orders of the trial court, including the 2010 and 2014 contempt orders were themselves nullities because they were based on the original 2008 judgment which contravened then-existing preemptive federal law.[77]

"[T]he fundamental purpose of the Supremacy Clause is to establish the priority of federal rights '*whenever* they come into conflict with state law.'"[78] Undoubtedly, the circuit court in this case had jurisdiction over the general subject matter of Petitioner's and Respondent's divorce.

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[74] *Bowie*, 441 Mich at 57.

[75] *Haines v Haines*, 35 Mich 138, 143 (1876) (CAMPBELL, J). See also *Lessee of Hickey*, 44 US (3 How) at 762 and Freeman, *supra*, § 322, pp 643-645.

[76] Freeman, *supra*, § 354, pp 734-735 (emphasis added).

[77] *Howell*, 137 S Ct at 1405.

[78] Babich, The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose, 64 Admin L Rev 1 (Winter 2012), p 7 (emphasis added), quoting *Golden State Transit Corp v City of LA*, 493 US 103, 107; 110 S Ct 444; 107 L Ed 2d 420 (1989).

However, it had no jurisdiction, because it had no authority, to contravene federal law concerning the disposition of Petitioner's federally protected property rights.[79]

This Court has long held where federal law occupies the field and preempts state law, "[t]he State courts are without jurisdiction in the most elementary sense."[80] This Court continued:

> The order of the court being void for want of jurisdiction over the subject matter, we cannot remit to such court the fruitless task of ascertaining whether or not certain acts of the defendants constituted a "contempt" of the void order.[81]

Federal preemption implicates the question of subject matter jurisdiction.[82] Indeed, while state courts in Michigan have assumed jurisdiction to litigate disputes in which the issue of federal preemption has arisen, when such preemption is found to apply, the lower court is deemed not to have had authority to issue a contrary ruling.[83] In such cases, an inquiry must always be had of the jurisdiction of the court to exercise authority over the subject about which the issue turns.[84] Upon a determination that the lower court lacked such authority, the ruling is void and must be annulled.

As this Court has ruled on multiple occasions, where federal law preempts state law, state courts have no authority to enter a contravening judgment. To the extent that they do so, such judgments, and any orders based on such judgments, are of no effect and therefore void *ab initio*.

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[79] Freeman, *supra*, § 354, p 733 (stating "[i]t is very easy to conceive of judgments which, though entered in cases over which the court had undoubted jurisdiction, are void because they decided some questions which it had no power to decide, or granted some relief which it had no power to grant….").

[80] *Town & Country Motors Inc*, 355 Mich at 54-55.

[81] *Id*.

[82] *Henry*, 495 Mich at 287 n 82.

[83] *Id*.

[84] *Thompson v Whitman*, 85 US 457, 462; 21 L Ed 897 (1873). Accord *Henry*, *supra*.

As such, they can and must be subject to collateral attack. This Court has an obligation to follow Supreme Court precedent enunciating controlling federal law under the Supremacy Clause.[85] Where a state court enters an order that is preempted by such law, the only option is to void that part of the judgment that offends the Constitution.[86]

2. 38 USC 5301 is a Direct and Affirmative Expression of Congress's Article I Powers to Protect Veterans' Disability Benefits from Any Legal Process

Respondent continues to argue she had a "vested" right in Petitioner's benefits. However, 38 USC 5301 represents a direct, affirmative and independent expression of Congress's Article I powers to protect veterans' benefits from "any legal process" whatever.[87] The Court in *Howell* ruled this provision affirmatively protects a veteran's entitlement to benefits. In doing so, it directly answered Respondent's assertion that she had a "vested" right. "State courts *cannot 'vest'* that (which under governing federal law) *they lack authority to give*. Cf. 38 USC 5301(a)(1)."[88] Given this ruling, the 2008 judgment, and the subsequent contempt orders, cannot be sustained. As noted by the Court in both *Ridgway* and *McCarty* any "diversion [of veterans' benefits] as directed by the state court, of future payments to be received by the beneficiary would be a 'seizure' prohibited by the anti-attachment provision."[89]

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[85] *Brooks & Perkins*, 446 Mich at 276.

[86] *Henry*, 495 Mich at 287 n 82.

[87] 38 USC 5301(a)(1).

[88] *Howell*, 137 S Ct at 1405 (emphasis added).

[89] *Ridgway*, 454 US at 55; *McCarty*, 453 US at 228-229 and n 22.

Congressional enactments in pursuance of constitutional authority are the supreme law of the land.[90] The Supremacy Clause dictates this outcome "notwithstanding" state law to the contrary. "[T]his very clause was but an expression of the necessary meaning of the former [that the Constitution and laws made in pursuance thereof shall be supreme], introduced from abundant caution, to make its obligation more strongly felt by the state judges" and "it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution."[91]

3. Howell Directly Addressed and Rejected the Reasoning of Megee

The Supreme Court previously addressed *Megee*-type orders awarding indemnification or reimbursement, ruling that state courts could not circumvent the prohibition against distributing veterans' benefits by simply recharacterizing the award. "[E]ven if there was no explicit prohibition against 'anticipation'… the *injunction against attachment is not to be circumvented by the simple expedient of an offsetting award.*"[92] And, indeed, if this was not clear enough in 1981, the Court in *Howell* explicitly ruled that state courts are prohibited from issuing orders to "reimburse" or "indemnify" the former spouse for their losses, stating:

> The state cannot avoid [the prohibition against dividing disability pay] by describing the family court order as one that requires the former servicemember to 'reimburse' or 'indemnify'…. Such…orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.[93]

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[90] *Hines v Lowrey*, 305 US 85, 91; 59 S Ct 31; 83 L Ed 56 (1938).

[91] Story, Commentaries on the Constitution, vol II, § 1839, p 642 (3d ed) (1858).

[92] *McCarty*, 453 US at 228, n 22 (emphasis added).

[93] *Howell*, 137 S Ct at 1406.

This is an absolute rejection of *Megee*, which ruled that such orders were not preempted as long as they did not specifically identify protected veterans' benefits.[94] It is of no moment that the state court does not specifically identify the federal benefits in the order (although here the trial court did identify non-disposable disability pay). "An offsetting award…would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater."[95]

CONCLUSION

As confirmed by *Howell*, state courts have always been preempted by federal law from dividing veterans' disability benefits in marital property divisions upon divorce. Moreover, the Court held 38 USC 5301, presents a jurisdictional bar to state courts asserting any authority over funds protected by this provision. These benefits are a personal entitlement of the servicemember and state administration of marital property divisions must yield. In this specific subject matter, Congress, in the USFSPA, lifted this jurisdictional bar by giving state courts discretion to consider only a portion of disposable military retired pay.[96] All other veterans' benefits always were and remain off limits.

Michigan recognizes the principle that where federal law pre-empts state law, the state court has no jurisdiction to enter or enforce judgments or orders to the contrary. Where jurisdiction is lacking over the particular subject matter, the state court's judgments and orders may be attacked at any time. Where federal pre-emption is present, ordinary rules of state law concerning collateral

[94] *Megee*, 290 Mich App at 574-575.

[95] *Hisquierdo*, 439 US at 588.

[96] 10 USC 1408.

attack of judgments do not apply. Recognizing a rule of preclusion in these cases would itself be a direct affront to the Supremacy Clause.

Howell quelled the last ill-conceived, indeed unlawful, stratagem devised by recalcitrant state courts to defy federal law. Moreover, *Howell* confirmed that federal pre-emption in this area has always existed, because Congress, through its enumerated Military Powers and by operation of the Supremacy Clause, has always had primary authority and control to authorize and direct veterans' benefits even where contrary to state family and property law, notwithstanding that the state has traditionally been deemed to have reserved its powers in these subjects.

Specifically addressing *Megee*, it would be troubling indeed if interim state law in the form of the decision of a state court (and here only an intermediate appellate court with limited statutory powers), could subvert the supremacy of federal law expressed through the delegated powers of the national government. The mere statement of the proposition provides sufficient cause to refute it. A system that allows widely disparate disposition of the constitutional rights and entitlements of citizens, which are granted and protected by Congress's enumerated Article I powers, cannot be tolerated if the Constitution is, indeed, the Supreme Law of the Land. State courts that enter orders violating it must be "void". Otherwise, "the will of a small part of the United States may control or defeat the will of the whole."[97]

The only historical anomalies in the law were those wayward state courts, including Michigan, that chose to ignore the federal directive and craft ways around it. To be sure, at least half the states did this. But, the swell of defiance in this direction did not make these states any more correct, nor did it insulate their judgments and orders from collateral attack by those who seek to regain and restore to themselves their constitutional entitlements. The passage of time and the din of

[97] *Hauenstein v Lynham*, 100 US 483, 489; 25 L Ed 628 (1879).

dissension cannot erode the underlying structure guaranteeing the rights bestowed. Retroactive application is only so because the state courts strayed from the correct path in the first instance.[98] The *law* that preempted state courts *always applied*. State court judgments to the contrary were, of necessity, void from their inception. Restitution of Petitioner's rights is not only warranted but required. He cannot be permanently deprived of those constitutional property rights and entitlements for which he sacrificed so much.

It is no justification to say that because former spouses have been recipients of awards that state courts had no power to make, that such awards must be allowed to continue. No matter how appealing this "policy" argument may be, it would require state courts to disregard the rulings of the United States Supreme Court, which this Court has recognized it is not at liberty to do.[99] Indeed, the Supreme Court's statement that the trial court never had power to "vest" former servicemembers' benefits in anyone other than the designated beneficiary is an explicit recognition that such state court orders *could never have done this*. That the benefits to which Respondent was entitled was subject to future defeasance by virtue of federal law cannot be defeated by an anticipatory state court order that would later take effect to defeat that law.[100]

With the prior judgment erased by this Court's vacatur, and *Howell* directly stating that (1) federal law *always preempted* state law in this particular subject matter; (2) 38 USC 5301(a)(1) removed from the jurisdiction of state courts any authority to vest, or otherwise divert by anticipation, Petitioner's federally protected veterans' benefits; and (3) state courts have no

[98] Cooley, Constitutional Limitations, *supra*, pp 24-25, citing *Hauenstein*, *supra*.

[99] *Petranek*, 240 Mich at 660; *Brooks & Perkins*, 446 Mich at 276.

[100] *Howell*, 137 S Ct at 1405.

authority to either approve or craft "equitable" work arounds to this pre-emptive federal law, the slate is wiped clean to correctly adjudicate Petitioner's rights.

That part of the 2008 judgment that violated the federal law was void. Its propriety, as well as the contempt orders based upon it, may be challenged at any time. Respondent was never entitled to these monies. There is no act, voluntary or otherwise, whether it be Petitioner's purported agreement or a state court judgment, order of contempt, execution of arrest or imprisonment, that can obfuscate the clarity of prevailing federal law or defeat its natural consequence.

Petitioner respectfully requests this Court to reverse the Court of Appeals judgment, overrule *Megee*, and vacate the 2008 judgment, and all orders subsequent thereto, which required Petitioner to use, and continue to use, his non-disposable veterans' disability pay in a manner contrary to federal law. Petitioner also respectfully requests this Court order that he is entitled to restitution of the amounts he has overpaid to Respondent on the basis of the void judgment and orders.

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Dated: August 13, 2018