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 BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

Respectfully submitted by:

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STATEMENT OF JURISDICTION

Pursuant to MCR 7.305(H)(1), this Court has granted Appellant, Ray James Foster's Application for Leave to Appeal by order dated November 7, 2018 (App. 2a). Appellant appeals the March 22, 2018 Opinion of the Court of Appeals, *Foster v Foster (On Remand*), unpublished opinion per curiam of the Court of Appeals, issued March 22, 2018 (Docket No. 324853)) (App. 4a – 10a), which was issued after this Court's remand with specific instructions to consider the unanimous opinion by the United States Supreme Court in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017) (Slip Opinion reproduced at App. 12a – 23a).[1]

Appellant also appeals the March 14, 2018 order of the Court of Appeals denying Appellant's Motion for a Stay and Termination of Appearance Bond (App. 25a), because the trial court's enforcement and conditions for that bond (Appellant's continuing payments of his federal protected veterans' benefits) were an extra-jurisdictional act and beyond the state court's authority under prevailing state and federal law. See 38 USC 5301(a)(1) and (3)(C) (App. 27a – 29a).

For purposes of issue preservation and further appeal, Appellant also continues to challenge all the rulings of law and reasoning of the Court of Appeals in *Foster v Foster*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2016 (Docket No. 324853) (App. 31a – 35a), significant portions of which were reprinted in and explicitly made a part of the Court of Appeals opinion on remand despite this Court's November 15, 2017 Order vacating the totality of the Court of Appeals' original judgment (App 37a).

[1] For the Court's convenience and ease of reference, the slip opinion of the United States Supreme Court's unanimous decision in *Howell v Howell* is made a part of the appendix. The most relevant federal statutes are also reproduced and made a part of the appendix. Citations to these authorities are also provided as instructed by the Michigan Court rules and guidelines.

As a *prima facie* jurisdictional matter, this Court has long held where federal law preempts state law, as it absolutely does in this case, the courts of this state lack subject matter jurisdiction to enter an order contrary to the prevailing federal rule. See, *inter alia*, *Arbuckle v GM LLC*, 499 Mich 521, 532; 885 NW2d 232 (2015); *Henry v Laborers' Local 1191*, 495 Mich 260, 287 and n 82; 848 NW2d 130 (2014); *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997) (state courts are deprived of subject-matter jurisdiction where principles of federal preemption apply), 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, 54-55; 94 NW2d 442 (1959) (where federal preemption applies "State courts are without jurisdiction in the most elementary sense" and orders entered in contravention thereof are "*void* for want of jurisdiction over the subject matter") (emphasis added). This principle, which applies here, has a significant impact on the Court's jurisdictional orientation to this case, and especially with respect to the Court's question concerning the status of the Circuit Court's contempt orders, which were themselves based on a federally preempted, and therefore absolutely void judgment. Where subject-matter jurisdiction is lacking due to federal preemption, 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 since such judgments or orders were entered. *Henry*, 495 Mich at 287, n 82 ("preemption is a claim that the state court has *no power* to adjudicate the subject matter….") (emphasis added); *Town & Country*, *supra* (such orders "being void for want of jurisdiction over the subject matter, [this Court] *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*.") (emphasis added). See also discussion *infra* at pp. 33 to 39 and 46 to 49.

> Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, which "*invalidates* state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Co v Automated Med Labs, Inc*, 471 US 707, 712; 105 S Ct 2371; 85 L Ed 2d 714 (1985), quoting *Gibbons v Ogden*, 22 U.S. (9 Wheat) 1, 211; 6 L Ed 23 (1824). When a state law is preempted by federal law, the state law is "*without effect*." *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981).
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> [*Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014) (emphasis added).]

As the United States Supreme Court has stated:

> [S]tate courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept *as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds*.
>
> [*Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added).]

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.*" *Ridgway v Ridgway*, 454 US 46, 54; 102 S Ct 49; 70 L Ed 2d 39 (1981) (emphasis added), citing *Herb v Pitcairn*, 324 US 117, 125-26; 65 S Ct 459; 89 L Ed 789 (1945). Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id*. at 55, citing the Supremacy Clause, US Const, Art VI, cl 2. This principle applies directly to state court divorce decrees that contravene preemptive federal law. *Id*.

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." *Kalb v Feuerstein*, 308 US 433, 440, n 12; 60 S Ct 343; 84 L Ed 370, 375 (1940). "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." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added). 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. *Kalb*, *supra*.

In 2008, when the Circuit Court entered judgment in this case, the law was, and still is today, that state courts may not enter orders as part of a division of property in divorce proceedings which force veterans to part with any non-disposable veterans' disability benefits to which they are entitled. See generally, *McCarty v McCarty*, 453 US 210, 218-236; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Mansell v Mansell*, 490 US 581, 588-595; 109 S Ct 2023; 104 L Ed 2d 675 (1989); and *Howell*, 137 S Ct at 1400-1407 (App. 14a – 23a). The Uniformed Services Former Spouses Protection Act (USFSPA), 10 USC 1408 (App. 39a – 51a), as confirmed by the Court in *Howell*, *supra*, did nothing to change this preexisting, preemptive law. Indeed, the Court stated that "*McCarty*, with its rule of federal preemption, *still* applies." *Howell*, 137 S Ct at 1404 (App. 17a) (emphasis added).

McCarty held, of course, that federal law preempted state law concerning the disposition of non-divisible veterans' benefits as marital property in state court divorce proceedings. As part of a marital property settlement, the 2008 judgment required Appellant to part with non-disposable federal veterans' disability pay if he were ever to begin receiving such pay at some point in the

future (App. 56a – 57a, December 3, 2008 Divorce Judgment). This was an order in absolute contravention of the prevailing federal rule enunciated by *McCarty* (in 1981), the USFSPA (in 1982), *Mansell* (in 1989), and then, eventually, reiterated in *Howell* in 2017. In other words, the contents of this order have *always been* preempted by federal law. *Howell*, 137 S Ct at 1404-1405 (App. 19a). "The state court did not extinguish (and most likely would not have had the *legal power* to extinguish) that future contingency" that Appellant could exercise his right to receive his disability entitlement and that Appellee would lose her share. *Id*. (App. 19a – 20a).

Based on this errant, federally preempted order, the Circuit Court went on to enter subsequent orders, culminating in the 2014 contempt order (App 62a – 64a), *enforcing* that part of the preempted 2008 judgment that was violative of federal law, and thereby forcing Appellant to part with his non-disposable federal disability pay. One hundred percent of Appellant's federal veteran's income is non-disposable disability pay in the form of Combat Related Special Compensation (CRSC) under 10 USC 1413a (App. 66a – 68a). See also 10 USC 1413a(g) (stating CRSC is *not* retired pay). Since only *retired* pay is "disposable" and therefore "divisible" under the USFSPA, any state court order that allows or forces diversion of *any other* veterans' benefits (those benefits considered *non-disposable*, which include disability pay and, necessarily, CRSC pay, which is based on the servicemember's combat-incurred disability, is and always has been preempted by federal law because Congress has total and absolute authority over the designation and provision of veterans' benefits under Article I, section 8, clauses 12 through 13 of the U.S. Constitution. *Howell*, 137 S Ct at 1406 (App. 21a) (stating "[t]he 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.").

What this means is that the part of the 2008 judgment that was preempted by federal law did not lose its character as preempted because some interim state appellate court case, here *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), purported to justify it after the fact. To ignore this reality would be a legal, and indeed, jurisdictional impossibility. *Kalb v Feuerstein*, 308 US at 440, n 12.

So, as it is this Court's duty to consider first the question of the trial court's jurisdiction to have issued the orders that it has issued in contravention of federal law, Appellant would respectfully suggest that this Court must question the Circuit Court's jurisdiction to have ever entered an order violative of then existing preemptive federal law in the first instance. The end result is, as it has been confirmed many times in this state, the portion of the order violative of the federal rule is *void ab initio*. *Semmes v United States*, 91 US 21, 27; 23 L Ed 193, 195 (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, Judgments (5th ed) § 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)). It is an absolute nullity, and no consent to its entry, nor passage of time therefrom, can ever erase this jurisdictional defect. *Bowie v Arder*, 441 Mich 23, 54, 57; 490 NW2d 568 (1992). Appellant thoroughly explains this below and traces the authority for this proposition back to its origins in Michigan jurisprudence. There should be no doubt that an order (or such part of that order) preempted by federal law is void and may be attacked, challenged, and nullified at any time, even on appeal, indeed, even after the time for appeal has passed.

So, this Court's jurisdiction is to consider the original authority of the circuit court to have ever entered a judgment containing a provision that is (and always was) contrary to prevailing, preemptive, and supreme federal law. This Court is bound to follow preemptive federal law. *Betty*

v Brooks Perkins, 446 Mich 270, 276; 521 NW2d 518 (1994). The application of and absolute control by federal law over the subject matter of Appellant's federal veteran's benefits is a jurisdictional bar to the trial court's authority, and allows this Court to question, *sua sponte*, the trial court's jurisdiction to have ever entered the contravening order in the first instance.

QUESTIONS PRESENTED

This case returns from the Court of Appeals after remand on this Court's specific instructions that it consider the United States Supreme Court's unanimous decision in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017) (App. 12a – 23a), which held state courts are preempted by federal law from requiring a retired military servicemember to reimburse or indemnify his or her former spouse in a marital property division in divorce proceedings for any financial losses suffered by the former spouse resulting from the servicemember's post-judgment waiver of retired pay to receive veterans' disability benefits to which he or she is entitled.

In *Howell*, *supra*, the Court held that state courts had always been preempted from considering *any* veterans' benefits as divisible in marital property divisions in divorce proceedings except "disposable retired pay" as defined in the USFSPA, 10 USC 1408(a)(4), (c)(1) and (e)(1) (App. 39a – 44a). *Howell*, 137 S Ct at 1403-1406 (App. 14a – 15a and 21a). See also *McCarty v McCarty*, 453 US 210, 228-229 and n 22; 101 S Ct 2728; 69 L Ed 2d 589 (1981) and *Mansell v Mansell*, 490 US 581, 586-587, 595; 109 S Ct 2023; 104 L Ed 2d 675 (1989). In *Howell*, the Court held that this preexisting preemption applies to *all* veterans' disability benefits. *Howell*, *supra* at 1406 (App 21a).

The Court also held that state courts cannot enforce orders that seek to indemnify or reimburse the veteran's former spouse for the latter's loss of the veteran's military retired pay where the veteran is required by law to waive that pay to receive disability pay, stating "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Howell*, *supra* at 1406 (App. 21a). "All such orders are thus pre-empted." *Id*.

The Court also stated that per 38 USC 5301 (a)(1), state courts had no authority to "vest" these benefits in anyone other than the beneficiary, i.e., the veteran. (App. 20a).

In its November 7, 2018 Order (App. 2a), this Court has asked the parties to address the following issues, in addition to the issues that were raised in Appellant's Application for Leave to Appeal (After Remand), filed with this Court on May 3, 2018:

I.

Whether the principles set forth in *Howell*, *supra*, apply to combat-related special compensation (CRSC), 10 USC 1413a?

Appellant Answers: Yes. *Howell* ruled that the USFSPA forbade state courts from dividing anything other than "disposable retired pay", which is defined in the USFSPA, 10 USC 1408 (App 39a – 51a). CRSC is not disposable retired pay. Rather, it is special compensation based on a combat-related disability incurred by the veteran. Moreover, it is specifically *excluded* from consideration as divisible pay under the USFSPA because Congress explicitly stated it is not to be considered retired pay. See 10 USC 1413a(g) (App 67a). Only disposable retired pay is divisible. *Howell*, 137 S Ct at 1404 (App 16a – 17a). According to the Court, the USFSPA "provided a 'precise and limited grant of power [to the states] to divide federal military retirement pay.'" *Id*. (App. 17a), citing *Mansell*, 490 US at 589. All other pay, including disability pay, is unavailable for state court disposition as property in divorce proceedings. *Id*. Since *Howell* ruled that under the USFSPA only disposable retired pay can be divided by a state court, and no other veteran's benefits can be considered, CRSC cannot be considered as a divisible property asset in state court divorce proceedings.

Appellee Answers: No.

Court of Appeals (On Remand) Answers: No.

II.

If federal preemption enunciated in *Howell* applies to CRSC, does *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), remain good law? (App. 2a).

Appellant Answers: No. In *Megee*, the Court of Appeals held:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment…. Conceptually…*we are dividing waived retirement pay* in order to honor the terms and intent of the divorce judgment…. [T]he compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, *but it must be paid to avoid contempt of court*….

> [*Megee*, 290 Mich App at 566-567, 574-575 (emphasis added) (footnote omitted).]

In the instant case, the Court of Appeals ruled:

> *Megee* governs and dictates…. [T]he offset provision in the consent divorce judgment is fully enforceable through the trial court's contempt powers…. [A] state divorce court has the authority to divide waived retirement pay, which waiver had resulted from a veteran's decision to elect CRSC, so long as the court does not directly order payment from CRSC funds….
>
> [*Foster v Foster (On Remand)*, unpublished per curiam opinion of the Michigan Court of Appeals, issued March 22, 2018 (Docket No. 324853) (App. 8a)][2]

In its unanimous opinion, the Supreme Court in *Howell* directly addressed and rejected the *Megee*-type state court orders, holding state courts had always been preempted from enforcing orders that seek to increase the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver. *Howell*, 137 S Ct at 1406 (App. 14a – 15a; 20a – 21a).

The Court ruled that the states court not get around federal preemption prohibiting the division of disposable retired pay as property by approving of orders "requiring [the veteran] to 'reimburse' or to 'indemnify' [the former spouse]." *Id*. (App 20a). The Court continued:

> The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to postdivorce waiver…. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. *All* such orders are thus preempted.
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> [*Id*. (App. 20a – 21a (emphasis added).]

Appellee Answers: Yes.

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[2] Incidentally, even thought this Court vacated the original judgment and opinion of the Court of Appeals, it essentially reprinted its opinion and reasoning in its decision on remand from this Court. (See *Foster v Foster*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 13, 2016 (Docket No. 324853) (App. 31a – 35a)).

Court of Appeals Answers: Yes.

III.

Whether the Court of Appeals was correct in upholding the Dickinson Circuit Court's November 6, 2014 contempt order against defendant? (App. 2a).

Appellant Answers: No. A contempt order based on a judgment preempted by federal law is as void as the original judgment. This Court has long held that where federal law preempts state law, all orders entered in contravention of the federal rule are void for lack of subject matter jurisdiction. As the Supreme Court stated in *Howell*, a state court has no authority to vest that which it has no authority to give. *Howell*, 137 S Ct at 1405 (App. 20a), citing 38 USC 5301. The trial court could not enter an order holding defendant in contempt of an earlier order or judgment which was preempted by federal law. See *Town & Country Motors Inc v Local Union No 328*, 355 Mich 26, 54-55; 94 NW2d 442 (1959). There, this Court stated that where federal preemption applies "State courts are without jurisdiction in the most elementary sense" and orders entered in contravention thereof are "*void* for want of jurisdiction over the subject matter." (emphasis added). Such orders "being void for want of jurisdiction over the subject matter, [this Court] *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*." *Id*. (emphasis added).

Appellee Answers: Yes.

Court of Appeals Answers: Yes.

Additional questions presented to this Court in Appellant's original application for leave to appeal, and in his most recent application for leave to appeal, continue to be presented for this Court's review.

IV.

In *Mansell v Mansell*, 490 US 581, 587, n 6; 109 S Ct 2023; 104 L Ed 2d 675 (1989), because the Court held that the USFSPA preempted state courts from treating waived military retired pay as divisible property in divorce proceedings, the Court did not address whether 38 USC 3101 (later re-designated as 38 USC 5301) independently protected veterans' disability benefits from state court orders dividing marital assets.

If, as the Court of Appeals held, CRSC benefits are not within the scope of benefits excluded from state court consideration as marital property under the USFSPA and *Howell* (which Appellant does not concede and explicitly challenges), does 38 USC 5301 independently protect these funds from the jurisdiction and authority of state court orders that have the effect of forcing Appellant to pay them over to Appellee

as "reimbursement" or "indemnity" in enforcing a marital property settlement agreement?

Appellant Answers: Yes. The United States Supreme Court held in *Howell* that all military retired and disability pay is protected by federal preemption from consideration as a marital property asset in state court divorce proceedings, except that which is defined as disposable retired pay in the USFSPA. *Howell*, 137 S Ct at 1403-1406 (App. 17a, 19a – 21a). The Court noted that the protected benefits are personal entitlements intended to actually reach the beneficiary. *Id*. at 1403 (App. 15a). The Court further held that orders which effectively force the veteran to indemnify or reimburse the former spouse (even those orders that do not designate what benefits the veteran is to use to do so) are equally preempted. *Id*. at 1406 (App. 20a – 21a). As such, the Court ruled that per 38 USC 5301 state courts do not have authority to vest that which under governing federal law they lack the authority to give. *Id*. (App. 20a), citing 38 USC 5301 and stating "disability benefits are generally nonassignable." *Id*.

Appellant has argued from the beginning of this appeal in 2014 that federal law via 38 USC 5301 jurisdictionally bars state courts from ordering or otherwise asserting control over these funds to the detriment of the beneficiary, the veteran.[3] Since Appellant is 100 percent disabled and receives only disability benefits in the form of his CRSC entitlement, which he earned as a disabled combat veteran, 38 USC 5301 affirmatively protects these benefits from any state court diversion or disposition. Appellant has been using these non-disposable disability benefits to pay Appellee $1000 per month on the basis of a federally preempted state court

[3] Bafflingly, in both of its opinions, the Court of Appeals ruled that Appellant's arguments concerning 38 USC 5301were "*woefully undeveloped*" and had been waived. (App. 9a and App. 30a) (emphasis added). Aside from the fact that 38 USC 5301 presents a jurisdictional bar to a state court's attempt to exercise authority over federal veterans' benefits protected by this provision and thus a challenge to a state court order in contravention of this federal statute can be raised at any time, Appellant unequivocally raised these arguments in his original appeal pleadings; to wit, in the Docketing Statement filed with the Court of Appeals on April 2, 2015; in the Brief on Appeal in the first, second, and third questions presented, and in the first and second argument sections (see Brief on Appeal, filed July 1, 2015, Table of Contents, Argument and Analysis, section I and section II, page ii; Questions Presented I, II, and III, pages v and vi; Argument I, pages 5 through 8; and Argument II, pages 11 through 14. Appellant expounded upon these arguments in his Reply brief. See Appellant's Reply, filed November 3, 2015, pages 1 through 5, and footnote 1. In fact, in his original brief, Appellant even anticipated and directly addressed the ultimate reasoning of the Court of Appeals concerning the meaning of the language in this provision: "except to the extent specifically authorized by law". See Brief on Appeal, p. 13. In other words, the Court of Appeals substantive argument concerning 38 USC 5301, and its substantive conclusion as to why the statute did not apply, was anticipated and addressed in Appellant's principal brief! It is hard to believe that an argument is "woefully undeveloped" and "waived" when the Court of Appeals uses the precise counter-argument (albeit in error) to defeat the substantive claim.

judgment, one which has been confirmed to have been preempted by a unanimous united States Supreme Court opinion addressing the very questions presented by Appellant in his appeal. Not only was the state court barred from forcing Appellant to pay Appellee, but Appellant is entitled to recoupment of the monies which he has been unlawfully forced to part with.

Appellee Answers: No.

Court of Appeals Answers: No.

V.

The plain language of 38 USC 5301(a)(3)(C) prohibits any collateral arrangements from securing an obligation on an agreement by a veteran to pay non-disposable veterans' benefits protected by this statute to another. In addition, Michigan law provides that a "bond" and any security therefor, automatically terminates upon satisfaction of the condition upon which the bond is based, and the liability stated therein is extinguished. See *DeMyer v McGonegal*, 32 Mich 120, 126 (1875) (GRAVES, J.); *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996); *Barresi v Barresi*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 21, 2015 (Docket No. 319739), (App. 70a – 73a), citing *Bruwer*, *supra* and MCR 3.604(I)(1). A state court has no authority to change or otherwise modify the bond once it has been satisfied. *DeMyer*, *supra*; *Bruwer*, *supra*; *Barresi*, *supra*.

Pursuant to the Circuit Court's November 6, 2014 contempt order, Appellant has been paying his former spouse $1000 per month from his only source of income – non-disposable veterans' disability benefits. (App. 63a). Plaintiff has now paid $1000 per month for 55 months (**July 2014 through February 2019**), making the amount of his total payments to his former spouse $55,000. This is $20,602.07 more than the challenged arrearages of $34,397.93 stated in the Circuit Court's order. See *id*.

These payments are secured by an "appearance bond" in the amount of $9500 that had been posted on June 23, 2014, and which was secured with a lien on Appellant's mother's home. (App. 75a – 78a, Bond and Circuit Court Docket Entries). On July 30, 2014, Appellant's attorney filed an appearance and contested the contempt proceedings. *Id*. In other words, he satisfied the conditions of the original bond by appearing in the Dickinson County Circuit Court. Nonetheless, the Circuit Court subsequently denied a motion for a stay of payments pending Appellant's appeal and for termination of the bond, *sua sponte* changing the condition of the bond to be one securing Appellant's continued payments. (App. 80a, Circuit Court's Order Denying Stay, January 16, 2015); (App. 85a, Circuit Court Hearing Memorandum, March 19, 2015).

On February 26, 2018, as Appellant's case was on remand in the Court of Appeals, Appellant, who is also a Counter-Plaintiff in this action claiming recoupment and reimbursement, sought an immediate stay of enforcement of the Circuit Court's order forcing him to continue making these payments from his non-disposable disability pay. In this same motion, Appellant also sought nullification or termination of the "appearance" bond and to nullify the related lien. The Court of Appeals denied Appellant's motion. The questions presented related to these facts and circumstances are as follows:

Did the Court of Appeals err in denying Appellant's motion for a stay of his ongoing payments where Appellant has already paid more than the challenged arrearages, all of which has been proven to be unauthorized and unlawful because the order under which Appellant was required to make these payments is and has always been preempted by federal law under 38 USC 5301(a)(3)(C)?

Appellant Answers: Yes.

Appellee Answers: No.

Court of Appeals Answers: No.

VI.

Did the court of Appeals err in denying Appellant's motion to nullify or terminate the bond where he filed an appearance, thereby satisfying the condition of the bond, and where both federal statutory law, 38 USC 5301(a)(3)(C), and Michigan law prohibit the continuation of the bond and the lien securing it?

Appellant Answers: Yes.

Appellee Answers: No.

Court of Appeals Answers: No.

SUMMARY OF THE ARGUMENTS

Via Congress's Article I enumerated "Military Powers", [4] US Const Art I, sec 8, cls 11-13, federal laws vesting benefits in military servicemembers and veterans have always preempted state

[4] Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 Mil L Rev 50, 54 (1999) (stating while cases often refer to "war powers," when discussing military matters falling outside the domain of "war," it is analytically more accurate to speak in terms of "military powers,"

authority over disposition of such benefits as "property" in state court divorce proceedings. See, *inter alia*, *McCarty v McCarty*, 453 US 210, 218-220, and n 12; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981); *Wissner v Wissner*, 338 US 655, 658, 660-661; 70 S Ct 398; 94 L Ed 424 (1950). Congress retains absolute authority to direct the payment of these benefits to our nation's veterans as against a state's desire to appropriate them and divert them to other uses. *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961) ("Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…[to] veterans."); *Johnson v Robison*, 415 US 361, 376, 385; 94 S Ct 1160; 39 L Ed 2d 389 (1974). Congress has exercised legislative authority in these premises since the earliest days of the Republic. *See, e.g.*, *Hayburn's Case*, 2 US (Dall) 409, 1 L Ed 436, 2 Dall 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 Wash L Rev 227, 228 (1977); Waterstone, *Returning Veterans and Disability Law*, 85:3 Notre Dame L Rev 1081, 1084 (2010). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981). In *McCarty*, *supra*, the Court noted that the historical and legal basis for disallowing state courts to treat military benefits as "property" was federal supremacy, "which generally means that a state court *lacks subject matter jurisdiction* over uniquely federal programs, specifically military compensation schemes, *unless* Congress specifically confers such authority." See Kirchner, *Division of Military Retired Pay*, 43 Fam L Q 367, 371 (2009-2010).

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that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect).

In 1982, through the Uniformed Services Former Spouses Protection Act (USFSPA), 10 USC 1408, Congress lifted this absolute preemption with respect to only a portion of disposable retired pay; but this "grant of the power [to the states] to divide federal military retirement pay" was "*precise* and *limited*". *Howell*, 137 S Ct at 1404, citing *Mansell*, 490 US at 589. All other military benefits remain off limits as an available property asset in state court divorce proceedings. With respect these other benefits absolute preemption *still* applies. *Id*. (App. __a), citing *McCarty*, *supra*. See also White, *The Uniformed Services Former Spouses Protection Act: How Military Members are at the Mercy of Unrestrained State Courts*, 9 Roger Williams U L Rev 289, 293-297 (Fall 2003).

This includes the amount of military retired pay that is waived to receive military disability benefits, as well as the amount of the disability benefits themselves. Congress even anticipated the attempt by state courts to exercise unlawful authority over these benefits by the passage of anti-attachment provisions, the most recent of which is 38 USC 5301, which makes all such benefits off limits in state court proceedings through any type of legal process that may be utilized in an attempt to appropriate these benefits for the use and benefit of others. See, e.g., *Youngbluth v Youngbluth*, 188 Vt 53; 6 A 3d 677, 688-689 (Vt 2010), citing 38 USC 5301 and *King v King*, 149 Mich App 495, 500; 386 NW2d 562 (1986) and stating: "[S]tate trial courts have *no jurisdiction* over disability benefits received by a veteran…. We conclude *the court may not do indirectly what it cannot do directly*." (emphasis added). See also *Ryan v Ryan*, 257 Neb 682, 688-691; 600 NW2d 739 (Neb 1999) (military retirement benefits are not divisible marital property except to the extent permitted by the USFSPA and holding that any state court judgment or order that purports to divide *non-divisible* benefits are void for lack of jurisdiction and may be collaterally attacked at any time).

Concerning CRSC, a relatively new federal military benefit based on a servicemembers disability incurred during combat, Congress again anticipated that these funds may be pursued in state court divorce proceedings and thus specifically stated that CRSC benefits are not to be considered disposable retired pay. By definition, CRSC is "not retired pay". See 10 USC 1413a(g) (App 67a). As such, the provisions of the USFSPA that *allows* division of *disposable retired pay*, see 10 USC 1408(a)(4)(A), (c)(1) and (e) (App 39a – 44a), do not apply to CRSC pay. See also Department of Defense (DoD) Financial Regulations on CRSC, October 2017, Volume 7B, Chapter 63, § 630101(C)(1) (reproduced at App. 90a). Since *the only* type of pay that is divisible as property in a state court divorce proceeding under federal law is *disposable retired pay*, and since CRSC pay is *not considered retired pay at all*, then CRSC cannot be considered as a disposable property asset subject to partition with the veteran's former spouse in a state court divorce proceeding.

Finally, *directly* addressing those wayward state courts like *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), which had approved various means for getting around the absolute preemption of federal law, the United States Supreme Court made clear by way of its unanimous opinion in *Howell* that state courts may not force the veteran to "make up" or "reimburse" a former spouse's losses when the veteran waives disposable retirement pay, part of which the former spouse is entitled to under the USFSPA, to receive disability pay, an asset to which the former spouse is not entitled. As the Court reiterated, it makes no difference whether the state court designates that the money is to come from the veteran's non-disposable federal benefit (although, in this case the trial court's judgment *does require* Appellant to use his non-disposable disability pay to reimburse Appellee (App 56a – 57a)), the effect of such an order is the same – it unlawfully deprives the veteran of his or her entitlement in contravention of the preemptive federal law, which

requires that the veteran retain the value of his or her benefit. It means nothing to the veteran if the non-disposable benefit he or she receives can be diminished by the simple, but unlawful, convention of an offsetting award. Indeed, this method was rejected by the Court long ago. *McCarty*, 453 US at 228-229 and n 22. "All such orders are thus preempted." *Howell*, 137 S Ct at 1406 (App. 21a). Undersigned counsel submitted an *amicus curiae* brief on behalf of the national service organizations Veterans of Foreign Wars and Operation Firing for Effect which tracks the background and history of the preemption of federal law over state courts in this particular subject matter. (App 109a – 151a). The Supreme Court, in a unanimous opinion, agreed with every one of the arguments in that brief in the order in which they were presented. These were the exact same arguments presented in Appellant's originally lodged appeal in 2014.

It should also be noted that in this particular case, the original 2008 judgment (App 56a – 57a), contains language that has always been violative of preemptive federal law because it directly states that Appellant was to use his disability pay (which, under federal law, has always been non-disposable and therefore non-divisible as property in state court divorce proceedings) to make up the difference of Appellee's loss as a result of Appellant's receipt of this disability pay in lieu of disposable military retired pay, a portion of which under the USFSPA would be divisible. In other words, the 2008 judgment contained language that has always been a violation of federal law, and, when effectuated by enforcement under the state court's powers of contempt, also violated the anti-attachment provision, 38 USC 5301(a)(1).

The absolute preemption of federal law over state law in this particular area has always applied. The Court in *Howell* unanimously stated as much. The decision of the Michigan Court of Appeals in *Megee*, which sanctioned offsetting the former spouse's lost share through judgments or indemnification orders did nothing to change or otherwise remedy the already defective state court

judgment. Further, contrary to the Court of Appeals reasoning here, the Court in *Howell unanimously* ruled that it is irrelevant whether or not the state court order identifies disability pay as the source of the veteran's reimbursement obligation if it forces the veteran to access assets that would otherwise be available to him or her to satisfy the previous judgment or order. *Howell*, 137 S Ct at 1406 (App 20a – 21a).

CRSC benefits are off limits. *Megee*-type orders are and never were legitimate and thus *Megee* is not (and never was) good law. As this Court has always held that state courts have no jurisdiction to enter orders contrary to preemptive federal law, and since the 2008 judgment was just that , the subsequent contempt orders, being based on the original preempted judgment, present no hinderance to direct collateral attack on the legitimacy of the state court's actions. In addition, as Appellant has argued from the beginning, his federal veterans' disability benefits being off limits for consideration as "property" in marital property dispositions are jurisdictionally protected from all legal process in state court proceedings by the absolute prohibition of 38 USC 5301(a)(1). A state court cannot allow their seizure, cannot force their payment through any legal process whatever, whether they are received by the beneficiary before or after the purported exercise of state process over them. Any such orders that purport to do otherwise orders are void *ab initio*. This means that not only does Appellant not have to pay these sums going forward, he has a right to recoupment of the amounts he has paid in excess of his legal obligation.

SUMMARY OF THE CASE

Appellant, Sergeant First Class (SFC) (retired) Ray J. Foster, is a veteran of the Iraq war who served two tours of duty as a combat infantry platoon leader (November 2003 to April 2004 and November 2005 to November 2006) (App. 153a – 154a, Appellant's US Army DD214) On September 30, 2007, he retired after 22 years and five months of active duty service. *Id*. He was

awarded the Purple Heart and Bronze Star medals, among others, for his injuries and actions while serving as a platoon leader of his infantry unit. *Id*.

He suffered injuries as the result of an improvised explosive device ("IED") attack on his convoy (App. 156a – 159a, VA Medical Records – Evidence of Injury and Condition). His injuries included traumatic brain injury ("TBI"), back and leg injuries, and other physical and mental injuries. *Id.* Appellant also suffers from severe post-traumatic stress syndrome ("PTSD"). *Id*.

Due to his service-connected injuries, Appellant is classified as a 100-percent disabled, 100-percent unemployable veteran. As his injuries were incurred during combat, Appellant qualified for and was awarded Combat-Related Special Compensation ("CRSC") under 10 USC 1413a, retroactive to 2007 (App. 161a – 162a, CRSC Benefits Award Letters).

After retirement, Appellant and Appellee were divorced. On December 3, 2008 a judgment of divorce was entered that required Appellant to pay Appellee 50% of his military retired pay as part of a Property Settlement. (App. 56a – 57a). The order stated, in pertinent part, as follows:

> If [Appellant] *should ever become disabled*, either partially or in whole, then [Appellee's] share of [Appellant's] entitlement shall be calculated *as if [Appellant] had not become disabled*. [Appellant] shall be responsible to pay, directly to [Appellee], *the sum to which she would be entitled if [Appellant] had not become disabled*. [Appellant] shall pay this sum to [Appellee] out of his own pocket and earnings, *whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to* [Appellee]. If the military merely reduces, but does not entirely stop, direct payment to [Appellee], [Appellant] shall be responsible to pay directly to [Appellee] any decrease in pay that [Appellee] should have been awarded had [Appellant] not become disabled, together with any Cost of Living increases that [Appellee] would have received had [Appellant] not become disabled. Failure of [Appellant] to pay these amounts is *punishable through all contempt powers of the Court*.
>
> [*Id*. (emphasis added).]

In January of 2009, the Defense Finance and Accounting Service ("DFAS") notified Appellant that it was paying Appellee her share of his disposable retired pay under USFSPA, 10 USC 1408

(App. 164a, Letter to Appellant Notifying of DFAS Payments to Appellee, January 27, 2009). At this time, Appellee was receiving $811.62 per month, which represented 50% of Appellant's disposable military retired pay (App. 63a, November 6, 2014 Order).

In February of 2010, Appellee began receiving only $212.00 from DFAS. In April 2010, DFAS notified Appellee that because of Appellant's waiver of military retired pay to receive his disability and CRSC pay, it had reduced the amount of disposable military retired pay that she was receiving pursuant to the USFSPA (App 166a – 167a, Letter to Appellee Notifying of Payment Reduction, April 14, 2010).

Appellee filed a motion seeking enforcement of the Circuit Court's 2008 Judgment, claiming, per the terms of the judgment's marital property settlement, that Appellant was responsible to make up the difference between what she had been receiving from DFAS and what she was then receiving due to the DFAS reduction. The trial court entered an order finding Appellant in contempt. In the Spring of 2014, Appellant was arrested on a bench warrant for failure to make payments. On June 23, 2014, an appearance bond of $9500 was posted and a show cause hearing was set for June 27, 2014. (App. 75a – 78a, Bond and Circuit Court Docket Entries) Collateral for the bond is a lien being held by the bonding company, Great Lakes Bail Bonds, on Appellant's ailing mother's home. *Id*.

On July 30, 2014, Appellant's trial attorney, Michael Gawecki, filed an appearance on Appellant's behalf in the Circuit Court and filed an objection to the proposed contempt order. *Id*., Trial Court Docket Entries No. 86-94. The Circuit Court entered a contempt order on November 14, 2014 (App. 62a – 64a, Circuit Court's November 6, 2014 Order).

On December 2, 2014, Appellant timely appealed. On December 22, 2014, while Appellant's appeal was already pending in the Court of Appeals, the Circuit Court held a hearing on a motion

to stay Appellant's payment obligations and to terminate the bond (App. 169a – 188a, December 22, 2014 Hearing Transcript). The Circuit Court concluded it did not have jurisdiction because the appeal had been filed and denied Appellant's motion to stay his payment obligations and to terminate the bond. *Id*.

On appeal, Appellant argued, *inter alia*, that state courts were preempted by federal law from ordering veterans to indemnify former spouses for financial losses resulting from the veteran's waiver of retired pay to receive disability pay. Appellant also argued that 38 USC 5301 independently protected his veterans' benefits from any legal process whatever, and the Circuit Court simply did not have jurisdiction or authority to order or otherwise force him to part with these monies, which are his only source of income. See Appellant's Brief on Appeal, filed July 1, 2015 (citing, *inter alia*, 10 USC 1408, 38 USC 5301(a)(1) and (a)(3)(A); *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Mansell v Mansell*, 490 US 581, 587, n 6; 109 S Ct 2023; 104 L Ed 2d 675 (1989); *King v King*, 149 Mich App 495, 499-500; 386 NW2d 562 (1986)) and Appellant's Reply Brief, filed November 3, 2015.

Appellant also specifically argued that the bond (which is secured by a lien on Appellant's mother's home) violated 38 USC 5301(a)(3)(C), which prohibits and voids from inception "[a]ny agreement for collateral for security for an agreement" prohibited by that subsection. Brief on Appeal, p. 18. Finally, as Counter-Plaintiff-Appellant, Appellant claimed an entitlement to recoupment and reimbursement of these funds that he has been paying per the Circuit Court's November 6, 2014 Order. *Id*.

On October 13, 2016, the Court of Appeals issued an unpublished opinion affirming the Circuit Court's order (App. 31a - 35a), *Foster v Foster*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 13, 2016 (Docket No. 324853)). Relying on *Megee v Carmine*,

290 Mich App 551, 562; 802 NW2d 669 (2010), in which the issue addressed was "whether a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division where the military spouse makes a unilateral postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment," the panel held:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive case law from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]
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> *Megee* governs and dictates, given the involvement of CRSC, that the offset provision in the consent divorce judgment is fully enforceable through the trial court's contempt powers. Defendant attempts to distinguish *Megee* on the basis that, because of the retroactive nature of the CRSC award, he effectively became entitled to and elected CRSC and waived retirement pay *prior* to entry of the divorce judgment, whereas *Megee* concerned a unilateral, *postjudgment* election to waive retirement pay and opt for CRSC. Defendant's argument construes *Megee* much too narrowly and misses the broader legal principle that emanates from *Megee*, which is that a state divorce court has the authority to divide waived retirement pay, which waiver resulted from a veteran's decision to elect CRSC, so long as the court does not directly order payment from CRSC funds.[5] Thus, assuming for the sake of argument that defendant's waiver of retirement pay and election of CRSC must be treated as having already occurred when the divorce

[5] The contempt order does not require payment from CRSC funds, nor do we construe the divorce judgment's offset provision as ordering payment from CRSC funds, and any such construction must be avoided.

> judgment was entered, the offset provision contemplating the division of waived retirement benefits was nonetheless valid and enforceable under *Megee*.
>
> [App. 34a – 35a (emphasis in original) (footnote in brackets).]

Regarding Appellant's argument that 38 USC 5301 prohibited the Circuit Court from exercising authority and jurisdiction over his VA benefits, the Court of Appeals first asserted that Appellant had waived this argument because it was undeveloped in the pleadings.[6] Yet, the Court went on to address the substantive merits, stating:

> 38 USC 5301(a)(1) speaks of precluding the assignment of benefits "except to the extent specifically authorized by law[.]" As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575.
>
> [*Id*.]

On November 28, 2016, Appellant timely applied to this Court for leave to appeal. While Appellant's original application was pending, the United States Supreme Court issued its *unanimous* opinion in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017) (App. 12a – 23a). The Court ruled that federal law has always preempted state courts from considering anything other than a small portion of military retired pay, i.e., "*disposable* retired pay", when dividing marital property upon divorce between a former servicemember and his or her spouse. *Id*. at 1403-1404 (App. 15a – 17a). Thus, where a former servicemember waives his or her right to receive military retired pay to receive service-connected disability pay or any other military benefit to which he or she is entitled by federal law, the latter monies are not to be counted as or included in a former servicemember's "marital property" for purposes of dividing such property upon divorce. In *Howell*, the Court explained that federal law preempts and has always

[6] See footnote 3, *supra*.

preempted state family law concerning marital property division upon divorce and that the USFSPA was a federal grant of authority to the states over only a *limited portion* of such benefits. *Howell*, 137 S Ct at 1405-1406 (App. 16a-17a), citing *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981).

The Court also specifically ruled that state courts could not avoid the effects of federal preemption by "describing the family court order as an order requiring [the servicemember] to 'reimburse' or 'indemnify' [the former spouse], rather than an order that divides property" because "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Id*. at 1406. (App. 20a – 21a). "*All such orders are thus preempted*." *Id*. (App. 21a) (emphasis added).

Citing 38 USC 5301(a)(1), the same provision cited by Appellant in his original appeal, the Court also stressed that the former spouse had no "vested" interest in the servicemember's future benefits because "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Id*. at 1405 (App. 20a).

On November 15, 2017, this Court vacated the Court of Appeals' opinion instructing it to apply *Howell* to Appellant's case. (App. 37a).

On Monday, February 26, 2018, after the case had returned to the Court of Appeals, Appellant filed a motion for a stay of the Circuit Court's order that he continue making payments to Appellee of $1000 per month pending disposition by the Court of Appeals and to terminate the "appearance" bond. Appellant also filed a motion for immediate consideration, which was filed and served pursuant to MCR 7.211(C)(6).

In his motion Appellant argued (as he had in his original appeal) that since federal law completely preempted state law concerning disposition of marital property and prohibited state courts from ordering veterans to reimburse or indemnify their former spouses when the latter's share of military retired pay was reduced by the veteran's waiver and since *Howell* had confirmed this, Appellant could not be required to continue making these payments to Appellee. Appellant also pointed out that the amount he had already paid Appellee (at that time $43,000) well exceeded the challenged arrearage in the Circuit Court's November 6, 2014 Order ($34,397.43) and that he was also a Counter-Plaintiff seeking recoupment and reimbursement of the amounts he has been wrongfully forced to pay.

Appellant also argued, again, as he had in his original appeal, that the payments, the bond and the lien contravened the plain language of 38 USC 5301 and therefore the Circuit Court's orders and enforcement of the bond constituted extra-jurisdictional acts, which were void from their inception. Finally, Appellant argued that an "appearance" bond terminates automatically once its conditions are satisfied, and that since Appellant's trial attorney appeared at the June 27, 2014 hearing, the bond was no longer in effect. In his motion, Appellant simply asked the Court of Appeals to stay his continuing payments on the 7th of each month and/or to declare the bond null and void so that Appellant could get the lien on his mother's house lifted.

Instead of giving Appellant's motion immediate consideration, as he requested pursuant to the specific procedures outlined in MCR 7.211(C)(6), the Court of Appeals gave Appellee *two weeks* to respond, until March 12, 2018. Appellee did not file a response and on March 14, 2018, the Court of Appeals denied Appellant's motion (App. 25a).

On March 22, 2018, without requesting additional briefing or oral argument, the Court of Appeals issued its opinion on remand again affirming the Circuit Court's decision. (App. 4a –

10a). Just as it had done in its first decision, the panel once again relied on the now wholly discredited *Megee v Carmine*, 290 Mich App at 566-567, 574-575, and, with the exception of two short paragraphs, reprinted much of its original opinion. The Court ruled:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]
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> ***
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> Given that CRSC is at issue in the instant case, that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay, and that *Megee* is on point and remains binding precedent, MCR 7.215(J)(1), we again affirm the trial court's ruling.
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> [App. 8a – 10a]

Appellant filed a timely application for leave to appeal in this Court on May 3, 2018. On November 7, 2018, the Court granted Appellant's application and requested the parties to address specific questions among the other issues that have been raised in this appeal.

APPLICABLE LEGAL PRINCIPLES

A. Introduction

The basis of this Court's review is whether federal law preempts state law concerning the state court's judgment and its subsequent contempt orders forcing Appellant to part with his federal military disability pay. To answer the issues presented in this appeal, it is necessary to explain the history and basis of federal preemption in the area of federal military benefits.

B. Standard of Review

Whether federal law preempts state law is a question of law to be reviewed *de novo* by this Court. *Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

C. Applicable Law

1. The Supremacy Clause

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof…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." US Const, art VI, cl 2 (emphasis added). Federal law preempts state law where Congress has intended to foreclose any state regulation in the subject matter regardless of whether state law is consistent or inconsistent with federal standards. *Oneok, Inc v Learjet, Inc*, 135 S Ct 1591, 1594-1595; 191 L Ed 2d 511 (2015). See also *Mich Canners & Freezers Ass'n v Agric Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984) (internal citations omitted), accord *Hisquierdo v Hisquierdo*, 439 US 572, 582-83; 99 S Ct 802; 59 L Ed 2d 1 (1979). When a state law is preempted by federal law, the state law is "without effect." *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981).

2. Veterans' Benefits Spring from Congress' Article I Enumerated "Military" Powers

Congress' authority for enacting veterans' benefits legislation springs from its enumerated "War Powers" or "Military Powers". US Const, art I, § 8, cls 11-13. See, e.g., *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961) ("Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…[to] veterans."); *Johnson v. Robison*, 415 U.S. at 376. Congress has exercised legislative authority in these premises since the earliest days of the Republic. *See, e.g.*, *Hayburn's*

Case, 2 US (Dall.) 409, 1 L. Ed. 436, 2 Dall. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, *Returning Veterans and Disability Law*, 85:3 Notre Dame L Rev 1081, 1084 (2010). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981).

3. Federal Law Concerning Military Benefits Completely Preempts State Domestic Relations and Family Law

It follows from the foregoing that while "the whole subject of domestic relations between husband and wife belongs to the laws of the States and not to the laws of the United States," and "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 application of community property law conflicts with the federal military retirement scheme" and is completely preempted. *McCarty v McCarty*, 453 US at 220, 223, citing *Hisquierdo*, 439 US at 581 (internal quotation marks omitted). See also *Ridgway v Ridgway*, 454 US at 54, citing *McCarty*, *supra* and *Hisquierdo*, *supra* and stating that "[n]otwithstanding 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." (emphasis added).

In *McCarty*, the Court ruled Congress had *completely* preempted state law from treating veterans' benefits as marital property in state court divorce proceedings. In this unique field, the Court explained, Congress had historically intended *all* military benefits to be property of the

servicemember. *Id*. at 228. After explaining the historical underpinnings of veterans' benefits and that in this area of the law, Congress has occupied the entire field of state law, the Court noted that veterans' retirement benefits were the personal entitlement of the retiree. 453 US at 232. Thus, the Court held state courts are not free to reduce the amounts that Congress had determined are necessary for the retired servicemember. *Id*. at 233. Finally, since Congress intended all pay to reach the beneficiary, state courts could not attach or assign funds to satisfy a property settlement incident to the dissolution of a marriage. *Id.* at 228. The Court denounced state court decisions that had the effect of attaching funds or approving anticipatory indemnity or reimbursement provisions, the latter of which were deemed to be just another way of depriving the former servicemember of his or her entitlement. *Id*. at n 22. The Court stated: "It is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." *Id*.

State law is and always has been preempted by federal law in this specific subject. *McCarty*, 453 US at 220, citing *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1, 15 (1979) and *In re Burris*, 136 US 586, 593-594; 10 S Ct 850; 34 L Ed 500 (1890). See also *Wissner*, 338 US at 660-661. 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." *Id*. State law is overridden in these cases because to recognize state authority over these benefits does "major damage" to "clear and substantial federal interests." *Ridgway*, 454 US at 54. 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. 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*. And, in each

instance, the Court has concluded state courts were preempted by pervasive federal laws protecting these benefits. *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' 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).

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 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." *Ridgway*, 454 US at 54. Pointing out that applicable federal law gave the servicemember the absolute right over these 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." *Id*. at 54-55, citing *Free v Bland*, 369 US 663, 665; 82 S Ct 1089; 8 L Ed 2d 180 (1962).

4. The USFSPA Lifted Preemption Only for Marital Property Division

In 1982, Congress recognized a *limited* exception to federal pre-emption in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408. See *Mansell v Mansell*, 490 US 581, 587-95; 109 S Ct 2023; 104 L Ed 2d 675 (1989), accord *King v King*, 149 Mich App 495, 499-500; 386 NW2d 562 (1986). The USFSPA allowed state courts to treat only one small portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 USC 1408(c)(1); *Mansell*, 490 US at 594-95. All other military benefits (non-disposable retirement benefits (defined in 10

USC 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service remained federally protected veterans' benefits. With respect to the latter, state courts are simply "without power to treat [them] as property divisible upon divorce." 10 USC 1408(a)(4)(B); *Mansell*, *supra* at 588-89; *King*, 149 Mich App at 499-500.

5. State Court Manipulation to Avoid Mansell

After *Mansell*, some state courts (including Michigan in the form of *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010)) began fashioning "equitable" remedies or approving orders that required servicemembers to indemnify or reimburse their former spouses for the loss caused by the retired servicemembers waiver of retirement pay to receive disability pay. In large part, the reasoning of these state courts was that they could not be preempted from ordering the retired servicemember to make up the loss to his or her former spouse, as long as the order did not specify that the money was to come from the servicemember's non-disposable veterans' benefits. According to these state courts *Mansell's* prohibition that they could not treat military veterans' benefits as "divisible" assets for marital property divisions in divorce proceedings did not preclude them from allowing indemnity or reimbursement orders so long as such orders did not specify where the servicemember was to get the money to make up the deficiency. Indeed, the Court of Appeals in this case adhered to this reasoning by continuing to follow the *Megee* opinion (App. 7a – 10a).

6. Howell v Howell

The United States Supreme Court revisited the issue in *Howell*. A unanimous Court simply reconfirmed that state courts never had jurisdictional authority to order veterans to part with their "non-disposable pay", i.e., waived military retirement pay, disability pay, and special compensation. *Howell*, 137 S Ct at 1403-1406 (App. 14a – 21a), citing 10 USC 1408 (a)(4)(B) and

(c)(1); 38 USC 5301; *Mansell*, *supra*; and *McCarty*, *supra*. State courts are therefore preempted (and have always been preempted) by federal law from ordering (or requiring) a veteran to indemnify his or her former spouse using non-disposable military retirement and disability pay. *Id*. at 1404 (App. 17a) ("*McCarty*, with its rule of federal preemption still applies.").

Importantly, *Howell* clarified that this rule of absolute preemption applies regardless of when the veteran chooses to receive such pay. *Id*. at 1405 (App. 19a – 20a). It prohibits state courts from ordering indemnity, offsets, reimbursements, or approving any other form of anticipatory agreement designed to evade the potential reduction in the former spouse's future payments. *Id*. at 1406 (App. 20a – 21a). It protects waived retirement pay, disability pay, and any other special compensation designated by Congress for the sole use and benefit of the veteran. *Id*. (App. 21a). Last, but not least, this rule pre-existed and survived the USFSPA's limited exception which gives state courts jurisdictional authority over "disposable retired pay" *only*. Thus, former spouses *never* had a vested interest in the veteran's non-disposable property. *Id*. at 1405-1406 (App. 20a), citing 10 USC 1408(c)(1); 38 USC 5301; and *Mansell*, 490 US at 589.

Howell's confirmation that states have always been preempted in this area, see 137 S Ct at 1404 (App. 17a), is also important because as the Court has previously explained, where it simply reiterates what the law is it applies retroactively, because the law never changed. In such instances, it is the states that went astray of the prevailing federal rule. See *Yates v Aiken*, 484 US 211, 217-18; 108 S Ct 534; 98 L Ed 2d 546, 554 (1988). This rule applies with even greater force where the legal ruling under consideration has been invalidated on the grounds of preexisting, preemptive federal precedent. See *McCarty*, 453 US at 219, n 22, citing *Dahnke-Walker Milling Co v Bondurant*, 257 US 282, 288-289; 42 S Ct 106; 66 L Ed 239 (1921). In such cases the state court,

having been presented with the preemptive federal law, has an obligation to grant the relief requested. *Id*.

7. Federal Preemption is a Jurisdictional Bar to a State Court's Ability to Enter a Contravening Order or Judgment

Where federal pre-emption applies to bar a state court's actions, a reviewing court must address the preemptive effect of the federal law on the lower court's jurisdiction because state courts do not have subject matter jurisdiction to enter orders contrary to the federal mandate. *Ridgway*, 454 US at 54-55; *McCarty*, 453 US at 219-220 and n 12. *A priori* such orders are "void, and therefore unenforceable." *McCarty*, *supra*, citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) and *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 440-441; 99 S Ct 1813; 60 L Ed 2d 336 (1979). Such orders "frustrate[] the deliberate purpose of Congress [and] *cannot stand*." *Ridgway*, *supra* at 55 (emphasis added).

This Court has similarly ruled that where federal law preempts state law under the Supremacy Clause it "invalidates" state law that interferes with the federal law. *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014) (stating "[w]hen a state law is preempted by federal law, the state law is 'without effect.'" *Id*. (emphasis added). Accord *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997) (stating "[s]tate courts are deprived of subject matter jurisdiction where the principles of federal preemption apply") (emphasis added), overruled on other grounds in *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002).

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." *Kalb v Feuerstein*, 308 at 440, n 12. "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." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added).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. *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*." *Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added).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.*" *Ridgway v 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). Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id*.

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" *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). In such cases, the "power of the State *ceases to exist*." *Id*. (emphasis added), quoting *Erie R Co v New York*, 233 US 671, 681; 34 S Ct 756; 58 L Ed 1149 (1914). Justice Cooley observed that the Supremacy Clause requires "[a] State 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." Cooley, Constitutional Law (1880), p 32.

This is why "the propriety of permitting collateral attacks [of federally pre-empted judgments] is premised upon the issue of subject-matter jurisdiction." *In re Waite*, 188 Mich App 189, 196; 468 NW2d 912 (1991) "[C]ourts…can only redress wrongs *within their jurisdiction*." *Cameron v Adams*, 31 Mich 426, 429 (1875) (CAMPBELL, J.) (emphasis added). 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*. *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). When a court is without jurisdiction of the subject matter, its subsequent acts are of no force and validity; they are void. *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). Thus, a judgment or order entered without jurisdiction may be challenged collaterally as well as directly. *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). Such a challenge can be raised at any time, even on appeal, and even after a case is concluded. *Henry*, 495 Mich at 287 n 82. Defects in jurisdiction cannot be waived. *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.").

"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*." 1 Freeman, Judgments (5th ed) § 226, pp 444-445 (emphasis added). "It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered *though the court may have had jurisdiction over the subject matter and the parties*." *Id*., § 354, p 733 (emphasis added). If a judgment is, in part, beyond the power of the court to render, it is void as to the excess. *Ex parte Rowland*, 104 US 604, 612; 26 L Ed 861, 864 (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). "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v United States*, 91 US 21, 27; 23 L Ed 193, 195 (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)).

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 on the very issue, 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*.
>
> [*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).]

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

While *Driver* was an evenly split decision, the ruling of the court was that the probate court had *statutory jurisdiction* to decide the matter and a *procedural irregularity* in the failure to appoint a guardian *ad litem* did not void the judgment and subject it to later 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. *Bowie v Arder*, 441 Mich at 54, citing *Ward*, *supra*. This principle is followed where preemptive federal law controls the particular issues. State courts do not have jurisdiction, i.e., authority, to incorrectly adjudicate those issues. See, *inter alia*, *Henry*, 495 Mich at 287 n 82.

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….". *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876). 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 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.
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> [*Lessee of Hickey v Stewart*, 44 US (3 How) 750, 762; 11 L Ed 814, 819 (1845). See also *In re Sawyer*, 124 US 200, 221-222; 8 S Ct 482; 31 L Ed 402, 409 (1888); Freeman, *supra*, § 322, pp 643-645.]

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

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. *Bowie*, *supra*. "The jurisdiction of a court arises by law, not by the consent of the parties." *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."). 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*." Cooley, Constitutional Limitations (7th ed) (1903), p 575. "[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*." *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.
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> [Cooley, Constitutional Limitations (7th ed) (1903), p 576 (emphasis added).]

ARGUMENTS

I. *Howell* held that federal preemption applies to all military benefits not defined as "disposable" under the USFSPA. The Court further ruled this applied to disability pay. CRSC pay is pay based on a combat-related injury and resulting disability. Congress also specifically stated CRSC is not to be considered as disposable retired pay under 10 USC 1408. Therefore, it cannot be a divisible marital property asset in a state court divorce proceeding and it is jurisdictionally protected from state court disposition under 38 USC 5301.

Howell reiterated what has always been federal law. Veterans disability benefits are and always have been considered non-disposable, indivisible benefits that were a personal entitlement and free from state legal process. *Howell*, 137 S Ct at 1405-1406 (App. 20a – 21a). The preemption applies to all disability pay. *Id*. at 1406 (App. 21a). CRSC is disability pay. It is also specifically precluded from being considered retired pay. Only retired pay is "disposable" under the USFSPA, and

therefore, if CRSC is not "retired pay", it is not disposable. See *Howell*, 137 S Ct at 1404 (App. 16a – 17a). The USFSPA only provided a *precise* and *limited* grant of authority to the states over *any* military benefits – it gave the states discretion to consider as disposable, and therefore, divisible, disposable retired and retainer pay. *Id.*, citing *Mansell*, 490 US at 588-589. All other benefits remain off limits. *McCarty* with its rule of absolute federal preemption *still applies*. *Id*. (App. 17a).

After *Howell*, the Supreme Court issued two additional orders vacating state court decisions that had ruled, consistent with the case that the Court of Appeals again relies on in its remand opinion here, *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), that veterans could be forced to satisfy marital property divisions in divorce proceedings if they had waived retirement pay to receive CRSC. Thus, according to *Howell*, the same rule of preexisting federal preemption applies to such state court orders. See *Merrill v Merrill*, ___ US ___; 137 S Ct 2156; 198 L Ed 2d 228 (2017), reh den at ___ US ___; 138 S Ct 30; 198 L Ed 2d 756 (2017) and *Cassinelli v Cassinelli*, ___ US ___; 138 S Ct 69; 199 L Ed 2d 2 (2017), reh den at ___ US ___; 138 S Ct 534; 199 L Ed 2d 410 (2017).

In *Merrill*, on remand from the Supreme Court, the Arizona Circuit Court held, with respect to a waiver of retirement pay to receive CRSC pay that per *Howell* "state courts *cannot require indemnification for any financial loss resulting from one spouse's waiver of retired pay in favor of disability pay*." *In re Merrill*, Maricopa County Superior Court, Case No. DR 1991-092542 (March 15, 2018) (App. 194a – 195a) (emphasis added). "Congress specifically precluded CRSC from the definition of military retired pay." *Id*. (App. 194a), citing 10 USC 1413a(g).

Similarly, *In re Cassinelli (On Remand)*, 2018 Cal. App. LEXIS 177 (March 2, 2018) (App. 197a – 205a), held that *Howell* effectively overruled California case law that had previously held

state courts were allowed to use or count a retired servicemembers' disability or other military benefits (there as here, CRSC) to force the servicemember to reimburse or indemnify his or her former spouse for the latter's lost share. "Because CRSC pay is not retired pay – just as veteran's disability benefits are not retired pay – under FUSFSPA as construed in *Mansell* [*v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989)], a state court *does not have jurisdiction* to treat CRSC as community property." *Id*. at *13 (emphasis added), citing 10 USC 1408(a)(4), (c)(1); 10 USC 1413a(g); and DoD Financial Management Regulations 7000.14-R, vol 7B, ch 63 (Oct 2017), § 630101.C.1, p. 63-4 (reproduced at App. 90a).

To answer this Court's first question (see App. 2a), *Howell's* rule of absolute and preexisting federal preemption over state courts concerning the disposition of and authority over federal military benefits (with the exception of disposable retired pay as defined in USFSPA) applies to preclude state courts from exercising authority or jurisdiction over CRSC benefits. As noted in the next section addressing the *Megee* opinion, even where a court does not specifically identify such prohibited benefits as being disposable and available for division (even though the Circuit Court in this case did errantly identify Appellant's "disability pay" as being a fund from which he would be required to access monies to pay Appellee her lost share), such orders have the same effect and frustrate the purposes and objectives of Congress. See *Howell*, 137 S Ct at 1406 (App. 21a). "All such orders are thus pre-empted." *Id*.

II. *Howell* specifically ruled that state courts which enforced agreements to reimburse or indemnify former spouses who suffered losses due to the veteran's waiver of disposable pay to receive non-disposable pay were violating preexisting, preemptive federal law. *Megee* was the type of case directly addressed by the Court's unanimous ruling. Even if *Howell* does not apply to CRSC, the decision in *Howell* prohibits *any state court* order or judgment that forces the veteran to "replace" the former spouse's lost portion with *any other asset* the veteran may have available. *Megee* was never good law because federal law always prohibited this.

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.*" *McCarty*, 453 US at 228, n 22 (emphasis added). 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.

> 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.
>
> [*Howell*, 137 S Ct at 1406 (App. 20a – 21a) (internal citations omitted).]

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. See *Megee*, 290 Mich App at 574-575. It is of no moment that the state court does not specifically identify the federal benefits in the order (although here the Circuit Court's judgment did identify non-disposable disability pay, see App. 56a – 57a). As noted long ago by the Supreme Court "[a]n 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." *Hisquierdo v Hisquierdo*, 439 US 572, 588; 99 S Ct 802; 59 L Ed 2d 1 (1979).

At oral argument in *Howell*, Chief Justice Roberts questioned the Solicitor General who, at that time, was supporting those states employing the reasoning of *Megee*.

CJ: It seems to me that – in other words, you're saying – you're basically saying there's no real substance to this law [the USFSPA]. All the court has to do is find some charade to get to the same result.

I mean, would it be all right under your view if they say, okay, you get 50 percent of – all the – no disability payments yet. You get 50 percent of the retirement pay. Listen to me. But in the event that there is disability pay – there are disability payments that result in a reduction of the military pay, I appreciate that I cannot divide the disability pay, but your share of the retirement pay is going to go up as if we were diving the disability pay. Is that good or bad?

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SG: Well – well, Your Honor, I think it – it is – it is okay to the extent that the court is applying its generally applicable principles of property division to treat the portion that is available under federal law.

CJ: The court wants to make sure that the spouse, whether wife or husband, receives half of the military retirement pay, and that – and going forward. So she does – he or she does exactly what I set forth; says, okay, you're entitled to half. But if there's disability pay, you're entitled to an additional amount exactly equal to half of the disability pay.

SG: Well, yes. I think the statue expressly contemplates fixed sum awards. And so the – the –

CJ: So you have a law that says – you have a law that says you can't divide disability pay, and yet, you say it's okay to say, well, I'm not going to divide it, but I'm just going to award you an amount equal to what it would be if I divided it.

SG: Well, let me be clear.

CJ: That's the sort of thing that gives, you know, law a bad name. It's just –

(Laughter.)

CJ: It makes a charade out of the statute.

[App. 225a – 228a, Oral Argument Transcript, April 20, 2017.]

And indeed, the trial court's order in this case did just this, stating:

> [Appellee] is awarded one hundred percent (100%) of any interest she has acquired in any retirement and pension benefits as a result of any employment she has held during her marriage to [Appellant].

> [Appellee] is awarded fifty percent (50%) of any military retirement benefits the parties have acquired as a result of military employment with the armed forces of the United States during the parties marriage to each other.
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> ***
>
> If [Appellant] *should ever become disabled, either partially or in whole*, then [Appellee's] share of [Appellant's] entitlement shall be calculated *as if [Appellant] had not become disabled*. [Appellant] *shall be responsible to pay, directly to [Appellee], the sum to which she would be entitled if [Appellant] had not become disabled*. [Appellant] *shall pay this sum to [Appellee] out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to [Appellee]*. If the military merely reduces, but does not entirely stop, direct payment to [Appellee], [Appellant] *shall be responsible to pay directly* to [Appellee] any decrease in pay that [Appellee] should have been awarded had [Appellant] not become disabled….
>
> [App. 56a – 57a (emphasis added).]

Howell unanimously held this practice was and always has been prohibited. State courts cannot fashion or approve alternative remedies which force servicemembers to make up the amount lost by the former spouse as a result of the servicemember's decision to waive his or her military retirement entitlement to receive his or her disability entitlement. *Howell*, 137 S Ct at 1406 (App. 20a – 21a). As the Court of Appeals' decision adhered to this erroneous reasoning, it must be reversed.

Since *Howell* a slew of state courts have corrected their prior decisions following the *Megee* model. See *Berberich v Mattson*, 903 NW2d 233 (Minn Ct App 2017), lv den 2017 Minn LEXIS 694 (December 27, 2017) (overruling *Gatfield v Gatfield*, 682 NW2d 632 (Minn 2004), which, like *Megee v Carmine*, 290 Mich App 551;802 NW2d 669 (2010), the case the Court of Appeals relies on here, had previously upheld Minnesota state court orders enforcing marital property settlements in divorce proceedings requiring former servicemembers to indemnify a former spouse for the latter's lost share of retirement pay when the servicemember waived his or her retirement

to receive VA benefits); *Hurt v Jones-Hurt*, 2017 Md App 610; 168 A3d 992 (2017) (overruling similar cases in Maryland); *Vlach v Vlach*, 2017 Tenn App LEXIS 717 (Tenn Ct App, October 27, 2017) (overruling prior Tennessee case law that had held that the former spouse's "vested interest" could not be unilaterally diminished by an act of the military spouse waiving retirement pay to receive VA benefits and held according to *Howell* that *both* the "vested interest" approach and the "indemnification" or "reimbursement" approach forcing the veteran to "make up" the former spouse's losses were no longer viable and were in fact preempted by federal law); *In re Marriage of Tozer*, 410 P3d 835, 838 (Colo App 2017) (stating "[t]he *Howell* takeaway is clear. Military retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted"); *Brown v Brown*, 2018 Ala Civ App LEXIS 54, *14-16 (Ala App 2018) (federal law preempted marital property agreement providing that former spouse of retired servicemember would receive 25 percent of husband's disposable retirement benefits "without regard to any reductions or setoffs due to disability compensation or any other reason" and that former servicemember would "indemnify and reimburse" the spouse for any such loss and noting that *Howell* determined that those state courts that were enforcing such agreements were not abiding by federal law and all such orders were preempted); *Roberts v Roberts*, ___SW3d___; 2018 Tenn. App. LEXIS 195, at *22 (Ct App, Apr. 16, 2018) (stating "although the Supreme Court did not make a distinction between divorce decrees ordered by the court and agreements entered into by the parties, the holding in *Howell* casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefit other than disposable retired pay"); *Sample v Sample*, ___SW3d___; 2018 Tenn. App. LEXIS 523, at *15-16 (Ct App, Sep. 4, 2018) (stating "*Howell*, which reaffirmed

the Court's *Mansell* decision, held that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property" and "[a]dditionally, the Court in *Howell* held that a state court 'may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefit…. Because federal law and Supreme Court precedent controls this issue, we reverse the trial court's order pertaining to the inclusion of Husband's VA disability benefits in Wife's portion of his military retirement pay."); *Phillips v Phillips*, 347 Ga App 524, 530; 820 SE2d 158 (2018) (holding that "[t]he trial court overstepped its authority by enforcing agreement in final judgment forcing veteran to indemnify or reimburse former spouse for her loss of veteran's share of retirement pay after he waived that pay to receive disability pay"); *In re Babin*, ___P3d___; 2019 Kan. App. LEXIS 6, at *18 (Ct App, Feb. 1, 2019) ("Military disability compensation is not among the military benefits that may be divided as marital property, and the district court lacked jurisdiction to enforce such a division of property in a settlement agreement."); *Fattore v Fattore*, ___A3d___; 2019 N.J. Super. LEXIS 16, at *1 (Super Ct App Div, Feb. 5, 2019) (stating "[t]rial court may not indemnify a payee spouse when the payor spouse waives a military pension and receives veteran disability retirement benefits.").

III. Since Michigan jurisprudence holds that a state court is without jurisdiction to enter an order or judgment that is preempted by federal law, the Circuit Court's subsequent contempt orders based on the absolutely preempted 2008 judgment, which purported to divide Appellant's veteran's disability pay cannot stand.

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, see *Brooks & Perkins*, 446 Mich at 276, 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. Howell, 137 S Ct at 1404 (App. 17a), citing Mansell, 490 US at 588, 589. Therefore, the Circuit Court had no jurisdiction to enter a judgment contrary to then-existing federal law. *McCarty* with its rule of federal preemption still applied. *Id*. at 1404 (App. 17a).

Second, and directly to the point of post-judgment contempt orders, where the original judgment of a court is void because it lacked jurisdiction, subsequent orders dependent upon the ostensible legitimacy of the original order will not be sustained. *Bowie*, 441 Mich at 57. "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…." *Haines v Haines*, 35 Mich 138, 143 (1876) (CAMPBELL, J). See also *Lessee of Hickey v Stewart*, 44 US (3 How) 750, 762; 11 L Ed 814, 819 (1845) and Freeman, *supra*, § 322, pp 643-645.

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

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. *Howell*, 137 S Ct at 1405 (App. 19a – 20a).

"[T]he fundamental purpose of the Supremacy Clause is to establish the priority of federal rights '*whenever* they come into conflict with state law.'" 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). Undoubtedly, the Circuit Court in this case had jurisdiction over the general subject matter of Appellant's and Appellee's divorce. However, it had no jurisdiction, because it had no authority, to contravene federal law. 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…."). 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." *Town & Country Motors Inc*, 355 Mich at 54-55.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.
>
> [*Id*.]

Federal preemption implicates the question of subject matter jurisdiction. *Henry v Laborers' Local 1191*, 495 Mich at 287 n 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 "subject matter jurisdiction" to issue a ruling contrary to the preemptive federal law. *Id*. 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. *Thompson v Whitman*, 85 US 457, 462; 21 L Ed 897 (1873), accord *Henry*, *supra*. Upon a determination that the lower court lacked jurisdiction to pass upon the question, the ruling is void and must be annulled. *Brooks & Perkins*, 446 Mich at 276. 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*. 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. *Id*. 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. *Henry*, 495 Mich at 287 n 82.

IV. 38 USC 5301 independently protects Appellant's CRSC benefits from "any legal process" whatever" and state courts lack jurisdiction and authority to order veterans to part with these benefits by forcing the veteran to use these monies to indemnify or reimburse a former spouse for his or her losses when the veteran waives retirement pay to receive other federally protected veteran's benefits.[7]

Section 5301 springs from Congress's war powers for purposes of protecting veterans' benefits. *Atlanta v Stokes*, 175 Ga 201, 210-212; 165 SE 270 (Ga 1932); *In re Ballard's Estate*, 293 NYS 31, 32-33; 161 Mis 785 (NY 1937). Its purpose was to afford "continuous support" of persons suffering because of their military service. *Yake v Yake*, 183 A 555; 170 Md 75 (Md 1936).

The Supreme Court has stated 38 USC 5301 is to be liberally construed to protect funds granted by Congress "for maintenance and support for beneficiaries thereof" and such funds "remain inviolate." *Porter v Aetna Cas & Sur Co*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962). Such payments are exempt "either before or after receipt by the beneficiary". *Id.* As such, "[t]he monies which are paid are preserved by statute for the sole use of the veteran, 'regardless of the technicalities of title and other formalities.'" *American Training Serv's, Inc v Veterans* Admin, 434 F Supp 988, 995-96 (DNJ 1977), citing *Porter*, supra. Thus, "[a]ny legal formulation or

[7] This section addresses the Questions Presented IV, V, and VI, as the application of 38 USC 5301 is common to each one.

arrangement which could dilute or evade the literal and historical thrust of the statute's protective provisions must be viewed with appropriate caution." *Id*.

All issues concerning application of a statute begin with its language. Relevant to this case, 38 USC 5301(a)(1) states:

> Payments of benefits *due* or *to become due* under any law administered by the Secretary [of Veterans Affairs] shall not be assignable *except to the extent specifically authorized by law*, and such payments *made to*, or *on 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…."
>
> [(App. 27a)(emphasis added).]

Section (a)(3)(A) further provides:

> This paragraph is intended to clarify that, in any case where a beneficiary entitled to 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…such agreement *shall be deemed to be an assignment and is prohibited*."
>
> [(App. 27a) (emphasis added).]

Section (a)(3)(C) further states:

> 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*.
>
> [(App. 27a) (emphasis added).]

Combat-related special compensation (CRSC) benefits under 10 USC 1413a are authorized by the Secretary of Veterans Affairs (VA) to be paid to former servicemembers for their service-connected disabilities incurred during combat and wartime service. *Adams v United States*, 126 Fed Cl 645, 647-648 (2016) (citing 10 USC 1413a(e) and stating CRSC benefits are based on a "combat-related disability" that is "compensable *under the laws administered by the Secretary of Veterans Affairs*") (emphasis added).

These benefits are not retired pay. 10 USC 1413a(g). Therefore, they are not disposable pay subject to marital property divisions by state courts under the USFSPA. *Howell*, 137 S Ct 1401-1406. *Merrill v Merrill*, ___ US ___; 137 S Ct 2156; 198 L Ed 2d 228 (2017) and *Cassinelli v Cassinelli*, ___ US ___; 138 S Ct 69; 199 L Ed 2d 2 (2017), reh den at 138 S Ct 534; 199 L Ed 2d 410 (2017) (remanding on the basis of *Howell* to apply to CRSC benefits). See also discussion at pp 41 – 43.

The United States Supreme Court reserved decision on this very issue presented by this case in *Mansell*, 590 US at 587, n 6, stating "[b]ecause we decide that the [USFSPA] precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause [then 38 USC 3101 and subsequently recodified as 38 USC 5301], independently protects such pay." However, *Howell* answered this question by ruling that state courts could not exercise authority over *any* non-disposable benefits under 38 USC 5301(a)(1). *Howell*, 137 S Ct at 1405 (App. 20a). The Court said: "State courts cannot 'vest' that which (under governing federal law) they lack authority to give. Cf. 38 USC 5301(a)(1) (providing that disability benefits are generally non-assignable)."

The Court of Appeals concluded that CRSC benefits are not included within the benefits that are "off limits" or "non-disposable" under the USFSPA because they are not benefits under Title 5 or Title 38. While Appellant does not concede this, and expressly challenges it by way of the arguments presented in this brief, if the Court of Appeals' conclusion that CRSC benefits are outside the scope of USFSPA is correct, the question remains whether 38 USC 5301 independently protects CRSC benefits from the reach of state courts.

In its original opinion, and incorporated into its remand opinion, the Court of Appeals ruled since the USFSPA did not preclude the trial court's order, i.e., because *Megee* allowed it, 38 USC

5301 did not apply to prohibit an order forcing Appellant to use his CRSC benefits to make up for that portion of his military retired pay waived to receive those benefits. The Court reasoned that the language in 38 USC 5301 that state courts were prohibited from exercising authority over these funds "except to the extent specifically authorized by law" meant that since Michigan state law in the form of the now debunked *Megee* opinion allowed such orders, the federal prohibition did not apply. The Court reasoned "38 USC 5301(a)(1) speaks of precluding the assignment of benefits 'except to the extent specifically authorized by law[.]' As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575."

Of course, *Howell* itself vanquished this argument. State courts cannot exercise authority over benefits that are protected by 38 USC 5301. *Howell*, 137 S Ct at 1405 (App. 20a). Since only "disposable retired pay" may be considered a marital asset under the USFSPA, see 10 USC 1408(a)(4)(A)(ii) and (c)(1), and CRSC benefits are not considered retired pay, they are not "disposable". See 10 USC 1413a(g) (App. 67a). See also DoD Financial Management Reg, § 630101.C.1, p. 63-4 (App. 90a) ("CRSC is *not retired pay*, and it *is not subject to the provisions of 10 USC 1408 relating to payment of retired or retainer pay in compliance with court orders*.") (emphasis added).

The Court of Appeals' rationale concerning 38 USC 5301 is even more suspect because the whole point of federal preemption is that state law must yield. *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014). If it were so easy to suppress binding federal statutory law passed under Congress' enumerated Article I powers by simply relying on a suspect state-court opinion

that defies that federal law as the "exception" referred to in the federal law, state courts could routinely employ this sophistic convention. Fortunately, it is well documented that this "exception" refers to other *federal* provisions. The USFSPA, as mentioned, allows state courts to exercise authority over benefits that are considered disposable, only. Thus, a portion of a former servicemember's "disposable retired pay" may be partitioned as marital property upon divorce, 10 USC 1408(a)(2)(B)(iii) and (a)(4)(A)(ii) and (c); and a portion of "waived retired pay" may be considered for payment of child support and/or spousal support awards, respectively. 10 USC 1408(a)(2)(B)(i) and (ii), (d)(1) and the Child Support Enforcement Act (CSEA), 42 USC 659(a) and (h)(1)(A)(ii)(V) (state courts may consider a portion of retired pay waived for receipt of disability pay for child support and/or spousal support awards). But, that is it. All other veterans' benefits are off limits to state courts. CRSC benefits are based on a "combat-related disability" that is "compensable *under the laws administered by the Secretary of Veterans Affairs*" *Adams v United States*, 126 Fed Cl 645, 647-48 (2016) (emphasis added), citing 10 USC 1413a(e).

Howell ruled that state courts that had previously held, like *Megee*, that an indemnification order or reimbursement order that has the effect of forcing a former servicemember to part with his protected funds were wrong and 38 USC 5301(a)(1) was again cited by the Court to prohibit such outcomes. *Howell*, 137 S Ct at 1405 (App. 20a). See also *Ridgway*, 454 US at 53-56 (holding that the anti-attachment provision (identical in all respects to 38 USC 5301) protected a servicemember's designation of a beneficiary (his current spouse) to receive his life insurance benefits, that a state court could not impose a "constructive trust" on the proceeds in favor of the servicemember's former spouse, stating that such measures by state courts "fail[] to give effect to the unqualified sweep of the federal statute," and that such anti-attachment provisions "ensure[] that the benefits actually reach the beneficiary[,] preempts all state law that stands in its way[,]

protects the benefits from legal process '[notwithstanding] any other law of any State[,] prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." (internal quotations and brackets removed). The Court in *Ridgway* noted it found "nothing to indicate Congress intended to exempt claims based on *property settlement agreements* from the strong language of the anti-attachment provision." *Id*. at 52 (emphasis added).

Moreover, 38 USC 5301 permanently protects veterans' non-disposable military retirement and disability benefits against "any legal process" whatever. 38 U.S.C. 5301(a)(1). So ironclad is this statutory protection that it even bars agreements entered into by the veteran to pay these funds to another. 38 USC 5301(a)(3)(A). Thus, a state court order based on the veteran's own agreement to pay non-disposable, non-assignable income is in contravention of this provision and, as such, "prohibited".

Since the Court in *Howell* noted that 38 U.S.C. 5301 applied to the military veteran's non-disposable benefits, the agreement in the instant case (as well as any judgment or order arising from that agreement) would be prohibited to the extent it requires Appellant to pay non-disposable benefits to his former spouse. Appellant's non-disposable veterans' benefits are his sole and only source of income and are protected by 38 USC 5301. They cannot be subjected to redistribution of any kind. Preemptive federal law voids a state court's judgments or orders regardless of their form. See *Howell*, 137 S Ct at 1406 (App. 21a) (stating "such…orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress" and "[a]ll such orders are thus pre-empted.").

In addition to the plain language of 38 USC 5301, the Supreme Court's pronouncements in *Howell* and *Rose v Rose*, 481 US 619, 630-636; 107 S Ct 2029; 95 L Ed 2d 599 (1987) demonstrate

that a state court simply cannot exercise jurisdiction or authority over non-disposable, non-assignable veterans' benefits in marital property divisions in divorce proceedings. In *Rose*, *supra* at 631-633, the Court examined the case law from *Wissner v. Wissner*, 338 US 655, 660; 70 S Ct 398; 94 L Ed 424 (1950) through *Ridgway*, *supra*, and noted where marital property division of veterans' benefits is concerned, state courts cannot order any other disposition of these benefits than that designated by Congress because it would violate 38 USC 770(g), which, the Court noted, was "a prohibition identical in all pertinent respects to [38 USC] 3101" (the predecessor of 38 U.S.C. 5301).

This provision independently protects veterans' benefits from state-court orders in marital property divisions. See *Rose*, *supra* (noting that the purpose of 5301 is to "prevent the deprivation and depletion of the means of subsistence of veterans who are dependent upon these benefits as the main source of their income"). Such benefits are not assignable or disposable "by or under *any legal or equitable* process whatever *either before or after receipt by the beneficiary*". 38 USC 5301(a)(1) (emphasis added); *Howell*, *supra* at 1405. Therefore, any state court order dividing marital property upon divorce which dispossesses a veteran of these federally protected benefits violates this statute and is simply *ultra vires* of the court's authority and jurisdiction. *Howell*, *supra*; *Rose*, *supra*.

The Court in *Ridgway* stated "anti-attachment provisions generally…ensure[] that the benefits actually reach the beneficiary…[and they] pre-empt[] *all state law that stands in [their] way*. [They] protect[] the benefits from legal process '*notwithstanding any other law of any State*' [and] prevent[] the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." *Ridgway*, 454 U.S. at 61 (emphasis added). Noting the "unqualified sweep" of this provision, the Court stated its language

is presented "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'" is prohibited. *Id*. (emphasis added). Any "diversion, 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." *Id*. at 55. As noted by the Court in *Ridgway*, the same preemption principle was followed in *McCarty*. *Id*.

In *Howell*, the Court recognized 38 USC 5301 was enacted by Congress to prevent state courts from exercising authority over these benefits. *Howell*, *supra* 1405 (state courts never had "legal power to extinguish" the veteran's entitlement and could not, *a priori* "'vest' [in the former spouse] that which (under governing federal law[, i.e., 5301(a)(1)] they *lack authority to give*.") (emphasis added).

This sweeping application of 38 USC 5301 is not new. Many other state courts have ruled that it presents a jurisdictional bar to state courts from ordering veterans to part with protected funds. A judgment rendered with respect to funds protected by this provision is void precisely because the court has no *prima facie* jurisdiction to assert authority over these funds. *Howell*, 137 S Ct at 1405. Veterans administration benefits covered by this statute do not lose their exempt status once paid to the beneficiary. Section 5301 specifies that exemption applies "either before or after receipt by the beneficiary." See *In re McFarland*, 790 F3d 1182 (11th Cir 2015). Further, veterans' disability benefits are nonmarital assets and are not subject to being classified as marital property upon dissolution of the marriage. *In re Marriage of Hapaniewski*, 107 Ill App 3d 848, 438 NE2d 466, 469 (Ill App 1982). Unlike personal injury or workers' compensation benefit, veteran's disability benefits are not considered to be property in a proceeding for dissolution of marriage, since they are *statutorily exempt* (per 38 USC 5301) from *all claims* other than claims of the United

States and are not divisible or assignable. *In re Marriage of Bornstein*, 359 NW2d 500, 504 (Iowa App 1984). See also *Rickman v Rickman*, 605 P2d 909, 911-912; 124 Ariz 507 (Ariz App 1980) (monies received from the Veterans Administration for service-connected disabilities were husband's separate property following dissolution of marriage, hence courts *lacked jurisdiction* to award one half thereof to former spouse).

Thus, under this provision, state trial courts are without power in divorce property settlements to divide the beneficiary's disability compensation benefits with former spouse so long as benefits were paid to beneficiary under federal law, and thus contempt adjudications attempting to enforce such provisions of a divorce decree have been ruled *void* and *unenforceable*. *Ex Parte Pummill*, 606 SW2d 707 (Tex App 1980). See also *Ex Parte Johnson*, 591 SW2d 453 (Tex 1979) (award to divorced wife of 50 percent of husband's anticipated future disability benefits from the Veterans Administration conflicted with clear intent of Congress that such benefits be solely for the use of the disabled veteran, and diversion of such future payments was in conflict with the exemption provision, 38 USC 5301, thus, under the Supremacy Clause, divorced husband could not be imprisoned for contempt in failing to make such preempted payments to his former wife).

The federal scheme for military retirement which preempts state domestic relations and community property law precludes state courts from treating portion of a spouse's military retirement pay, which is waived in order to receive veteran's disability benefits, as community property subject to division in marital property dissolution action. *In re Marriage of Costo*, 203 Cal Rptr 85 (1984) (applying 38 USC 5301).

When 38 USC 5301 applies to the particular benefit at issue – here CRSC benefits authorized and administered by the Secretary of Veterans Affairs, see *Adams*, 126 Fed Cl at 647-648 – state

courts do not have jurisdiction to order the beneficiary to pay them pursuant to a property settlement to former spouse. *Reed v Reed*, 481 P2d 125 (Colo App 1971).

Thus, 38 U.S.C. 5301 applies to this case notwithstanding the consent agreement or any subsequent orders. A state court order that is preempted by federal law is an extra-jurisdictional, *ultra vires* act. It is void *ab initio* to the extent its terms violate that federal law. Therefore, it may be challenged and nullified at any time. State courts never had authority over non-disposable veterans' benefits as identified by federal law, 38 USC 5301(a)(1), and thus, orders purporting to force veterans to part with these monies in marital property dispositions upon divorce may be attacked at any time. *Howell*, 137 S Ct at 1405 (App. 20a).

Appellant continues to argue that 38 USC 5301 independently protects his disability pay and special compensation from any state court attempts to redistribute them. Section 5301 prohibits a state court from exercising any legal process whatever with respect to benefits authorized by the Secretary of Veterans Affairs. It also prohibits agreements by the beneficiaries to dispossess themselves of such funds. Finally, it forbids any collateral arrangement from being used to secure a promise to pay what are essentially these inalienable federal benefits. Where 38 USC 5301 is found to apply, it places a jurisdictional limitation on the state court's ability to exercise authority over the protected funds.

Appellant has been paying his former spouse $1000 per month from his only source of income – non-disposable veterans' disability benefits. These payments are ostensibly guaranteed by an "appearance bond" in the amount of $9500 that had been posted on June 23, 2014, and which was secured with a lien on Appellant's mother's home. (App. 75a – 78a, Bond and Circuit Court Docket Entries) On July 30, 2014, Appellant's attorney filed an appearance and contested the contempt proceedings. *Id*. Therefore, under Michigan law, the "bond" was satisfied at that moment and there

is no longer a basis to execute on said bond or to continue to hold the lien on Appellant's mother's home. *DeMyer*, *supra*; *Bruwer*, *supra*; *Barresi*, *supra*.

Moreover, the plain language of section 5301 prohibits any collateral arrangements from securing an obligation by the veteran to pay non-disposable veterans' benefits to another. 38 USC 5301(a)(3)(A) and (C). Appellant's only source of income is non-disposable veterans' benefits under 38 USC 5301. As noted in *Howell*, 137 S Ct at 1405 (App. 20a), 38 USC 5301(a)(1) prohibits state courts from ordering veterans to reimburse or indemnify former spouses where the veteran receives non-disposable pay protected by that statute in lieu of military retired pay. Since Appellant's benefits are protected by this provision and *Howell* unequivocally so held, the Court of Appeals erred in refusing to cancel the bond and stay Appellant's payment obligations. This is especially relevant as Appellant is claiming a right to recoupment.

CONCLUSION

As of today, Appellant, who is a 100 percent disabled, 100 percent unemployable combat veteran suffering from severe and debilitating PTSD continues to abide by this preempted order. Upon the filing of this application, Appellant has paid $55,000 to Appellee. This is $20,602.57 more than the challenged arrearages of $34,397.93 stated in the Circuit Court's order. Indeed, since *Howell* clarified that preexisting federal law preempts all such orders, Appellant has actually paid $55,000 in excess of Appellee's entitlement and he has demanded and is entitled to recoupment of these funds.

Instead of being allowed the benefit of his personal entitlement as provided by Congress and as acknowledged by the United States Supreme Court, Appellant is forced, on the threat of contempt and imprisonment, to continue making these payments. This is the case notwithstanding the Circuit Court's acknowledgment that Appellant has no ability to earn a living and is indeed

medically and mentally affected by his combat-related disabilities. (App. 209a, Circuit Court Opinion on Child Support; Income Comparison Statements; and Garnishment Disclosures). Appellant simply has no "disposable" income and Appellee is a registered nurse with a full-time job. *Id*.

This Court has the constitutional authority and indeed the duty to say what federal law requires and to abide by that law pursuant to the Supremacy Clause of the United States Constitution. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). 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. 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 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 preemption 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 seen as having reserved powers in these subjects.

It would be untoward indeed if interim state law in the form of decisions of state courts (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' enumerated Article I powers, cannot be tolerated if the Constitution is, indeed, the Supreme Law of the Land. State courts that enter orders violating the Supremacy Clause must be "void". If it we otherwise, certain unacceptable consequences would follow "the will of a small part of the United States may control or defeat the will of the whole." *Hauenstein v Lynham*, 100 US 483, 489 (1879).

The only anomaly in the law were those wayward state courts, including Michigan, that chose to ignore the federal directive and judicially craft sophistic and hypocritical 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 personal entitlements. The passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed. Retroactive recognition is only so because the state courts strayed from the correct path in the first instance. Cooley, Constitutional Limitations (7th ed) (1903), pp 24-25, citing *Hauenstein*, *supra*.

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 and eternally deprived of those constitutional property rights and entitlements for which he sacrificed so much.

And, it is no justification to say that because former spouses have in the past been the recipients of awards that state courts had no power to make, that such awards must be allowed to continue infinitely depriving the veteran of his or her entitlement. The number of cases in which judgments have been reopened to *restore* or *sort* the former spouse's rights because the federal preemptive law was *not being followed* are too voluminous to cite here. Is it just to allow such corrections to occur and to be sustained where it is now evident that they were always forbidden, but to disallow a just correction now to restore an entitlement that has been historically personal to the veteran who has sacrificed himself or herself in the service of our country in part reliant on the guarantees of security in the future? No matter how appealing the "policy" argument may be to maintain the *status quo*, 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. *Petranek*, 240 Mich at 660; *Brooks & Perkins*, 446 Mich at 276.

Indeed, the Supreme Court's statement that the trial court never had power to "vest" the former servicemembers' benefits in anyone other than the designated benefit is an explicit recognition that such state court orders *could never have done this*. *Howell*, 137 S Ct at 1405 (App. 20a). That the benefits to which the spouse 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. *Id*. (App. 19a – 20a).

With the prior judgment erased by this Court's vacatur (App. 37a), 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, federally protected veterans' benefits; and (3) state courts have no authority to either approve or craft "equitable" work arounds to this preemptive federal law, the slate is wiped clean to correctly adjudicate Appellant'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. Appellant was never entitled to these monies. There is no act, voluntary or otherwise, whether it be Appellant'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.

RELIEF REQUESTED

Appellant respectfully requests the Court to reverse the Court of Appeals and overrule *Megee v Carmine*, which in light of the Supreme Court's unanimous opinion in *Howell v Howell*, is no longer good law; order that Appellant's payments to Appellee cease; cancel the "appearance" bond and the lien securing it; and order that Appellant be allowed to recoup those monies that he has paid in contravention of preexisting and preemptive federal law.

Respectfully submitted by:

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