Kevin's disability benefits were retroactively awarded to June 2010 (R. 279, November 1, 2013 CRSC Award Letter). As of June 2010, Kevin was "total combat disability" rated at over one-hundred (100) percent. *Id.*

The consent judgment of divorce between the parties contained the following language pertinent to Kevin's disposable military retired pay:

> YVONNE RENEA BOUTTE is entitled to a forty-three (43%) percent share of KEVIN LEE BOUTTE's military retirement pay and/or benefits, including cost of living expenses or any other retirement system in which his military service was a significant part of the entitlement. . . .

The judgment further provided that Kevin "assigns" his interest in his military retired pay and Yvonne was to receive payments under the "direct payment" provisions of the USFSPA, 10 U.S.C. § 1408.

DFAS paid Yvonne monthly her share of the disposable military retired pay from March 2012 to February 2014 (R. 382, ll. 1-10). Yvonne's share was $673.68 per month (R. 381). When Kevin's disability and CRSC entitlement began to be paid to him, the amount of available "disposable retired pay" was reduced by operation of law. DFAS could no longer directly pay Yvonne disposable military retirement pay as contemplated in the original consent judgment of divorce because there was no such pay to divide (R. 382, ll. 7-10). Therefore, DFAS stopped paying these amounts to Yvonne and sent letters informing the parties of the change (R. 306, February 19, 2014 Letter from DFAS to Yvonne R. Boutte).

Yvonne filed a motion for contempt against Kevin claiming that he should be required to continue making these payments. On May 22, 2014, Kevin filed and then withdrew an exception of no cause of action. In that exception, Kevin had argued that the disability payments were his separate property and not divisible.

The parties entered into a "stipulated" Consent Judgment on June 6, 2014, which provided:

> IT IS ORDERED, ADJUDGED, DECREED AND STIPULATED that the defendant, Kevin Lee Boutte is in contempt of court.
>
> IT IS ORDERD, ADJUDGED, DECREED AND STIPULATED that the parties agree that the defendant, Kevin Lee Boutte, shall resume payment to the plaintiff, Yvonne Renea Boutte of her forty-three percent (43%) interest in the defendant's military retirement pay and/or benefit including cost of living expenses as ordered by the Consent Judgment and Voluntary Partition Agreement dated January 19, 2012 (**ATTACHMENT B**, R. 77-78).

Subsequent to this, the United States Supreme Court decided the case of *Howell v. Howell*, 137 S. Ct. 1400 (2017), in which the Court reiterated the principle that federal law preempts state

law concerning the disposition of military benefits and the USFSPA only allows state courts to divide "disposable" military retired pay. The Court overruled case law in over 32 states that had previously allowed the parties to agree or the courts to enforce "indemnification" or "reimbursement" schemes whereby the former servicemember was forced to continue paying using his or her disability pay to compensate for the loss of the former spouse of his or her share of the former servicemember's "disposable" retired pay due to his or her receipt of in lieu disability pay. The Court reiterated that under 38 U.S.C. § 5301 state courts have no jurisdiction or authority over *any* military benefits that are *not* explicitly divisible by Congress. *Id.* at 1405 ("State courts cannot 'vest' that which (under governing federal law) they lack authority to give.").

Nonetheless, under threat of contempt, Kevin continued using his disability and CRSC to pay Yvonne. In 2018, after *Howell* was released, he filed a Petition for Declaratory Judgment, Alternative Petition to Annul Judgment, Alternative Petition to Modify MDRO. The trial court conducted a hearing on April 29, 2019. The crux of the issue addressed was whether Kevin had agreed in the 2014 consent judgment to "pay privately forty-three percent of his military retirement pay. Not disposable retired pay because he has the option under the law." (R. 331, Hearing Transcript, April 29, 2019, ll. 22-26). Trial Counsel for Kevin argued that the consent judgment, as was the original judgment in 2012, was confined only to any "military retirement pay and/or benefit". There was no difference in the two agreements (2012 and 2014) and neither mentioned or specified that Kevin was agreeing to pay Yvonne using any federally proscribed disability benefits.

The trial court contended that "the issue...today is the very issue that we were here about in May of 2014 is whether or not by moving this money and calling it Combat Related Special Compensation or Concurrent Retirement Disability Pay, if it could be shielded from Ms. Boutte." (R. 331-332, ll. 29-32; ll 1-3, resp.). "Mr. Boutte agreed to that judgment from May 22, 2014." (R. 332, ll. 4-5).

Counsel for Kevin raised *Howell v. Howell*, 137 S. Ct. 1400 (2017), which overruled prior case law across the country in which state courts were authorized to approve agreements between the parties whereby the former military servicemember agreed to use his or her "non-disposable" military disability benefits to "make up" or "reimburse" the former spouse due to the latter's loss of an interest in previously "disposable" military retired pay that had been automatically paid to

the former spouse by DFAS by operation of federal law. Nonetheless, the trial court asked whether "the parties have a right in any area of the law to create the law between themselves?" (R. 334, ll. 29-31). Counsel for Kevin argued that the language of the May 22, 2014 agreement "does not agree to anything" but "the Military Retired Pay." (R. 335, ll. 25-32). Kevin testified he could not remember "what was said five years ago" and he did not remember because "one thing about PTSD is memory loss." (R. 367, ll. 11-13).

The trial court ruled that although CRSC was the separate property of Kevin under federal law, the 2014 consent judgment had reduced the parties agreement to a judgment that barred Kevin from challenging his payments to Yvonne of the 43 percent share. **(ATTACHMENT C**, Trial Court's Oral Reasoning for Decision in Open Court, April 29, 2019, R. 387-393). The trial court acknowledged that Kevin was using military disability pay to satisfy the consent judgment, but that because the parties had agreed to continue the 43 percent division even after Kevin began receiving his disability pay, he could challenge the 2014 consent judgment and it was barred by *res judicata* (R. 392). Judgment was entered for Yvonne. **(ATTACHMENT D)**.

The Court of Appeal affirmed **(ATTACHMENT E**, *Boutte v. Boutte*, 19-734 (La. App. 3 Cir. 07/08/20); 2020 La. App. LEXIS 1030), Slip Opinion of the Court of Appeals, issued July 8, 2020). First, the Court of Appeals assessed the trial court's conclusion that the 2014 "Consent Judgment" was *res judicata* as to Kevin's rights to challenge the disposition of his military pay. *Id.* at 2). "The only issue presented to this court is whether the trial court erred in finding that *res judicata* applied to a consent judgment in a family law case." *Id.* at 3. The Court of Appeals ruled that the issue was "actually adjudicated" in 2014 because the phrase "and/or benefit" in the consent judgment could be deemed to have referred to Kevin's federal disability pay. *Id.* at 6. The Court concluded: "[T]he only logical conclusion to be reached is that the benefits referenced in the 2014 Consent Judgment are the CRSCD benefits." *Id.* The Court further reasoned that a "consent judgment is a bilateral contract" and that the 2014 consent judgment "adjudicated the issues" including the use of Kevin's disability pay and *res judicata* applied to his 2018 action. *Id.* at 7, citing *McDaniel v. McDaniel*, 567 So. 2d 748, 750 (La. App. 2 Cir. 1990).

The Court of Appeals further reasoned that *Howell v. Howell*, 137 S. Ct. 1400 (2017) would apply, but that "La. Civ. Code. Ann. art. 1971 allows parties 'to contract for any object that is *lawful*, possible, and determined or determinable.'" *Id.* at 8 (emphasis added). The Court

continued: "Unless the object of the contract *is restricted by the government because it violates public policy*, a party has the freedom to contract for any object." *Id.* (emphasis added), citing *South East Auto Dealers Rental Ass'n, Inc. v. EZ Rent to Own, Inc.*, 2007-0599 (La. App. 4 Cir. 2/27/08), 980 So.2d 89, *writ denied*, 08-684 (La. 04/18/08), 978 So. 2d 355.

Kevin seeks review in this Court of the decision of Court of Appeals for the reasons stated in his statement of Rule X(1)(a) Consideration, *supra* and as further explained as follows.

QUESTION PRESENTED

Did the Court of Appeals err in concluding that *res judicata* barred Kevin's challenge to the 2014 Consent Judgment where federal law absolutely preempts state law concerning the disposition of all military benefits in state court divorce proceedings unless Congress explicitly allows it, and where positive federal statutory law prohibits veterans from agreeing to dispossess themselves of these restricted federal benefits, which are the benefits at issue in the case *sub judice*?

ASSIGNMENTS OF ERROR

The Court of Appeals erred in concluding that *res judicata* barred Petitioner's claim that his continued payments of federal disability benefits violate the federal constitution and laws of the United States.

SUMMARY OF ARGUMENT

There is in fact stated federal policy in affirmative legislation making it *unlawful* for a veteran to contract away his rights to protected disability pay. 38 U.S.C. § 5301(a)(3). Thus, as the Court of Appeals noted what would in fact defeat the principle of *res judicata* is present here in preexisting and absolutely preemptive federal law, to wit, the object of the consent agreement in this case is in fact "restricted by the government because it violates public policy" (ATTACHMENT E, Slip Op. at 8). See 38 U.S.C. § 5301(a)(1) and (3)(A) and (C). As reiterated by the United States Supreme Court in *Howell*, under this provision, state courts have no authority or jurisdiction, through "any legal or equitable process whatever" to order that a beneficiary of veterans disability benefits pay them over to another "whether before or after receipt" and "when due or to become due"; and all such decrees, orders, judgments, including judgments by consent agreement, are prohibited and void from inception. See 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C). See also *Howell v. Howell*, 137 S. Ct. 1400, 1405 (stating that under 38 U.S.C. § 5301(a)(1)

"state courts cannot 'vest' that which they have no authority to give"). As such agreements and orders directing that the veteran use these federally protected funds in the division of property in a state court divorce proceeding are "void from inception" and/or "wholly void", respectively, the principles of *res judicata* would not apply. *Howell, supra*; 38 U.S.C. § 5301(a)(1) and (a)(3); *United States v. Hall*, 98 U.S. 343, 349-356 (1878) (the statutes protecting veterans from agreeing to dispossess themselves of their disability benefits have existed "since Congress, under the Constitution, commenced to grant such bounties" and such agreements are "wholly void"); *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159, 161-162 (1962) (38 U.S.C. § 3101 (renumbered to 38 U.S.C. § 5301) was to be liberally construed and such funds are "inviolate").

Under Louisiana law, as the assignment and consent judgment violate federal law and policy as expressed by the plain language of 38 U.S.C. § 5301(a)(1) and (a)(3), and because this statute of federal preemption actually voids such agreements from their inception, the principles of *res judicata* would not apply to the Petitioner's challenge. See La. Civ. Code Ann. art. 1971. See also *Ackel v. Ackel*, 696 So.2d 140, 143 (La. App. 5 Cir. 1997) (citing La. Civ. Code Ann. art. 1966 and stating that "[a] contract cannot exist without a lawful cause."). "The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy. La. Civ. Code Ann. art. 1968." *Id.*

As the Court of Appeal panel noted in the instant case, "[u]nless the object of the contract is restricted by the government because it violates public policy, a party has the freedom to contract for any object." (ATTACHMENT E, Slip Op. at 8). Title 38 U.S.C. § 5301(a)(3) protects veterans and the benefits provided to them for their disabilities from contracting away their rights to these monies. This provision is to be liberally construed in favor of the veteran and any assignments of the veterans' rights contrary to the provision are wholly void. See *Porter v Aetna*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962); *United States v Hall*, 98 US 343, 349-355, 25 L Ed 180 (1878).

LAW AND ARGUMENT

The nation has been at war in one theater or another for the better part of three decades. Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in

Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf. Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, *supra*. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html. As of March 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id.* See also VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp.

Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent or higher, with approximately 900,000 in 2011. VA, Trends, *supra* at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id.* Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org. Thus, according to this data analysis, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation also conducted a study and found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims. See http://www.nvf.org/staggering-number-of-disabled-veterans/. Yet another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths,

Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. This progress comes with a price.

Physical injuries in these situations are understandably horrific. *Id.* See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis L. Rev. 545, 570 (2016). Many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family perceptions of post-deployment healthcare needs of Iraq/Afghanistan military personnel, 7(3) Mental Health in Family Medicine 135-143 (2010). Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, *et al.*, War and the Family, 11(2) Stress Medicine 131-137 (1995).

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. Families, already stretched by this extraordinary burden, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011). Thus, disabled veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.

This is why these unfortunate consequences of military service have historically been recognized and attended to under exclusive and preemptive federal law. Congress has exercised exclusive legislative authority in these premises since the earliest days of the Republic. See, *e.g.*, *Hayburn's Case*, 2 U.S. 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).

Congress exercises its enumerated military powers when it passes legislation providing veterans with benefits. U.S. Const., art. I, § 8, cls 12-14. 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."). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference". *McCarty v. McCarty*, 453 U.S. 231, 236 (1981), citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

The solicitude of Congress for veterans is of longstanding. *United States v Oregon*, 366 US 643, 647; 81 S Ct 1278; 6 L Ed 2d 575, 578 (1961). President Lincoln's second inaugural address challenged a divided nation "to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan." Abraham Lincoln, Second Inaugural Address (March 14, 1865). "The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative... The power is given fully, completely, unconditionally. It is not a power to raise armies *if* State authorities consent; nor *if* the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution, without an *'if'*". 9 Nicolay and Hay, Works of Abraham Lincoln 75-77 (1894). See also *Lichter v. United States*, 334 U.S. 742, 756, n. 4 (1948). "It must also be remembered that it is of the essence of national power that where it exists, it dominates." Charles Evans Hughes, War Powers Under the Constitution, Marquette Law Review, volume 2 , issue 1, p. 10 (1917). "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." *Id.* "The power...is explicit and supreme...." *Id.*

As a result of this deference, statutes providing for and protecting veterans' benefits are *liberally construed*. *Porter v Aetna*, 370 U.S. 159, 162 (1962). The Supreme Court has never wavered from this principle. *Henderson v Shinseki*, 562 U.S. 428, 440 (2011) (stating "the canon that provisions for benefits to members of the Armed Services are to be construed *in the beneficiaries' favor*.") (emphasis added) (citing cases). This principle of statutory construction has

been directly applied to 38 USC § 3101 (now § 5301), the statute at issue in the instant case which void any agreement by the veteran to dispossess himself of his federal entitlements. *Porter*, *supra*.

Thus, while state law in domestic relations is originally deferred to, it must yield when addressing the disposition of Congressionally purposed military benefits. 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*, *supra* at 223; U.S. Const. art. VI, cl. 2. See also *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981) (stating "[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.").

The Supreme Court has reiterated this principle time and again. See, *e.g.*, *Wissner v. Wissner*, 338 U.S. 655, 660-661 (1950); *Free v. Bland*, 369 U.S. 663, 666 (1962); *McCarty*, *supra*; *Ridgway*, *supra*; *Mansell v. Mansell*, 490 U.S. 581 (1989), and, most recently, in *Howell v. Howell*, 137 S. Ct. 1400, 1406 (2017), citing *McCarty*, *supra* at 232-235. In all such cases, the Supremacy Clause of the United States Constitution requires that state law yield where it conflicts with the disposition of these federally purposed benefits. *Ridgway*, *supra* at 54-55 (citing *Free*, *supra* at 665 and stating "[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."

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. Feurstein*, 308 U.S. 433, 440, n. 12 (1940), citing *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); and *Hines v. Lowrey*, 305 U.S. 85, 90, 91 (1938) (applying the same

principles to the predecessor of the statutory provision prohibiting veterans from entering into agreements to dispossess themselves of their benefits, 38 U.S.C. § 5301, applicable in this case). "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, citing *Hines*, *supra*. Interpreting the USFSPA and 38 U.S.C. § 5301, which are directly applicable to the case *sub judice*, the Court in *Howell* stated simply that "[s]tate courts cannot 'vest' that which (*under governing federal law*) they lack the authority to give." 137 S. Ct. at 1405 (emphasis added), citing 38 U.S.C. § 5301.

Here, the question is whether under this federal preemption paradigm, Kevin's currently received military disability benefits may be considered part of the "community property" divisibly by and between him and Yvonne. More precisely, the question is whether the Court of Appeals erred in affirming the trial court's ruling that that Kevin is forever barred by *res judicata* from challenging the ongoing order in which he is be forced by way of the 2014 "consent agreement" to use his non-disposable disability pay as a substitute for the share of previously "disposable" retired pay Yvonne had received by operation of federal law.

The USFSPA and 38 U.S.C. § 5301, and the United States Supreme Court cases interpreting these provisions, dictates the answer. The USFSPA provides state courts with a "precise and limited" authority over "disposable" retired pay as defined in the statute. *Howell*, 137 S. Ct. at 1404, quoting *Mansell*, 490 U.S. at 589. By definition, what is not "disposable retired pay" is off limits to state courts. The USFSPA gives states discretionary authority to divide as property up to 50 percent of a retired servicemember's "disposable" military retirement pay. See 10 U.S.C. § 1408(a)(4) (defining what is and what is not "disposable retired pay"); (c)(1) (the actuating provision of USFSPA giving the state court jurisdiction to order a division of such defined "disposable" retired pay); and (e)(1) (expressly limiting the state court's jurisdiction to a maximum of 50 percent of the "disposable retired pay", if any, as available to the former spouse in a state court divorce proceeding) and 10 U.S.C. § 1413a(g) (explaining that CRSC, a special form of disability pay awarded for combat-incurred injuries is "not retired pay"). See also Department of Defense Financial Regulations on CRSC, October 2017, Volume 7B, Chapter 63, § 630101(C)(1) (stating "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.").

Following its decision in *Howell*, the Court vacated two other decisions (one from Arizona, *Merrill v. Merrill*, 238 Ariz. 467, 468 (2015), vacated 581 U.S. ___; 137 S. Ct. 2156 (2017) and one from California, *In re Cassinelli*, 4 Cal. App. 5th 1285, 1291, 1297; 210 Cal. Rptr. 311 (2016), vacated sub nom *Cassinelli v. Cassinelli*, 583 U.S. ___; 138 S. Ct. 69 (2017)) and remanded to the respective state courts for consideration of *Howell's* application to the additional disability benefit, CRSC. In both cases, the state courts applied the prohibition against forced indemnification and erased the veteran's obligations. See also *Foster v. Foster*, 2020 Mich. LEXIS 687, *16-18 (April 29, 2020).

Moreover, and most pertinent to the qualification expressed by the Court of Appeals, affirmative and plain federal law does, as a matter of public policy expressed through the exercise of Congress's enumerated military powers, prohibit state courts from using "any legal or equitable process" – which would include rules of estoppel and *res judicata* – to force the veteran to use non-disposable military benefits to make up the difference in a former spouse's lost share of disposable retired pay. 38 U.S.C. § 5301(a)(1). These monies are protected "before and after receipt" when "due or to become due." *Id.*

Finally, and most pertinent to Kevin's situation, the statute also prohibits the veteran himself from entering into an agreement that would cause a depletion of these benefits. 38 U.S.C. § 5301(a)(3)(A). Subsection (a)(3)(C) *voids from inception* any agreements or assignments based on such agreements. The purpose of these provisions are to protect not only the benefit, but the disabled veteran. See, *e.g.*, *Yake v. Yake*, 170 Md. 75, 76; 183 A. 555 (1936) (noting that the anti-attachment provision in the World War Veterans' Act of 1924, 38 USC § 454 (identical to 38 USC § 5301) was to guard those unfortunates who had been disabled in the service of their country from imposition of others or the depletion of their maintenance and support by their own improvidence and to assure them a subsistence). Compare *Hines v Lowrey*, 305 U.S. 85, 90, 91 (1938) (noting the same applies to protect against excessive attorney fees charged against the veterans' benefits) and *Porter v. Aetna*, 370 U.S. 159, 162 (1962), where the Court ruled that 38 USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*." (emphasis added). Finally, *Howell* confirmed that that state courts simply do not have

authority by way of this provision to vest an interest in these personal entitlements in anyone other than the beneficiary.

The fact that these federal statutes protect these benefits and treat them as inviolate has removed any necessity of debating their wisdom or fairness when addressing their application to individual cases. Congress, in the exercise of its enumerated powers, is not "required to build a record in the legislative history to defend its policy choices." *Mansell*, 490 U.S. at 592. Any state court attempt to divert his federally protected disability benefits would be impermissible and contrary to the sweeping jurisdictional prohibitions in 38 U.S.C. § 5301. See also *Howell*, 137 S. Ct. at 1405.

Veterans' benefits have been protected from state legal and equitable process since at least the 1870's. *United States v Hall*, 98 US 343, 349-355, 25 L Ed 180 (1878). Agreements to pay these benefits to a non-beneficiary have also been deemed by the federal statutes that preceded 38 USC § 5301 to be "wholly void" and subject to recovery in assumpsit. *Id.* (citing cases). The Court, in 1878, stated of canvassing the anti-attachment provisions in veterans' benefit legislation that "[t]hese diverse selections from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted *the exclusive use and benefit of the money appropriated and paid for that purpose*. *Id.* at 352 (emphasis added). Exclusive use and benefit cannot occur if the veteran is forever bound by an agreement which the statute says is void from inception.

Interpretation of these provisions has been consistently in favor of protecting the defined benefits against all state authority and control. The United States Supreme Court has ruled that 38 U.S.C. § 5301 is to be interpreted *liberally* in favor of the beneficiary's rights and the benefits covered by this statute are inviolate. In *Porter v. Aetna*, 370 U.S. 159, 162 (1962), the Court reasoned that 38 USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*" and thus diversion by "*any legal or equitable process*" is forbidden. *Id* (emphasis added). Accord, *Ridgway v Ridgway*, 454 US 46, 54-56 60-61; 102 S Ct 49; 70 L Ed 2d 39 (1981) and *Howell v Howell*, 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017). A comprehensive discussion of these provisions is found in both *United States v. Hall*, and

Ridgway v. Ridgway, 454 U.S. 46, 60-61 (1981). There, the Court stated of these provisions appearing in multiple veterans' benefits statutes that they "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 absolute preemption principle was followed in *McCarty*, *supra*, and finally in *Howell*, *supra*, the Court confirmed that 38 U.S.C. § 5301(a)(1) actually divests state courts of authority to divert these benefits at any time in the future. As the statute applies to any benefits administered by the Secretary of Veterans Affairs, it applies to Kevin's VA and CRSC benefits, which were retroactively awarded in 2009 and 2010, a date prior to his divorce (R. 279). CRSC is a retroactive award of what is considered non-disposable disability pay. See 10 USC § 1413a(g) (CRSC is not considered disposable retired pay; it is pay that is protected by 38 USC § 5301 as veterans' non-disposable benefits). See also *Adams v. United States*, 126 Fed Cl 645, 647-648 (2016) (CRSC benefits are "compensable under the laws administered by the Secretary of Veterans Affairs").

Kevin was suffering from his disabilities during his divorce proceedings, and he continues to suffer from them today. In other words, as of 2012 and 2014, when the "consent judgments" of divorce were entered on the record in this case, the disabilities suffered by Kevin had already manifested due to his combat-related injuries. The fact that he began receiving these protected benefits only after the divorce was a consequence of the time it took for him to complete the application and eligibility process and the reductions in Yvonne's portion of disposable pay occurred by operation of federal law. Nonetheless, Kevin continues to pay these restricted funds to his former spouse in contravention of 38 U.S.C. § 5301(a)(1) and (a)(3)(A). Since the latter statute

considers such arrangements prohibited and therefore "void from inception" there would be no bar to challenge his ongoing obligation in this regard. It is, in fact, an obligation that is contrary to policy and law.

"A contract cannot exist without a lawful cause." *Ackel v. Ackel*, 696 So.2d 140 (La. App. 5 Cir. 1997). See also La. Civ. Code Ann., art. 1968 "The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy." As it is against federal law for a veteran to enter into any agreement to assign away his benefits for consideration, it would be prohibited by federal law for Kevin to be forced to comply with the consent agreement, which the Court of Appeals acknowledged was a contract. (**ATTACHMENT E**, Slip Op. at 7, citing *McDaniel v. McDaniel*, 567 So. 2d 748, 750 (La. App. 2 Cir. 1990). See also *Nelson v. Nelson*, 985 So.2d 1285, 1290 (La. App. 5 Cir. 2008) (a consent judgment is a bilateral contract wherein the parties adjust their differences by mutual consent). Parties are forbidden to contract for any object that is not lawful. La. Civ. Code Ann. art. 1971. *Ackel, supra.*

> [I]n any case where a beneficiary [the veteran] 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 an assignment and is prohibited [and] "[a]ny 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.
>
> 38 U.S.C. § 5301(a)(3)(A) and (C)

In *Howell*, the Supreme Court reiterated under 38 USC § 5301, "[s]tate courts cannot *vest* that which (under governing federal law) they *lack the authority to give*." *Howell v Howell*, 137 S Ct at 1405 (emphasis added). Put another way, state courts are without power, *i.e.*, jurisdiction, to dispose of the federal benefit in a manner contrary to the statute. Indeed, the lack of authority in a state court to vest a future right to the benefits at issue is confirmed by the statute's language which renders any agreement to do so *void from inception*. The state's inability to adjudicate is absolute. The statute absolutely voids any agreement (voluntary or otherwise) whereby the veteran agrees to dispossess himself or herself of the benefits at issue, and thus, there is no need to consider whether it can be collaterally attacked. State law is preempted and "without effect". *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). See also *Gibbons v. Ogden*, 22 US 1, 211; 6 L Ed 2d 23 (1824).

Relieved of the fiction that Kevin waived this issue, where no such waiver is possible, the Court is free to examine, directly, the trial court's *post-Howell* attempt to do exactly what the Supreme Court said state courts could not do – force veterans to indemnify or reimburse their former spouses from their restricted disability pay (or any equivalent amounts for that matter) where the former spouse loses his or her interest in the former servicemember's disposable retired pay by operation of federal law. "All such orders are thus preempted." *Howell*, 137 S. Ct. at 1406. The Court in *Howell* even went so far as to say that this has in fact been the rule of law since 1981. "McCarty with its rule of federal preemption *still applies*." *Id.* at 1404. And, that rule applies *a fortiori* to all disability pay. *Id.* at 1406.

The Court further reminded the states that only Congress can say when and if the state may exercise jurisdiction over federal benefits, and when it does so, its allowance is both "precise and limited". *Id.* at 1404, citing *Mansell* 490 U.S. at 589. The exception in the USFSPA only applies to "disposable" retired pay, which is not (and never has been), an available asset in the case *sub judice* because Petitioner's CRSC pay was retroactively awarded to 2009 (R. 279). Further, 10 U.S.C. § 1413a(g), which governs such pay, expressly says that it is not to be considered disposable retired pay for purpose the USFSPA's limited allowance. See also DoD Financial Management Regulations 7000.14-R, vol. 7B, ch. 63 (Oct. 2017), § 630101.C.1, p. 63-4).

Mansell did not address the direct application of 38 U.S.C. § 5301 because, as the Court noted, it was addressing only the "value" of the waived pay, not the disability pay itself. *Howell* did have occasion to apply 38 U.S.C. § 5301 because the Court was addressing the situation, as here, in which the state court approves of the veteran's dispossession of the disability pay itself. The Court ruled that state courts could not "vest" these benefits in anyone other than the beneficiary by way of judgments, orders, decrees, indemnity, reimbursement, restitution, or forced contractual arrangements. Indeed, 38 U.S.C. § 5301(a)(1) *precludes* the authority and jurisdiction of state courts because it anticipates and prohibits, "any legal or equitable process whatever" from being employed to deprive the disabled veteran of the benefit. It further voids from inception any voluntary agreement the veteran might enter into to dispossess himself or herself of the benefit. The public policy and rationale for 38 U.S.C. § 5301 (and related provisions) was thoroughly discussed by the Court in *United States v. Hall*, 98 U.S. 343 349-356 (1878); *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159, 161-162 (1962); *Ridgway v Ridgway*, 454 US 46, 60-61;

102 S Ct 49; 70 L Ed 2d 39 (1981), *inter alia*. Petitioner submits the plain and unambiguous language of the provision itself suffices to define its broad scope, the Court has nonetheless gone out of its way to declare that the provision is be liberally construed and that the funds it protects are "inviolate" as they relate to the rights of the beneficiary thereto. *Porter*, *supra*. See also, *inter alia*, *Wissner v. Wissner*, 388 U.S. 655, 658-661 (1950) (where the state court ordered the diversion of future payments of a veteran's life insurance benefits to a former spouse (who was not the designated beneficiary) the Court said it was a seizure in "flat conflict" with the anti-assignment provision and of no effect per *McCulloch v. Maryland*, 17 U.S. 316, 400 (1819)); *McCarty v. McCarty*, 453 U.S. 210, 223-234 and nn. 22 and 23 (1981) (holding that the source of the military retirement and benefits system is Congress's enumerated military powers, Congress never authorized or required property division of military retired pay; that the anti-assignment provisions equivalent to 38 USC § 5301 prohibit attachment and cannot be avoided by offsetting awards or orders of indemnification because the former spouse does not receive the benefits by operation of federal law; "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member"; and "the law of the State is not competent to do this") (internal quotations and citations omitted); *Ridgway*, *supra* at 52-63 (where federal statute directly contradicts and conflicts with the state court's disposition, the Supreme Court's authority extends "over state judgments *to the extent that* they incorrectly adjudge federal rights"; even in the area of family law the Court has protected under the Supremacy Clause the rights and expectancies established by federal law and in all such cases state law must yield; "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other"; interpreting an anti-assignment provision equivalent to 38 U.S.C. § 5301 and stating that it "pre-empts all state law that stands in its way"; "[i]t protects the benefits from legal process '[notwithstanding] any other law...of any State'"; "[i]t prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy."); and *Howell*, 137 S. Ct. at 1404-1405 (directly applying 38 U.S.C. § 5301 and noting state courts cannot vest benefits in anyone other than the beneficiary because they do not have the authority to do so).

Prior to the Supreme Court's decision in *Howell* some state courts and parties used a range of mechanisms to "divide" otherwise non-disposable and restricted disability pay. However, some

state courts properly recognized that federal law preempted state law and removed the jurisdiction of the state over these restricted benefits. See, *e.g.*, *Ryan v. Ryan*, 257 Neb. 682, 686-693; 600 N.W.2d 739 (Neb 1999) (court exceeded its jurisdiction to the extent that divorce judgment divided prohibited veterans' disability benefits and order was void and subject to collateral attack and *res judicata* did not apply); *Youngbluth v. Youngbluth*, 188 Vt. 53; 6 A.3d 677 (Vt. 2010) (38 U.S.C. § 5301 jurisdictionally barred state courts from dividing prohibited veterans' disability benefits as property and stating that *Mansell* "makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran and courts *may not do indirectly what it cannot do directly*", citing, inter alia, *King v. King,* 149 Mich. App. 495, 386 N.W.2d 562 (Mich. App. 1986); *Mallard v. Burkart*, 95 So.3d 1264, 1270-1273 (Miss. 2012) (citing cases).

Howell sided with these cases. State courts across the country have since addressed the precise facts of this case in which a trial court attempts to force a post-judgment indemnification or reimbursement "agreement" between the parties. "[T]he 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 benefits." *Sample v. Sample*, 2018 Tenn. App. LEXIS 523, * 15 (Tenn. App. 2018), citing *Howell*, 137 S. Ct. at 1401. See also *Vlach v. Vlach*, 556 S.W.3d 219, 223-224 (Tenn. App. 2017) (canvassing the pre-*Howell* cases and explaining that the Supreme Court in *Howell* rejected both the "vested interest" approach and the "reimbursement or indemnification" approach (the one used here by the trial court) because "either approach amounted to an award of military pay waived in order to obtain disability benefits" and "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.") (quoting *Howell* at 1405-1406); *Roberts v. Roberts*, 2018 Tenn. App. LEXIS, *22 (Tenn. 2018) *Howell* cases 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); *In re Babin*, 437 P.3d 985, (Kan. Ct. App. 2019) (*Howell* "abrogat[ed] several cases dealing with property settlement agreements" and "endorsed *Mansell* and its restriction on using a property settlement agreement to divide pay" and "overruled cases relying *on the sanctity of contract to escape the federal preemption*) (emphasis added); *Berberich v. Mattson*, 903 N.W.2d 233, 241 (2017) (*Howell* "makes clear that state courts 'cannot

'vest' that which (under governing federal law) they lack the authority to give'" and "overruled cases *relying on the sanctity of contract to escape federal preemption*"; "[s]imply put, state laws are preempted in this specific area.") (emphasis added); *Brown v. Brown*, 260 So.3d 851, 857-858 (Ala. Ct. App. 2018) (*Howell* "recognized that some state courts were enforcing agreements and divorce judgments entered before a military member chose to waive retirement pay to receive disability pay, thus decreasing the pool of 'disposable retirement benefits' in which the military member's spouse could share" and "determined that those state courts were acting in error" and "once a military member opts to waive retirement pay for disability pay, a state court cannot subsequently increase the spouse's share of the military member's retirement benefits, pro rata, or otherwise indemnify the spouse for the shortfall that occurs when disability pay reduces the amount of retirement pay from which the spouse it so receive a share."); *Hurt v. Jones-Hurt*, 168 A.3d 992, 1001, 1002 (Md. Ct. App. 2017) (*Howell* "held that state law purporting to recognize a vested interest in military retirement pay is preempted by federal law, period" and "the veteran's ability under federal law to waive retirement pay for disability benefits, at whatever time his disability status might change, overrides (preempts!) any state law agreement he might have made, or state court judgment to which he was a party, relating to his military retirement benefits" and the military member's "ability to elect disability benefits over retirement pay overrides our courts' ability to amend the marital property award to reflect post-judgment changes in circumstances); *In re Marriage of Tozer*, 410 P.3d 835, 836-837 (Colo. Ct. App. 2017) ("The *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"); *In re Marriage of Cassinelli (On Remand)*, 2018 Cal. App. LEXIS 177, *13 (2018) (*Howell* "held that a state court cannot order a veteran 'to indemnify the divorced spouse for the loss caused by the veteran's waiver'" and overruled case law that had previously held state courts were allowed to 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; and stating "[b]ecause CRSC pay is not retired pay – just as veteran's disability benefits are not retired pay – under FUSFSPA as construed in *Mansell*, a state court *does not have jurisdiction* to treat CRSC as community property."); *Fattore v. Fattore*, 2019 N. J. Super. LEXIS 16 (N. J. App.

2019) (calculation of hypothetical pension benefit waived as a result of veteran's receipt of disability pension and payment of that figure from another asset belonging to veteran is preempted). Finally, in *Foster v. Foster*, 2020 Mich. LEXIS 687, *21-22 (April 29, 2020), the Michigan Supreme Court held that a consent agreement requiring the disabled veteran to dispossess himself of disability benefits was prohibited by 38 U.S.C. § 5301(a)(1) and (3) and therefore impermissible. On remand to the Court of Appeals, in *Foster v. Foster (On Second Remand)*, 2020 Mich. App. LEXIS 4880, * (Mich. Ct. App., July 30, 2020), the Court held that the principle of federal preemption deprived the state courts of subject matter jurisdiction to the extent that the lower court required the veteran to dispossess himself of his federal disability benefits and therefore the veteran "did not engage in an improper collateral attack on the 2008 consent judgment." *Edwards v. Edwards*, 132 N.E.3d 391 (Ind. App. 2019), transfer denied 138 N.E. 3d 957 (2019) (holding that *res judicata* barred the challenge to the veteran's prior agreement but that *Howell* required the trial court to modify the judgment so that the veteran would not be required to continue using his disability benefits to pay his former spouse going forward).

CONCLUSION

In light of this significant (and growing) body of post-*Howell* case law across the country, this Court has the opportunity to address a post-*Howell* decision forcing a veteran to continue to dispossess himself of these benefits in a manner contrary to federal law. Petitioner urges it do so here.

Moreover, the Court of Appeals qualified its approval of the judgment in this case noting that it was not aware of a prohibition on the enforcement of the consent agreement. As demonstrated herein, the plain language of 38 U.S.C. § 5301(a)(3), which applies to the CRSC benefits at issue, actually prohibits agreements by the veteran to dispossess himself of the restricted benefits. Moreover, pursuant to this provision, which the *Howell* court noted was applicable, a state court may not use any legal or equitable process whatever to force the veteran to abide by such an agreement where these benefits are implicated in the proceedings.

The Louisiana Civil Code recognizes that the obligation of a contract must be lawful and must not be prohibited by law. Preexisting federal law prohibits a veteran from agreeing to contract his personal entitlement to veterans' benefits. 38 U.S.C. § 5301(a)(3).

Petitioner respectfully suggests that the requirements of Rule X(1)(a) are present in the instant case and respectfully requests this Honorable Court grant his application for review.

Respectfully submitted,

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VERIFICATION

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned authority, personally came and appeared:

David C. Hesser

who, upon being duly sworn, did depose and say:

That he is one of the attorneys for Applicant, Kevin Lee Boutte, in the above-entitled and numbered proceeding, and who certified that he has prepared and read the foregoing Writ Application and that all of the allegations contained therein are true and correct to the best of his knowledge.

That copies of the Writ Application were duly served upon the Honorable Judge, C. Kerry Anderson, by U.S. Mail, properly addressed and postage prepaid, Charles G. Blaize and Frederic C. Fondren, counsel for Yvonne Boutte, by U.S. Mail, properly addressed and postage prepaid, and Honorable Renee R. Simien, Clerk, Third Circuit Court of Appeal on this 7th day of August, 2020.

David C. Hesser

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 7th day of August, 2020.

Notary Public Adam Huddleston
Bar Roll No. 33159 Notary # 91717
(My commission expires at death)

CERTIFICATE OF SERVICE

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned Notary, personally came and appeared David C. Hesser, who being duly sworn did depose and say that he is the counsel of record for Kevin Lee Boutte and that all allegations of this Writ Application are true and correct, and that a copy has been sent via U. S. mail to the Judge, Clerk, Third Circuit Court of Appeal and to Charles G. Blaize And Frederic C. Fondren, counsel for Yvonne Boutte as follows:

Honorable C. Kerry Anderson
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DeRidder, Louisiana 70634
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Honorable Renee R. Simien
Clerk, Third Circuit Court of Appeal
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Lake Charles, Louisiana 70615

David C. Hesser

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 7th day of August, 2020.

Notary Public Adam Huddleston
Bar Roll No. 33184 / Notary 91717
(My commission expires at death)

CERTIFICATE FOR ATTACHMENTS

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned Notary, personally came and appeared David C. Hesser, who being duly sworn did depose and say that

I hereby verify that the Opinion attached to this Writ Application has previously been made part of the Appeal Record, to the best of my knowledge, information, and belief. I understand that failure to comply with this local rule may result in the refusal to consider said attachments. *WILLFUL FAILURE TO COMPLY WITH THIS LOCAL RULE MAY SUBJECT ME TO PUNISHMENT FOR CONTEMPT OF COURT.*

David C. Hesser

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 7th day of August, 2020.

Notary Public Adam Huddleston
Bar Roll No. 33189 / Notary 91717
(My commission expires at death)

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 2020-C-985

YVONNE RENEA BOUTTE,
Plaintiff-Respondent

versus

KEVIN LEE BOUTTE
Petitioner-Applicant.

Application for a Writ of Certiorari from a July 8, 2020
decision by the Court of Appeal, Third Circuit, State of Louisiana
Docket No. 19-734, affirming a decision of the
36th District Court for the Parish of Beauregard,
Civil Docket No. C-2010-1241-B, June 24, 2019
Judge C. Kerry Anderson presiding

OPPOSITION TO ORIGINAL APPLICATION FOR A WRIT OF CERTIORARI

FAMILY LAW MATTER

BY:

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COUNSEL FOR PLAINTIFF-RESPONDENT
YVONNE RENEA BOUTTE

APPELLEE'S STATEMENT OF THE CASE

Kevin Boutte's writ application represents the latest installment in his long-time quest to weasel out of what he has repeatedly promised to do: resume paying his ex-wife an amount equal to 43% of his military benefit. He thinks he has finally found the magic bullet: the 2017 case of *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), in which the United States Supreme Court held that a state may not require a Veteran to indemnify his ex-wife for the loss of her portion of the Veteran's retirement pay caused by the Veteran's waiver of such retirement pay in order to receive service-related disability benefits.

As the court of appeal noted, however, *Howell* does not come into play at all, because the question is one of *res judicata*—not substantive application of the federal statutes governing the division of military benefits in divorce settlements. *Remarkably, in his entire writ application, Kevin doesn't address what the court of appeal characterized as the "only issue" before the court on appeal: "whether the trial court erred in finding that res judicata applied to a consent judgment in a family law case."* (Ct. Appeal J. at 3.)

Not only does Kevin's Michigan lawyer fail to discuss the Louisiana law of *res judicata*, but he fails to discuss the possible grounds under Louisiana law for nullifying his 2014 consent judgment. Perhaps that was by design, because none of the possible grounds apply in this case. Even if they did, it would not matter, because Kevin unquestionably "acquiesced" in the consent judgment, and is thus statutorily barred from attempting to nullify it.

As explained below, neither *Howell* nor the preemption doctrine presents any impediment to enforcing the consent judgment in which Kevin agreed to "resume" paying an amount to his ex-wife equal to 43% of his military benefits. Kevin's misbegotten writ application should be summarily denied.

APPELLEE'S RESTATEMENT OF THE FACTS

Kevin agrees in 2012 to pay Yvonne 43% of his "military retirement pay and/or benefit" in exchange for Yvonne's giving up permanent spousal support.

Kevin Boutte retired from the military in 2009, and his wife Yvonne Boutte filed a petition for divorce on December 21, 2010. (R. at 9-15, Pet. divorce.) The parties ended their initial litigation over the divorce and ancillary matters by entering into a consent judgment on

January 19, 2012 that entitled Yvonne to 43% of Kevin's "military retirement pay ***and/or benefit***." (R. at 49-51, 1/19/12 Consent J., emphasis added.)

At the time that the parties entered the 2012 consent judgment, both Yvonne and Kevin believed that she would be able to prove that Kevin was at fault because of his multiple infidelities, and establishing fault was a prerequisite for Yvonne to be entitled to permanent spousal support: a result that Kevin certainly did not want. (R. at 357-58, 376-81, Hr'g Tr.) Therefore, Kevin's agreement to pay the 43% was a critical element of the parties' negotiations; it was the reason why Yvonne agreed to only 30 months of spousal support rather than permanent support. (R. at 381.)

Kevin converts his military retirement pay to disability pay and stops paying Yvonne the agreed 43%.

After the 2012 consent judgment was executed, Kevin, who claims to suffer from PTSD, mood disorder, and cognitive disorder, applied in 2013 to have his retirement pay converted to a form of disability pay called Combat Related Special Compensation ("CRSC"). (R. at 279, CRSC decision letter.) This request was granted in early 2014. (*Id.*)[1] Because CRSC pay is generally not divisible as community property under federal law, the Defense Finance and Accounting Service ("DFAS"), which had been issuing payments for the 43% directly to Yvonne, stopped making payments to her. (R. at 306, 381-82.) When Yvonne notified Kevin about DFAS's action and asked him to resume the payment in accordance with the consent judgment, Kevin "said he was not going to pay it, and that he would see [her] in court." (R. at 383.) Despite knowing that the 43% was an important consideration in the settlement calculus, and despite knowing that both parties intended that Yvonne would receive these benefits until Kevin's death and that he would do nothing to stop this (R. at 358), Kevin refused to make any further payments to Yvonne after DFAS stopped making automatic payments to her. (R. at 327-28.)

[1] It was understood by the parties that Kevin's VA Disability pay was not part of the 2012 consent judgment, as evidenced by further language in the judgment referring solely to "pension benefits" or "retirement pay." (R. at 50-51.) At the time of the April 29, 2019 hearing, Kevin was receiving $3,139 monthly in VA Disability pay, and $1,481 monthly in CRSC pay. (R. at 346.) It is only Yvonne's entitlement to half of the $1,481 monthly CRSC pay that is in dispute; she has never claimed any share of the VA Disability pay.

A 2014 consent judgment requires Kevin to "resume" paying Yvonne 43% of his "military . . . benefit."

In response, Yvonne filed a Rule for Contempt and/or Rule for Allocation of Assets Pursuant to R.S. 9:2801.1. (R. at 54-56.) Kevin challenged this pleading raising Exceptions of No Cause of Action and No Right of Action, and arguing that he was not required to pay Yvonne any portion of the CRSC because it was not subject to division as community property. (R. at 285-93, Exceptions.) Kevin – who was at all times represented by counsel – withdrew his exceptions, and the parties agreed to a stipulated consent judgment that was signed by the trial court on June 6, 2014 and provided, *inter alia,* as follows:

> IT IS FURTHER ORDERED, ADJUDGED, DECREED AND STIPULATED that the parties agree that the defendant, KEVIN LEE BOUTTE, shall ***resume*** payment to the plaintiff, YVONNE RENEA BOUTTE of her forty three percent (43%) interest in the defendant's military retirement pay ***and/or benefit*** including cost of living expenses as ordered by the Consent Judgment and Voluntary Partition Agreement dated January 19th, 2012.

(R. at 77-78, emphasis added.)

Pursuant to this consent judgment, and in order to avoid sanctions for contempt, Kevin resumed paying 43% of his CRSC to Yvonne. (R. at 364, 373.)

In 2018, Kevin seeks to re-litigate whether he must continue paying 43% of his "retirement . . . benefit" to Yvonne.

On August 22, 2018 – more than four years after acquiescing to the 2014 consent judgment – Kevin filed a Petition for Declaratory Judgment, Alternative Petition to Annul Judgment, and Alternative Petition to Modify MDRO, seeking to re-litigate the issue he had raised in 2014 as to whether he was required to continue paying Yvonne 43% of his CRSC pay. (R. at 81-90). In response, Yvonne filed Exceptions of Res Judicata, No Cause of Action, and No Right of Action, and in the Alternative, Petition for Specific Performance and Injunctive Relief. (R. at 95-103.)

The trial court properly sustains the res judicata exception.

At the hearing of the exceptions on April 29, 2019, the trial court sustained the exception of *res judicata*, denying Kevin's 2018 Petition. (R. at 388-91.) As the trial court explained,

> [B]asically what Mr. Hesser is artfully trying to do for his client is the same thing that could have been argued on May 22nd, 2014, and that is under Federal law and the prior judgment in this matter, Mr. Boutte doesn't have to pay Ms. Boutte anything. And the parties

> agreed differently on May 22nd, 2014. Not only did the parties agree differently in a judgment based upon that stipulation was rendered, but Mr. Boutte has in accordance with that agreement and judgment continued to pay.

(R. at 388.)

The trial court further explained that the conversion to CRSC pay had *already occurred* by the time that Kevin litigated the issue in 2014 as to whether he was required to continue paying 43% of his military benefit. (R. at 389.) Thus, the issue that Kevin raised in 2018 (and in this appeal) about the CRSC pay is essentially the same issue as what he had already litigated in 2014. (*Id.*)

The court of appeal correctly affirms the trial court's ruling.

Kevin appealed. The only issue presented to the court of appeal was "whether the trial court erred in finding that res judicata applied to a consent judgment in a family law case." (Ct. Appeal J. at 3.) The court of appeal affirmed the trial court.

The court of appeal rejected Kevin's argument that the case was not "actually adjudicated" for *res judicata* purposes because the consent judgment did not expressly refer to disability pay. (*Id.* at 5-6.) The court noted that in light of the conduct of the parties and the reference in the consent judgment to "retirement pay and/or benefit," the "only logical conclusion" was that the matter of disability pay was adjudicated. (*Id.* at 6.) The court of appeal further explained that under Louisiana law, consent judgments settling property matters are adjudications. (*Id.* at 6-7.)

The court of appeal noted that in *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), the Supreme Court held that military disability pay is not divisible as community property. But the court of appeal found that *Howell* did not apply because the issue had already been litigated. Thus, it affirmed the exception of *res judicata*. (*Id.* at 8.)

As explained below, both lower courts correctly applied the law of *res judicata*. Kevin's writ should thus be denied.

ARGUMENT

Section 1 explains that the lower courts correctly found that *res judicata* bars Plaintiff's attempts to re-litigate what was adjudged in 2014. Section 2 shows that there are no applicable mechanisms by which Kevin can nullify the judgment – especially since he acquiesced in the judgment. Finally, Section 3 shows that neither *Howell* nor the preemption doctrine precludes Louisiana courts from enforcing the consent judgment in which Kevin promised to "resume" paying an amount equal to 43% of his military disability pay to Yvonne.

1. The lower courts properly sustained the *res judicata* exception because Kevin's latest attempt to avoid paying any of his military benefit to his ex-wife is the same action he litigated back in 2014.

The trial court correctly applied the law of *res judicata*, which provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) *If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.*
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment

R.S. 13:4231 (emphasis added).

In 2014, Yvonne Boutte filed a Rule for Contempt and/or Rule for Allocation of Assets after Kevin Boutte had his military retirement pay converted to CRSC pay and then stopped paying any of his military benefits to Yvonne. (R. at 54-65.) In this pleading, Yvonne specifically alleged that Kevin had agreed to pay 43% of his "military retirement pay and/or benefit" in a 2012 consent judgment and had promised her that he would not do anything to interfere with her future receipt of these payments, but that he breached these obligations. (R. at 54-55.) Kevin filed exceptions to this Rule, arguing that he was no longer obligated to make

payments to Yvonne because he had his retirement pay converted to CRSC pay, and CRSC pay is not generally subject to division as a community asset. (R. at 68-76.)

The litigation over this issue ended in a consent judgment in which Kevin stipulated that he was in contempt of court, and that he would "resume" paying Yvonne 43% of his "military retirement pay and/or benefit" (and also that he would pay an arrearage from when he had stopped making payments). (R. at 77.) Under the *res judicata* statute, this judgment "in favor of the plaintiff" (Yvonne) regarding her entitlement to continue receiving 43% of Kevin's CRSC pay is "conclusive" between Kevin and Yvonne, and the "issue" of whether Kevin is required to continue paying Yvonne 43% of his CRSC pay cannot be re-raised. R.S. 13:4231. Thus, Kevin's attempt four years later to re-litigate precisely the same issue of whether he is required to continue paying Yvonne 43% of his CRSC pay, was properly rejected on *res judicata* grounds.

Kevin's lead argument on appeal was that under R.S. 13:4232(B), *res judicata* does not apply to "an action for partition of community property and settlement of claims between spouses under R.S. 9:2801" unless the causes of action are "actually adjudicated," and according to Kevin, a consent judgment is not an "adjudication." (Appellant's Br. at 12-15.) The court of appeal properly rejected this argument. It cited *Riche v. Riche*, 09-1354 (La.App. 3 Cir. 4/7/10), 34 So.3d 1004, in which the court held that a compromise in a community settlement was "actually adjudicated," citing La. C.C. art. 3080, which precludes subsequent litigation on a matter that is compromised. The *Riche* court further noted that:

> Comment (b) to article 3080 provides that the preclusive effect of the article is tantamount to that of former article 3078, which provided that a transaction or compromise had the effect of a thing adjudged; therefore, res judicata would attach as though the document were a judgment.

Id. at 1008.

Other authorities showing that a consent judgment is an "adjudication" for purposes of R.S. 13:4232(B) include *Fletchinger v. Fletchinger*, 2010-0474 (La.App. 4 Cir. 1/9/11); 56 So.3d 403, 406. In *Fletchinger,* the trial court found that a consent judgment entered into by a husband and wife constituted a final judgment allocating all former community property between parties, and that *res judicata* precluded re-litigation in divorce proceedings of the proper allocation of certain property. *Id.* The trial court noted that the consent judgment was entered after "hours of

wrangling between the parties, their counsel, and the trial court" and that the relevant language in the consent judgment was "clear and unambiguous." *Id.*

The same thing is true in the instant case. The parties each filed pleadings on the issue of whether Kevin was required to continue paying Yvonne 43% of his CRSC benefit, and there was a hearing on May 22, 2014, culminating in stipulations and agreements between the parties that involved the superintendence of the trial court. (R. at 77-78, 2014 consent J.) The resulting consent judgment unambiguously stated that Kevin would "resume" paying Yvonne 43% of his "military retirement pay and/or benefit." (*Id.*) The *only* "military retirement pay and/or benefit" at issue was the CRSC pay, so there can be no doubt that the parties intended to conclude their litigation by Kevin's agreeing to "resume" paying Yvonne 43% of his military "benefit" which at this time existed only in the form of CRSC pay. Just like in *Riche*, the language in the consent judgment made it clear that Kevin and Yvonne did not reserve any other issues for litigation for a later date.

The 1991 comment to R.S. 13:4232 underscores that the exceptions of R.S. 13:4232(B) apply *only* when the "judgment is silent as to the actions in question." In the case at bar, the consent judgment is far from "silent as to the actions in question"; it very clearly addresses the sole "action in question" by stating that Kevin "shall resume payment" to Yvonne for 43% of his "military retirement pay and/or benefit." Thus, the court of appeal correctly found that "the only logical conclusion to be reached is that the benefits referenced in the 2014 Consent Judgment are the CRSCD benefits" – and that this issue was adjudicated for *res judicata* purposes. (Ct. Appeal J. at 6, 7.)

Other jurisdictions have similarly applied *res judicata* to bar a Veteran's challenge to a prior agreement concerning the vision of military benefits. *Edwards v. Edwards*, 132 N.E.3d 391, 396-97 (Ind. Ct. App. 2019). Kevin falsely claims that the *Edwards* court required the trial court to modify the judgment to reflect Kevin's view of federal law. It did not. The *Edwards* court simply held that *res judicata* barred the Veteran's challenge to his prior agreement – just as the court of appeal correctly found in the case at bar.

2. Kevin cannot assert an applicable Louisiana grounds for nullifying the consent judgment.

Just as Kevin fails to address the Louisiana law of *res judicata*, he fails to address the possible grounds for nullifying a judgment. And for good reason: none of them are applicable to the case at bar.

In Louisiana, a judgment can be annulled for vices of form or substance. La. C.C.P. art. 2001. The only recognized vice of substance is when the judgment was obtained by fraud or ill practices. La. C.C.P. art. 2004(A). Kevin has never alleged fraud or ill practices, much less provided evidence of such, and even if he had, his claim would be prescribed since it wasn't brought within a year of discovery of it. La. C.C.P. art. 2004(B).

The only possible vices of form are set forth in La. C.C.P. art. 2002(A):

> A. A final judgment shall be annulled if it is rendered:
>
> (1) Against an incompetent person not represented as required by law.
>
> (2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken.
>
> (3) By a court which does not have jurisdiction over the subject matter of the suit.

Kevin fails to directly raise any of these grounds. He indirectly raises the third of these grounds, implying in his writ application that the state courts lacked subject-matter jurisdiction over his claim because federal law preempts state law with respect to the division of military benefits upon divorce. This conflates an alleged legal error with a lack of jurisdiction. Louisiana courts unquestionably have jurisdiction to divide assets in a divorce, even when some of the assets are governed by "preempt[ive]" federal law. *E.g.*, R.S. 9:2801.1. A "purported violation" of preemptive federal rules governing divisibility of military disability benefits upon divorce "does not" strip courts of subject-matter jurisdiction. *Tarver v. Reynolds*, No. 2:18-CV-1034-WKW, 2019 WL 3889721, at *6 (M.D. Ala. Aug. 16, 2019) (citing decisions of numerous different state courts). *See also Edwards*, 132 N.E.3d at 395-96.

In any event, even if the Louisiana state courts lacked subject-matter jurisdiction regarding the 2014 consent judgment, Kevin is barred from raising such grounds to nullify the judgment, because he undisputedly "acquiesced" in the consent judgment. La. C.C.P. art. 2003 (providing that a defendant "*who voluntarily acquiesced in the judgment . . . may not annul the*

judgment on any of the grounds enumerated in Article 2002"). Kevin simply does not have a viable avenue to avoid the promise he made to Yvonne.

3. *Howell* provides no impediment to enforcing Kevin's agreement to "resume" paying Yvonne payments pursuant to their settlement agreement.

Kevin's keystone argument is based on the 2017 case of *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017). In *Howell*, the Court held that a state court may not order a Veteran to indemnify a divorced spouse for the loss of the divorced spouse's portion of the Veteran's retirement pay caused by the Veteran's waiver of such retirement pay to receive service-related disability benefits. *Howell,* 137 S.Ct. at 1402. In other words, if a property settlement includes military retirement pay, and the Veteran later waives part of that retirement pay in order to receive CRSC pay, the Veteran is not required to pay the divorced spouse part of the CRSC pay in order that the recipient spouse will continue receiving the same amount. Rather, the recipient spouse has no "vested interest" in receiving an amount equal to her original share of the retirement pay, because the retirement pay was always subject to the "contingency" that it could be waived and converted to CRSC pay. *Id.* at 1404-06.

Contrary to Kevin's narrative, however, "*Howell* does not hold that a state court cannot enforce a property division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages." *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018).

Gross is remarkably on point with the case at bar. In *Gross*, the parties entered a court-mediated settlement agreement whereby the Veteran agreed to pay his ex-wife 50% of all of his military pay. *Id.* at 401. The agreement provided that the payments would continue throughout the Veteran's life, and that if the Veteran or the military did anything that would reduce the ex-wife's share of the retirement pay, the Veteran would reimburse his ex-wife for the reduction. *Id.* at 393. Just like Kevin, the Veteran in *Gross* "stopped paying [his ex-wife] the amount she was entitled to pursuant to the property division" on grounds that he had waived retirement pay in favor of disability pay. *Id.* at 401. The ex-wife filed a motion to enforce the settlement, and the lower courts ordered the Veteran to "resume" paying his ex-wife pursuant to their agreement. *Id.*

On appeal, the *Gross* court began by considering whether there was a procedural basis under Alaska law for the Veteran to attack the enforcement of the divorce settlement—an analysis that is very similar to the discussion *supra* part 2 regarding the Louisiana bases for nullifying a final judgment (including consent judgments in a divorce proceeding). Just as Kevin has not asserted a valid basis under Louisiana law for nullifying the 2014 Consent Judgment, *supra* part 2, the *Gross* court found that the Veteran "has asserted no valid basis under [Alaska law] for bringing a collateral attack on the property division more than a year after he voluntarily agreed to it." *Id.* at 399. (Notably, the *Gross* court found that even if the divorce decree erroneously applied federal law by dividing the Veteran's disability pay, this did not mean that the lower court lacked subject-matter jurisdiction or that the decree was void. *Id.* at 397.)

The *Gross* court next considered whether the lower court impermissibly required the Veteran to "indemnify" his ex-spouse. *Id.* During the pendency of the appeal, *Howell* was decided. *Id.* at 400. The *Gross* court recognized that *Howell* prevents a state court from ordering a Veteran to "indemnify" his spouse for retirement benefits waived to receive disability pay. But the *Gross* court found that *Howell* does *not* prevent a court from ordering a Veteran to "resume monthly payments" as ordered pursuant to a settlement agreement. *Id.* Thus, under the reasoning of *Gross*, *Howell* does not extend so far as to interfere with the 2014 consent judgment that ordered Kevin to "resume payment" to Yvonne pursuant to their agreement that he pay her 43% of his entire "military . . . benefit" including CRSC pay.

When Kevin agreed to pay Yvonne 43% of his military retirement pay "and/or benefit," he did so with eyes wide open, after he had already converted his military retirement pay to disability pay. Regardless of whether the consent judgment was in error, it is now a valid final judgment, and as the *Gross* court pointed out, *Howell* does not bar state courts from enforcing such a judgment by requiring a Veteran who unilaterally stops making payments he was required to make under that judgment to resume making those payments.

CONCLUSION

Just like in *Gross*, Kevin's and Yvonne's 2014 consent judgment is a final judgment. Kevin did not assert valid grounds for nullifying the judgment (nor could he, since he acquiesced in it). Therefore, *res judicata* bars Kevin from coming back to court several years later to

challenge it. As the *Gross* court held, *Howell* poses no impediment to enforcing the very type of consent judgment that Kevin freely entered into. Accordingly, Kevin's writ should be denied.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing opposition to writ of certiorari has this day, 21st day of August, 2020, been served upon the following by hand delivery and/or fax and/or electronic mail and/or by placing in U.S. mail, postage prepaid and properly addressed:

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Judge C. Kerry Anderson
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IN THE SUPREME COURT

STATE OF LOUISIANA

Docket No. **2020-C-985**

YVONNE RENEA BOUTTE, Respondent

VERSUS

KEVIN LEE BOUTTE, Petitioner / Applicant

Application for a Writ of Certiorari
from a July 8, 2020 decision by the
Court of Appeal, Third Circuit, State of Louisiana
(Judges Conery, Savoie and Perry)
Docket No. 19-734.
affirming a decision of the
36th District Court for the Parish of Beauregard,
Civil Docket No. C-2010-1241-B, June 24, 2019
(Judge C. Kerry Anderson)

REPLY TO THE OPPOSITION'S BRIEF

FAMILY LAW MATTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY TO APPELLEE'S OPPOSITION

Appellee glosses over the Court of Appeals significant qualification in this case. It ruled that *res judicata* applied to Kevin's agreement because it did not find that "the object of the contract is *restricted by the government because it violates public policy....*" See *Boutte v. Boutte*, 2020 La. App. LEXIS 1030, *12 (2020) (emphasis added). Long ago, Congress removed from state courts the necessity of concerning themselves with the often unpleasant consequences of dividing a veteran's disability pay as property in state-court divorce proceedings. *United States v. Hall*, 98 U.S. 343, 356 (1878) (discussing the federal statutes preceding 38 U.S.C. § 5301 and explaining that they render *wholly void* any attempt at a prohibited disposition of the benefits at issue). These statutes have been in place at least as long as Congress has granted such bounties to its wounded servicemembers. *Id.* at 348. These restrictions on state courts imposed by Congress removed any negative tendencies one might have to question the disabled veteran's integrity or to doubt the nature and extent of his or her injuries, an endeavor in which Appellee's counsel unfortunately engages in his opposition before this Honorable Court. See Opposition Brief at page 1, describing the disabled veteran as trying to "weasel" out of a promise, and at page 2, refusing to accept the government's conclusion that Kevin suffers from a combat-related disability. But see the Appellate Record at 279 (as of November 2009 and June 2010 the VA assessed 30% and 70%, respectively, of Kevin's disability as including "Post-Traumatic Stress Disorder, Mood Disorder, and Cognitive Disorder").

In fact, Appellee's counsel's discreditable, but predictable reaction to this situation is precisely why the preemptive federal statutes are applicable in these cases. They remove the pain of having to choose a perceived injustice in following supreme and irrefutable law. *Mansell v. Mansell*, 490 U.S. 581, 593-594 (1989) (noting that the wisdom of Congress's policy choices do not have to be consulted in light of the plain language of the statutes protecting veterans' disability benefits). Subsection (a)(3)(A) of 38 U.S.C. § 5301 prohibits a beneficiary from entering into any agreement to dispossess himself or herself of the restricted benefits. "[I]n *any* case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation...such agreement shall be deemed to be an assignment and is *prohibited*." (emphasis supplied). In *Howell v. Howell*, 137 S. Ct. 1400, 1405 (2017) the Court said of this provision that state courts lack the authority to vest the restricted

benefits in anyone other than the beneficiary. The Court earlier stated that this provision (then 38 U.S.C. § 3101) was to be liberally construed in the beneficiary's favor and that the funds covered by the provision are "inviolate"). *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962).

Of course, it should be evident to anyone that a disabled veteran suffering from the brutal psychological and physical injuries of war would be protected from voluntarily agreeing to dispossess himself or herself of these necessary benefits. The provision has been described by the Court as preventing "the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." *Rose v. Rose*, 481 U.S. 619, 630 (1987). See also *Hines v. Lowrey*, 305 U.S. 85, 90 (1938) (addressing Congress's exercise of its enumerated military powers to protect "all veterans, competent and incompetent, in all courts, state and federal" from payment of fees from the benefits beyond that authorized by the statute). But, neither Appellee nor this Court has to venture into the uncomfortable position of having to assess Kevin's character or speculate as to the extent and nature of the wounds he received in defense of the nation..

The powers of Congress in this realm are absolute. Only Congress can give state courts authority, and therefore jurisdiction, to consider certain federally appropriated funds as divisible "property" in state court divorce proceedings. There is no doubt that the preemption imposes upon state courts a jurisdictional bar to proceed to a judgment that would be in excess of the statutory grants of authority to the state. *Lowrey, supra*, was cited by the Court in *Kalb v. Feurstein*, 308 U.S. 433, 440, nn. 11 and 12 (1940), which also followed the rule that a court cannot act in excess of the jurisdiction and authority conferred upon it by federal law. "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." *Id.* at n. 12 (emphasis added).

This absolute prohibition in the context of "property" was established the moment the states assented to surrender their sovereign authority over military affairs. "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 193 (1819). State law that is preempted is simply "without effect". *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). See also *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

The Supreme Court's 2017 decision in *Howell* merely reaffirmed that the rule of absolute federal preemption in this particular subject matter "still applies." *Howell*, 137 S. Ct. at 1404. This absolute preemption applies to all disability pay because such benefits are personal entitlements actually intended to reach (and remain with) the beneficiary. The Court also reminded the states that Congress's grant of authority is "precise and limited" in this context because of its retained supremacy in this area. *Id.* at 1404, citing *Mansell*, 490 U.S. at 589. There is no question that these monies are of the restricted type because Congress, in this instance, has specifically said that the limited authority Congress gave the states to divide military retirement pay do not apply at all to combat-related special compensation (CRSC) 10 U.S.C. § 1413a(g). Finally, the Court reiterated that as to these particular benefits, 38 U.S.C. § 5301 applies to prevent states from vesting any rights to these restricted monies.

While *Edwards v. Edwards*, 132 N.E.3d 391, 395 (Ind. App. 2019), transfer denied 138 N.E. 3d 957 (2019), did rule that *res judicata* would bar a challenge to the agreement in that case, something undersigned counsel did not dispute in Kevin's petition, the appellate court left in place the trial court's ruling that *federal law* prohibited it from forcing the veteran to continue paying his CRSC disability pay in accordance with an agreement that was clearly in contravention of federal law. See Petitioner's Writ, p. 21; Appellee's Opposition, p. 7. Moreover, the Court did not address the plain and unambiguous language of 38 U.S.C. § 5301(a)(3)(A) and (C), which prohibit such agreements and makes them void from inception.

Appellee's counsel also cites *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018), as a post-*Howell* example of a state court which held that a disabled veteran was bound to an agreement to divide military benefits. See Appellee's Opposition, pages 9-10. However, there are also significant shortcomings with reliance upon that case. First, the court was *not* addressing combat related special compensation (CRSC), which is at issue in this case. As pointed out in Kevin's petition to this Court, 10 U.S.C. § 1413a(g), the federal source for CRSC benefits, specifically excludes them from consideration as an available asset in state court divorce proceedings. See Petitioner's Writ, pp. 12, 17. That subsection states, simply, that "payments under this section are not retired pay." Therefore, CRSC is not considered a disposable military benefit within the meaning of 10 U.S.C. § 1408. DoD Financial Management Regulations 7000.14-R, vol. 7B, ch. 63 (Oct. 2017), § 630101.C.1, p. 63-4). Rather, it is disability pay. As *all disability* pay is *a fortiori* excluded from the jurisdictional control

of state courts, it cannot be the subject of a division of marital assets in divorce. *Howell*, 137 S. Ct. at 1404, 1406 (stating that "*McCarty* [*v. McCarty*, 453 U.S. 210 (1981)] with its rule of federal preemption, still applies" and "[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 (describing the federal interests in attracting and retaining military personnel.")).

This leads to the second significant distinction in this case compared to *Gross*. CRSC pay is affirmatively protected by the provisions of 38 U.S.C. § 5301. See, respectively, *Adams v. United States*, 126 Fed. Cl. 645, 647-648 (2016) (stating CRSC benefits are "compensable under the laws administered by the Secretary of Veterans Affairs") and 38 U.S.C. § 5301(a)(1) and (a)(3)(A) and (C) (respectively stating that "[p]ayments of benefits due or to become due *under any law administered by the Secretary* shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt...by or under any legal or equitable process *whatever*, either before or after receipt by the beneficiary" and that any agreement by the beneficiary to dispossess himself or herself of the benefits is prohibited and "void from its inception") (emphasis added). *Gross* did not even address 38 U.S.C. § 5301.

In addition, both before and after *Howell*, many state cases have acknowledged the jurisdictional limitations placed upon them in the context of property divisions when 38 U.S.C. § 5301 applies. See, e.g., *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 851-852 (Ill. App. 1982) (citing 38 U.S.C. § 3101 (renumbered as § 5301) and stating that this provision protects the benefit that Congress has said "should go to the veteran and would cause an injury to Federal interests which is forbidden by the supremacy clause"); *Youngbluth v Youngbluth*, 188 Vt. 53, 70; 6 A. 3d 677, 688 (2010) (38 U.S.C. § 5301 jurisdictionally barred state courts from dividing prohibited veterans' disability benefits as property). Of course, after *Howell*, which reiterated 38 U.S.C. § 5301's sweeping application to all veteran's disability benefits, Courts that have applied this provision in a manner commensurate with its breadth. See, e.g., *Foster v. Foster*, ___ Mich. ___; ___ N.W.2d ___; 2020 Mich. LEXIS 687, *20-21 (Mich. 2020) (38 U.S.C. § 5301(a)(1) and (3)(A) barred agreements by the veteran to dispossess himself of his CRSC disability pay); *Foster v. Foster III*, ___ Mich. App. ___; 2020 Mich. App. LEXIS 4880 (2020) (applying the Michigan Supreme Court's application of 38 U.S.C. § 5301 and holding that federal preemption removed the subject matter jurisdiction of the court to the extent that the parties' agreement was one in which the veteran

agreed to give up his federal disability pay (also CRSC) and holding that *res judicata* and principles of collateral estoppel did not bar the veteran's challenge to the 2008 judgment).

Finally, while the Court of Appeals and the trial court made much of the fact that the reference in the consent judgment was to an agreement by Kevin to pay "military retirement pay *and/or benefits*", see Slip. Opinion at pp. 6-7 (emphasis added), and this could have arguably included Kevin's agreement to divide the CRSC benefits and, thus, the issue as to whether that language applied to these benefits was "actually adjudicated", this reasoning ignores the fact that federal law preempts any attempt by a state court to characterize the benefits as disposable in state court proceedings when federal law clearly provides that they are not. 38 U.S.C. § 5301(a)(1) and (3)(A), respectively. Regardless of the characterization, when the state makes a decision to sequester the restricted benefits they make a decision that "displace[s] the federal rule and stand[s] as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Howell*, 137 S. Ct. at 1406. Citing § 5301, the Court in *Howell* said simply that the state cannot "vest" that which it has no authority to give. *Id.* at 1405.

Moreover, this provision, as with all veterans' benefits legislation, is to be liberally construed *in favor of the beneficiary. Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (renumbered as § 5301) and stating the provision was to be "liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof" and that the funds "should remain inviolate."). See also *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"). Relating these statutory restrictions back to the Supremacy Clause, the Supreme Court in *Ridgway v. Ridgway*, 454 U.S. 46, 61 (1981) stated that these provisions:

> [E]nsures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[notwithstanding] any other law. . .of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.... *Id.*

However the consent judgment might be construed, Kevin could not have agreed, under federal law, to dispossess himself of his CRSC benefits. Any conclusion that he agreed to do this or that

the state court could, through any equitable or legal doctrine like *res judicata*, conclude that he agreed to do this, would be prohibited by 38 U.S.C. § 5301's sweeping prohibitions.

CONCLUSION

In *Howell*, the Court was addressing state attempts to encroach on military benefits for a third time in as many decades. *McCarty* and *Mansell* clearly expressed the absolute federal preemption of state law in these cases. The travesty lies in the fact that disabled veterans, who have limited resources and capacity, must consistently seek recourse in the United States Supreme Court because 50 different states have seemingly devised as many ways of defining out or getting around the limitations imposed upon them by the Supremacy Clause. But, the Constitution "has presumed (whether rightly or wrongly [the Court] does not inquire) that *state attachments*, *state prejudices*, *state jealousies*, and *state interests*, might sometimes obstruct, or control…the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816) (emphasis added). Of these inevitable tergiversations, Justice Story there spoke of the "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347-348.

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution…. *Id.* at 348.

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court spoke to the exercise by Congress of its enumerated powers. Justice Marshall, writing for the majority, said: "[T]hat the government of the Union, though limited in its powers, is supreme within its sphere of action" is a "proposition" that "command[s] … universal assent…." *Id.* at 406. There is no debate on this point because "the people, have, in express terms, decided it, by saying," under the Supremacy Clause that "'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 "by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it." *Id.* Marshall finished the point by citing to the last sentence of the Supremacy Clause:

> The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of

> the land, "any thing in the constitution or laws of any State to the contrary notwithstanding." *Id.*

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

For decades, disabled veterans have suffered immeasurably under *wholly judicial* creations developed as exceptions to the explicit protections afforded them by Congress's exercise of its enumerated military powers. State theories of estoppel and the reliance interests of the parties have been raised with a resounding clamor in an effort to prevent the self-evident and explicit preemptive laws from simply taking effect. But the swell of defiance does not make these parties any more correct, nor can it insulate state courts from the constitutional rights of those who seek to regain and restore to themselves their earned entitlements. The passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed. The Supreme Court has recently expressed this sentiment in overturning more than a century of reliance on erroneous legal principles. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). There, Justice Gorsuch, writing for a majority of this Court stated:

> Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right. *Id.* at 2482.

The federal statutes and regulations passed pursuant to Congress's enumerated military powers contain no allowance to the states to sequester the veterans' disability benefits at issue in this case and force them to be paid over to any other individual. Rather, these benefits are (and always have been) explicitly excluded by statute from state jurisdiction and control, *before* and *after Howell*.

Petitioner respectfully requests the Court to grant his petition so that this important issue of federal law can be addressed by the highest court of the State of Louisiana.

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Dated: August 31, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Reply to the Opposition's Brief has this day, 31st day of August, 2020, has been served upon the following by U. S. mail to the Judge, Clerk, Third Circuit Court of Appeal and to Charles G. Blaize and Frederic C. Fondren, counsel for Yvonne Boutte as follows:

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IN THE SUPREME COURT

STATE OF LOUISIANA

Docket No. **2020-C-00985**

YVONNE RENEA BOUTTE, Respondent

VERSUS

KEVIN LEE BOUTTE, Petitioner / Applicant

Application for a Rehearing from Denial of Petition for Writ of Certiorari
from a decision of the Court of Appeals, Third Circuit, State of Louisiana
(Judges Conery, Savoie and Perry)
Docket No. 19-734,
affirming a decision of the
36th District Court for the Parish of Beauregard,
Civil Docket No. C-2010-1241-B, June 24, 2019
(Judge C. Kerry Anderson)

APPLICATION FOR REHEARING

FAMILY LAW MATTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

BRIEF IN SUPPORT OF REHEARING

Petitioner respectfully requests the Court to grant the herein Application for Rehearing from its December 8, 2020 decision denying his Petition for a Writ of Certiorari, and to grant said Petition to address this important issue of preemptive federal law. The issues in this case have not been directly addressed by the State of Louisiana despite significant United States Supreme Court jurisprudence and other state high court jurisprudence bearing on these issues. See *Howell v. Howell*, 137 S. Ct. 1400 (2017).

The Court of Appeals stated it would consider the issues differently if there was a public policy prohibiting the agreement by Petitioner to dispossess himself of his federal veterans' benefits. There is a federal statute that expressly prohibits the agreement in this case. The United States Supreme Court in *Howell, supra,* recently ruled that under 38 U.S.C. § 5301, state courts could not allow the vesting of veteran's disability benefits in anyone other than the veteran beneficiary. That is Petitioner in this case.

This federal statute that expresses this public policy and preempts state law thereby voiding such agreements in which veterans are dispossessed of their protected disability benefits has been in force and effect in some form or another since at least the 1820's. *United States v. Hall*, 98 U.S. 343, 346-357 (1878) (canvassing the anti-assignment legislation applicable to military benefits). These provisions have established a consistent national policy protecting particular veterans' benefits from "*any* legal or equitable process *whatever*." 38 U.S.C. § 5301(a)(1) (emphasis supplied). The United States Supreme Court has stated that this language applies to *all* orders or agreements that would attempt to offset or otherwise redirect these funds to anyone other than the statutorily allowed beneficiaries. See, e.g., *Wissner v. Wissner,* 338 U.S. 655, 659 (1950) (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary).

Moreover, the Court has consistently stated that this provision is to be "liberally construed" to protect the benefits from any depletion or dilution whatever, and considers these funds as "inviolate." *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (renumbered as 5301)). Indeed, the Court has historically interpreted provisions protective of veterans' benefits liberally and broadly to ensure protection of the beneficiary in appreciation

for his or her service to the nation. See, e.g., *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (federal statutes protecting servicemembers from discrimination by employers is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *United States v. Oregon*, 366 U.S. 643, 647 (1961) (stating "[t]he solicitude of Congress for veterans is of long standing.").

In fact, given this liberal interpretation, there appears to be no limit to its reach as applied to the funds themselves. The Court in *Ridgway v. Ridgway*, 454 U.S. 46, 60-61 (1981), in countering the oft-repeated contention that these provisions only apply to garnishments or attachments, stated that the assertion "fails to give effect to the *unqualified sweep* of the federal statute." (emphasis added). The statute "prohibits, in the broadest of terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" *Id.* at 61. Tying the statute back to the Supremacy Clause, the Court concluded that:

> [I]t ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[notwithstanding] any other law. . .of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.... *Id.*

Finally, the Court of Appeals decision completely ignores and therefore usurps the Supremacy Clause and the principle of federal preemption applicable to veterans' benefits legislation. Despite the Supreme Court's uninterrupted jurisprudence holding federal law in this specific area preempts *all* state law that stands in its way, the effect of upholding the lower court's decision is to reject federal preemption, which this Court is not at liberty to do.

It is of no moment that the prior agreement might be subjected to res judicata or estoppel – the statute prospectively protects the benefits due or to become due before or after receipt. Petitioner's ongoing payments are prohibited by federal law. The state must yield. *Ridgway, supra,* ruled that state courts were prohibited from exercising any legal or equitable process to create equitable run-arounds to a veteran's choice to designate a specific recipient of his or her benefits upon death.