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Elizabeth A. Brown
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IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICH M. MARTIN, Appellant, vs. RAINA L. MARTIN, Respondent.	Case No. 81810 Appeal from the Eighth Judicial District Court, the Honorable Rebecca L. Burton Presiding
ERICH M. MARTIN, Appellant, vs. RAINA L. MARTIN, Respondent.	Case No. 82517 Appeal from the Eighth Judicial District Court, the Honorable Rebecca L. Burton Presiding

PROOF OF FILING OF PETITION FOR WRIT OF CERTIORARI WITH THE UNITED STATES SUPREME COURT

Appellant, Erich Martin, by and through his counsel of record, Marquis Aurbach, hereby provides proof of filing his petition for writ of certiorari with the United States Supreme Court, docketed as Case No. 23-605.

While Erich Martin anticipates that the clerk of this Court will receive written notice from the clerk of the United States Supreme Court by December 18, 2023, that Mr. Martin filed his petition for writ of certiorari with the United States Supreme Court on December 1, 2023, Mr. Martin hereby provides proof of such filing out of an abundance of caution so as to avoid the issuance of the remittitur and ensure the stay continues in effect until final disposition of the certiorari proceedings.[1]

Dated this 12th day of December, 2023.

MARQUIS AURBACH

By /s/ Chad F. Clement
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[1] *See* Proof of Filing, attached as **Exhibit 1**; Docket for U.S. Supreme Court Case No. 23-605, attached as **Exhibit 2**; December 1, 2023 Email Confirmation of Filing, attached as **Exhibit 3**; Petition for Writ of Certiorari, attached as **Exhibit 4**; and Certificate of Service, attached as **Exhibit 5**.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PROOF OF FILING OF PETITION FOR WRIT OF CERTIORARI WITH THE UNITED STATES SUPREME COURT** was filed electronically with the Nevada Supreme Court on the 12th day of December, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Richard Crane, Esq.
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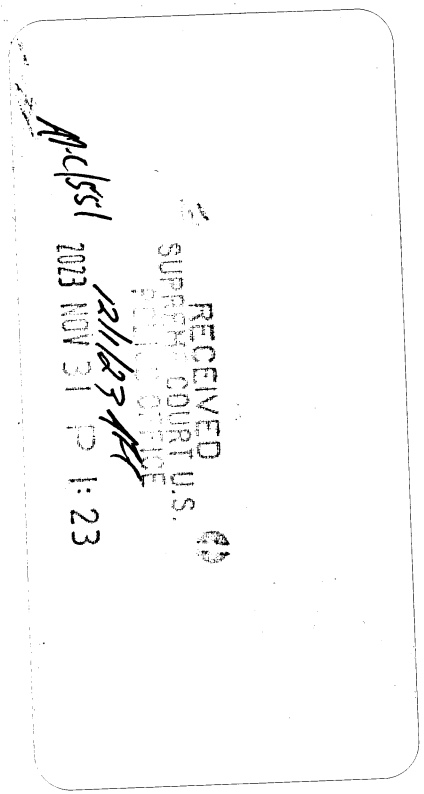
Las Vegas, NV 89110
Willicklawgroup.com
Attorney for Respondent, Raina L. Marti

/s/ Leah Dell
An employee of Marquis Aurbach

Exhibit 1



No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

ERICH M. MARTIN,

Petitioner,

v.

RAINA L. MARTIN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Exhibit 2

Search documents in this case: Search

No. 23-605

Title:	**Erich M. Martin, Petitioner** **v.** **Raina L. Martin**
Docketed:	December 6, 2023
Lower Ct:	Supreme Court of Nevada
Case Numbers:	(81810, 82517)
Decision Date:	December 1, 2022
Rehearing Denied:	April 17, 2023

DATE	PROCEEDINGS AND ORDERS
Jul 17 2023	Petition for a writ of certiorari filed. (Response due January 5, 2024) **Petition** **Certificate of Word Count** **Other** **Proof of Service**

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Party name: Erich Martin		

Exhibit 3

From: no-reply@sc-us.gov <no-reply@sc-us.gov>
Sent: Friday, December 1, 2023 8:50 PM
To: Carson Tucker <cjtucker@lexfori.org>
Subject: Your Electronic Filing record has been submitted.

Your Petition for a Writ of Certiorari has been submitted. It will be reviewed once the hard copy is received. If you are not expecting this email, please contact the Supreme Court Electronic Filing Support Group at eFilingSupport@supremecourt.gov.

Exhibit 4

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May state law doctrines of judicial convenience, like res judicata and collateral estoppel, be raised against a preemptive federal statute, 38 U.S.C. § 5301, which voids from inception any and all agreements made by a disabled veteran to dispossess himself of his federally protected veterans' disability benefits?

2. Even if a state court may raise such state law doctrines, may a disabled veteran be compelled by a state court to use his restricted disability benefits to satisfy such an agreement, where 38 U.S.C. § 5301 explicitly prohibits the state from using *any* "legal or equitable" process whatsoever to dispossess the veteran of his personal entitlement and applies to all such benefits "due or to become due" and before or after their receipt by the beneficiary?

PARTIES TO THE PROCEEDING

Petitioner, Erich M. Martin, was the Plaintiff-Appellant below. Respondent, Raina L. Martin was the Defendant-Appellee.

There are no corporate parties and no other parties to the proceedings.

CORPORATE DISCLOSURE

There are no corporate parties involved in this proceeding.

RELATED PROCEEDINGS

This case arises from the following prior proceedings:

Martin v. Martin, 520 P.3d 813; 2022 Nev. LEXIS 74 (December 1, 2022) (App. 1a-19a)

Martin v. Martin, 498 P.3d 1289; 2021 Nev. App. Unpub. LEXIS 664 (November 17, 2021) (App. 20a-27a)

Martin v. Martin, Order Denying Rehearing, dated April 17, 2023 (App. 28a).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Erich M. Martin, petitions for a Writ of Certiorari to the Supreme Court of Nevada, which denied Petitioner's motion for a rehearing on April 17, 2023 (App. 38a-39a).

OPINIONS BELOW

On December 1, 2022, the Supreme Court of Nevada issued an opinion reversing a decision by the Nevada Court of Appeals in *Martin v. Martin*, 498 P.3d 1289; 2021 Nev. App. Unpub. LEXIS 664 (Nov. 17, 2021) (App. 27a-37a) and holding that Petitioner was barred by state-law doctrines of res judicata and collateral estoppel from challenging a settlement agreement in which he agreed to dispossess himself of his restricted federal veterans' benefits, which agreement is explicitly prohibited by preemptive federal law. See 38 U.S.C. § 5301(a)(3). *Martin v. Martin*, 498 P.3d 1289; 2021 Nev. App. Unpub. LEXIS 664 (Nov. 17, 2021) (App. 1a-26a).

The Supreme Court of Nevada then denied a motion for rehearing on April 17, 2023. (App. 38a-39a).

These decisions comprise the substantive rulings from which Petitioner seeks a writ of certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).

STATEMENT OF THE CASE

A. Introduction

Congress's authority over military benefits originates from its enumerated "military powers" under Article I, § 8, clauses 11 through 14 of the Constitution. In matters governing the compensation and benefits provided to veterans, the state has no sovereignty or jurisdiction over these bounties without an express grant from Congress. See, e.g., *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2465 (2022) (Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces); *Howell v. Howell*, 581 U.S. 214, 218, 137 S. Ct. 1400, 1404 (2017).

In fact, *unless* otherwise allowed by *federal* law, Congress affirmatively prohibits the state from using "*any* legal or equitable process whatever" to dispossess a veteran of these benefits. See 38 U.S.C. § 5301(a)(1), *Mansell v. Mansell*, 490 U.S. 581, 588; 109 S. Ct. 2023 (1989).

Even where Congress has granted permission to the states to consider veterans' benefits in state court proceedings, the grant is precise and limited. *Howell*, 137 S. Ct. at 1404; *Mansell*, 490 U.S. at 588 (Congress must explicitly give the states jurisdiction over military benefits and when it does so the grant is precise and limited); 10 U.S.C. § 1408(a)(4) (state may consider only disposable retired pay as divisible property); 42 U.S.C. § 659(h)(1)(A)(ii)(V) (state may garnish only partial *retirement* disability as

"remuneration for employment", i.e., income, available for garnishment for child support and spousal support); 42 U.S.C. § 659(h)(1)(B)(iii) (excluding from the definition of income *all other* veterans' disability compensation).

This Court has ruled that the federal preemption by Congress over matters concerning compensation and benefits paid to military servicemembers and veterans of the armed forces is absolute and occupies the entire field concerning disposition of these federal appropriations. See, e.g., *Hillman v. Maretta*, 569 U.S. 483, 490-91, 493-95, 496; 133 S. Ct. 1943; 186 L. Ed. 2d 43 (2013) (noting *in the area of federal benefits*, Congress has preempted *the entire field* even in the area of state family law and relying on several cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway v. Ridgway*, 454 U.S. 46, 54-56; 102 S. Ct. 49; 70 L. Ed. 2d 39 (1981); and *Wissner v. Wissner*, 338 U.S. 655, 658-659; 70 S. Ct. 398; 94 L. Ed. 424 (1950)).

Petitioner is a disabled veteran. He is 100 percent permanently and totally disabled. His only means of sustenance are his federal veterans' disability compensation.

These benefits are affirmatively protected from all legal and equitable process either before or after receipt. 38 U.S.C. § 5301(a)(1). There is no ambiguity in this provision. It *wholly voids* attempts by the state to exercise control over these restricted benefits. *United States v. Hall*, 98 U.S. 343, 346-57; 25 L. Ed. 180 (1878) (canvassing legislation applicable to military benefits); *Ridgway*, *supra* at 56. This Court

construes this provision liberally in favor of the veteran and regards these funds as "inviolate" and therefore inaccessible to all state court process. *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962).

This Court recently reconfirmed that federal law preempts all state law concerning the disposition of veterans' disability benefits in state domestic relations proceedings. *Howell*, 137 S. Ct. at 1404, 1406. There, the Court reiterated that Congress must affirmatively *grant* the state authority over such benefits, and when it does, that grant is precise and limited. *Id*. at 1404, citing *Mansell*, *supra*. The Court also stated that without this express statutory grant, 38 U.S.C. § 5301(a)(1) affirmatively prohibits state courts from exercising any authority or control over these benefits. *Id*. at 1405. Finally, the Court concluded that this prohibition applied to all disability pay because Congress's preemption had never been expressly lifted by federal legislation (the *exclusive means* by which a state court could ever have authority over veterans' disability benefits). *Id*. at 1406, citing *McCarty v. McCarty*, 453 U.S. 210, 232-235; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981). "The basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws *apply a fortiori to disability pay*" and therefore "*McCarty*, with its rule of federal pre-emption, *still applies*." *Howell*, 137 S. Ct. at 1404, 1406 (emphasis added).

Veterans' disability benefits are appropriated by Congress for the purpose of maintenance and support of disabled veterans under its Article I enumerated

powers, without any grant of authority to the states to consider these monies as an available asset in state court proceedings. The state has no concurrent authority to sequester these funds and put them to a use different from their intended purpose. This Court's reiteration in *Howell* that federal law preempts all state law in this particular subject, *unless* Congress says otherwise remains intact. There is no *implied* exception to absolute federal preemption in this area. *Bennett v. Arkansas*, 485 U.S. 395, 398; 108 S. Ct. 1204; 99 L. Ed. 2d 455 (1988). See also *Hillman v. Maretta*, *supra* at 490-91, 493-95, and 496 (noting simply that in the area of federal benefits, Congress has preempted the entire field even in the area of state family law and relying on several cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway*, *supra* at 55-56 and *Wissner*, *supra* at 658-659.

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

The Court went on to hold that in the realm of federal legislation governing military affairs, "the

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

Consistent with those preemption cases like *Howell*, *Hillman*, and *Ridgway*, *inter alia*, Congress' authority in this realm, carries with it "inherently the power to remedy state efforts to frustrate national aims." *Id*. at 2465 Thus, objections sounding in ordinary federalism principles are untenable. *Id*. at 2465, citing *Stewart v. Kahn*, 11 Wall 493, 507 (1871) (cleaned up).

While the holding in *Torres* provided a long-awaited answer to the question of whether a state could assert sovereign immunity in lawsuits filed by returning servicemembers alleging employment discrimination against state employers under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq., it is a direct complement to this Court's application of federal preemption under the Supremacy Clause concerning Congress's exercise of the same enumerated Article I Military Powers as against state efforts to thwart Congress' objectives and goals in passing legislation thereunder. *Id*. at 2460, 2463-64, citing Article I, § 8, cls. 1, 11-14.

This is no surprise. The concepts of state sovereignty and freedom to legislate or adjudicate in

those areas not specifically reserved, i.e., enumerated, in Article I, are two sides of the same coin. Where Congress has exercised its Article I Military Powers, inherent structural waiver prevents the state from asserting sovereign immunity because Congress has provided a mechanism for the objectives of legislation passed pursuant to its enumerated powers to be realized by pursuit of a statutory civil action against the state. In *Torres*, we are instructed that the state cannot assert sovereign immunity where a returning servicemember seeks to vindicate his pre-deployment employment rights and status as against his employer (the state of Texas) under the USERRA, an act passed pursuant to Congress' Article I Military Powers to benefit returning servicemembers. On the flip side, Article VI, clause 2, the Supremacy Clause, prohibits, i.e., *preempts*, the state from passing and enforcing laws or issuing judicial decisions that equally frustrate the same national interests underlying Congress's plenary powers in the premises.

Hence, in *Howell*, *supra*, and other cases addressing the Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C. § 1408, state courts are prohibited from repurposing (i.e., appropriating and redirecting) those federal benefits that Congress has provided, again under its Article I military powers, to incentivize, maintain, and support national service. As was stated in *McCarty*, 453 U.S. at 229, n. 23, quoting *Buchanan v. Alexander*, 4 How. 20 (1845), the funds of the government are appropriated for a specific purpose and if they were allowed to be diverted or redirected by state process or otherwise, the proper functioning of the government

as it pertains to the objectives and goals of these monies would be destroyed.

Thus, to the extent the state cannot assert immunity if doing so interferes with a personal right conveyed by Congress' legislation under its Article I Military Powers because the state has surrendered its sovereignty in this area, the state is preempted by those same federal powers from passing legislation or issuing judicial decisions (extra judicial acts) that would interfere with a veteran's federal rights and personal entitlements. In either case, the state's resistance results in the same frustration of Congress' goals in maintaining and building a federal military force and protecting national security. *McCarty*, *supra*.

Structural waiver of sovereignty occurred when the states consented to join the union in recognition of the enumerated and limited, but absolute powers reserved by the federal government under Article I, § 8. Preemption occurs because the states cannot legislate or adjudicate where Congress has acted affirmatively by passing legislation pursuant to and within the realm of those Article I powers. See also U.S. Const. Art. VI, cl. 2 (1789) (the Supremacy Clause).

Indeed, the USERRA, like the USFSPA, both of which provide military servicemembers and veterans with post-service benefits, is legislation intended to promote, maintain, and incentivize service to the nation and to ensure reintegration into civilian life (the former preserving a servicemember's right to return to civilian work without penalty, and the latter

providing him or her (and family) benefits if he or she becomes disabled in the service of the country). *Torres*, *supra* at 2464-65 (explaining the importance of federal control and maintenance of a national military); *Howell*, *supra* at 1406 ("the basic reasons" *McCarty*, *supra*, gave as to why Congress intended to exempt military retirement pay from state community property laws, i.e., to incentivize national service and reward same (the federal interests in attracting and retaining military personnel), applies a fortiori to the protection from state invasion of veterans' disability pay).

Of course, if the state has no sovereign authority to assert immunity, a fortiori, it has no *jurisdiction* to render judicial decisions that conflict with prevailing federal legislation in the occupied field. See also, *Hillman*, 569 U.S. at 490-91, 493-95, and 496 (in the area of federal benefits Congress has preempted the entire field even in the area of state family law and relying on the cases addressing military benefits legislation to sustain its rationale, e.g., *Ridgway*, 454 U.S. at 54-56 and *Wissner*, 338 U.S. 655.

Therefore, the state cannot raise doctrines of judicial convenience like res judicata and collateral estoppel to effectively nullify the protective and functional effects of federal preemption under the Supremacy Clause.

In the instant case, the Nevada Supreme Court did just that in ruling that Petitioner was barred by state doctrines of judicial convenience such as res judicata and collateral estoppel from challenging the effects of an agreement prohibited by 38 U.S.C. § 5301(a)(1) and

(3), in which he agreed to dispossess himself of his federally protected veterans' disability benefits. Such an agreement is expressly prohibited and void from its inception under § 5301. Under the absolute preemption of all state law in this particular subject, the state cannot thwart the objectives and goals of Congress by retroactively resuscitating a void agreement.

Here, the Nevada Supreme Court concluded that state doctrines of judicial convenience like res judicata could act to circumvent the Supremacy Clause and 38 U.S.C. § 5301(a)(1) and (3), to effectively nullify, retroactively, the efficacy of that provision upon agreements by veterans to dispossess themselves of their personal entitlement to disability benefit, even though such agreements are, by federal statute, expressly prohibited and "*void from their inception*." See 38 U.S.C. § 5301; *Howell*, 137 S. Ct. 1405 (citing § 5301 and ruling that state courts cannot "vest" that which they have *no authority* to give in the first instance).

Where federal preemption applies, the question of a state doctrines like res judicata should be irrelevant if, indeed, as this Court has held, the state has "*no authority*" in the premises to "vest" or otherwise control the disposition of federal benefits that are purposed by Congress to support disabled veterans and expressly protected from all "legal or equitable" powers of the state. See 38 U.S.C. § 5301(a)(1).

The Nevada Supreme Court's decision to force Petitioner to litigate his continuing rights in his federal disability benefits must be reversed if this

Court expects the states to respect the Supremacy Clause of the United States Constitution.

B. Background

Petitioner and Respondent were married in 2002, while Petitioner was on active military duty. (App. 3a-4a). Petitioner filed for divorce after a separation and entered into a mediation, which resulted in a settlement agreement and decree of divorce. (*Id*.).

In November 2015, a final decree was entered, in which Respondent was allotted fifty percent of Petitioner's disposable military retirement pay. (*Id*., 3a-4a). In the agreement, Petitioner also agreed to "reimburse" Respondent for any reductions in that latter amount if he were to elect to receive disability pay instead of retirement pay. (*Id*.). A year later, the district court entered an order consecrating the settlement, including the provision requiring Petitioner to "make up" or "reimburse" Respondent from any disability pay he might later receive in the event that Respondent's portion was reduced due to Petitioner's exercise of his rights under federal law to waive his "disposable" retirement pay to receive "non-disposable" and therefore non-divisible disability benefits. (*Id*.).

In 2019, Petitioner retired from active military service. Petitioner was designated as disabled by the Department of Veterans Affairs (VA), and thus, he would not be entitled to receive disposable retired pay,

part of which he had agreed to divide with Respondent in the divorce agreement. (*Id.*, 4a).[1]

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[1] While the Nevada Supreme Court gratuitously states that Petitioner "opted" to receive disability pay, and therefore waived his right to receive retirement pay, it is a significant and unfortunate mischaracterization of the manner in which this occurs. First and foremost, no veteran wants to become disabled, and therefore, no veteran simply "opts" to have a disability status attributed to him or her. Second, it is not an "option" that the veteran somehow has the ability to choose in order to defraud or otherwise escape some obligations he or she might have to a former spouse. The VA conducts extensive testing and analysis and attributes the disability ratings and status to the veteran based upon these professional medical diagnoses. Third, but not least, it is against federal law to hold a veteran hostage by forcing him or her to make a "choice" between claiming disability or receiving otherwise disposable retired pay, which would be divisible under the USFSPA, 10 U.S.C. § 1408. So, to put pressure on veterans by mischaracterizing their intentions and stigmatizing them as somehow deceitful and morally suspect for ostensibly "choosing" to be designated disabled is not only a dastardly act that contributes to further alienanation of disabled veterans from society generally, but it is against federal law to do this. Courts and lawyers alike time and again paint the veteran's disability status as a choice he or she somehow makes in an attempt to evade what these courts and lawyers deem to be legal obligations on the part of the veteran; when in fact, the veteran's legal obligations and entitlements are governed solely and exclusively by federal law and the disability benefits he or she is personally entitled to are expressly protected from all legal or equitable process whatever to prevent this exact thing from happening. If the state courts and these lawyers were unable to successfully steal disability benefits from veterans, that is, if they were to actually follow federal law, they would not be able to engage in feigned moral superiority and stigmatize disabled veterans, shaming them into doing something that they are not at all required to do, and in fact, are prohibited from doing themselves. See 38 U.S.C. § 5301(a)(3)(A) and (C) (disabled veterans are prohibited from agreeing to dispossess themselves

Because Petitioner was disabled, he was no longer entitled to receive "disposable" retired pay, and, by operation of federal law, Respondent also lost her right to her federally allotted portion per the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408.

The Defense Finance and Accounting Agency (DFAS), the federal agency that previously made direct payments to Respondent of her federally allotted share of Petitioner's disposable retired pay, could no longer legally make payments to her because there was no longer any available disposable retired pay.

Respondent filed a motion to enforce the divorce decree's provision requiring Petitioner to utilize his restricted federal veterans' disability benefits to "make up" the difference or to "reimburse" Respondent; effectively restoring to Respondent what she would have received pursuant to the USFSPA had Petitioner not been deemed disabled and entitled to receive restricted disability benefits, instead of "disposable" retired pay.

Petitioner argued that he was not required to use his disability benefits to federal law and this Court's decision in *Howell*, *supra*. (App. 5a-6a).

Following a hearing, the district court ordered Petitioner to comply with the divorce decree's "offset" provision, effectively forcing him to use his restricted disability pay to satisfy the provisions of the 2015

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of their protected disability benefits).

divorce decree. (App. 4a-5a). The district court reasoned that Petitioner was bound by "contract" to satisfy the provisions of the decree and that federal law did not "divest the parties of their right to contract," part of which included Petitioner's agreement to "indemnify" or "reimburse" Respondent for her lost share of his previously "disposable" retirement pay. (*Id.*). The district court ordered Petitioner to pay Respondent monthly installments to reflect the value of what she would have received had Petitioner not become disabled. The district court also concluded that the decree was binding on the parties as res judicata.

Petitioner appealed and Respondent sought attorneys' fees, which were awarded by the district court in the amount of $5000. Petitioner appealed this ruling as well and the appeals were consolidated before the Court of Appeals.

The Court of Appeals affirmed the attorney fee award, but reversed, in part, the district court's order enforcing the divorce decree, and remanded. See, *Martin v. Martin*, 498 P.3d 1289; 2021 Nev. App. Unpub. LEXIS 664 (Nov. 17, 2021) (App. 27a – 37a).

Respondent sought review of the Court of Appeals decision. In an opinion dated December 1, 2022, the Nevada Supreme Court reversed. The Court reasoned that "federal law does not preempt enforcement" of the divorce decree in which the Petitioner agreed to dispossess himself of his federal benefits. (App. 12a). The Court cited to the Michigan Supreme Court's decision in *Foster v. Foster*, 509 Mich. 109, 131; 983 N.W.2d 373 (2022), which similarly ruled that state

law doctrines like res judicata could be asserted to block the prohibition in 38 U.S.C. § 5301, which prevents a disabled veteran from agreeing to dispossess himself of his disability benefits via contractual agreement, and voids any such agreements from their inception.

Petitioner filed a motion for rehearing pointing out several errors in the Nevada Supreme Court's opinion. The court denied rehearing. (App. 38a-39a).

Petitioner now seeks review of the Nevada Supreme Court's decision.

REASONS FOR GRANTING THE PETITION

1. Section 5301(a)(3)(A) and (C) is a federal statute which voids from inception all agreements in which a disabled veteran agrees for consideration to pay his federal benefits to another party. No state court can circumvent this provision using state common-law doctrines of judicial convenience like *res judicata* or collateral estoppel. Allowing state courts to use such theories to ignore preemptive federal statutes is tantamount to ignoring the Supremacy Clause and allowing circumvention of the objectives and goals of Congress in exercising its enumerated military powers to incentivize and reward national service. There is no "preemption" if the state can simply nullify federal law by claiming that a judgment or court order that is preempted can be nonetheless allowed to stand. This is especially true where, as here, the federal statute explicitly *voids* from inception any agreement on the part of the disabled veteran to dispossess himself of his disability pay.

Ridgway, *supra*, provides the most succinct yet comprehensive summary of Congress' authority on the scope and breadth of legislation concerning military affairs vis-à-vis state family law. Citing, inter alia, *McCarty v McCarty*, 453 U.S. 210; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981) and *Wissner*, *supra*, the Court stated:

> Notwithstanding the limited application of federal law in the field of domestic relations generally this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. While state family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden, ***the relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevai***l. ***And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. That principle is but the necessary consequence of the Supremacy Clause of our National Constitution.*** *Ridgway*, 454 U.S. at 54-55 (cleaned up) (emphasis added).

These cases confirm the broad reach of the Supremacy Clause in the narrow areas of the Constitution wherein Congress retained absolute power to act. U.S. Const., Art. VI, cl. 2 (1789).

Thus, the enumerated power of Congress in Article I to raise and maintain the armed forces "is complete in itself". *Torres*, *supra*. This "power" includes providing the benefits to veterans after their service to the nation renders them disabled. *McCarty v. McCarty*, 453 U.S. 210, 232-33; 101 S. Ct. 2728; 69 L. Ed. 2d 589 (1981) (noting that state courts are not free to reduce the benefits that Congress has determined are necessary for the servicemember). These funds are appropriated under Congress' military powers, and in no area of the law have the courts given Congress more deference. *Id*. at 230. See also *Rostker v. Goldberg*, 453 U.S. 57, 63; 101 S. Ct. 2646; 69 L. Ed. 2d 478 (1981); *United States v. O'Brien*, 391 U.S. 367, 377; 88 S. Ct. 1673; 20 L. Ed. 2d 672 (1968) (also cited in *Torres*, *supra*).

Thwarting Congress' objectives to provide benefits to returning servicemembers and veterans, whether by blocking discrimination suits by them against their state employer or finding ways through legislation or judicial fiat to dispossess them of their personal benefits, results in the same frustration of the national cause. Again, as succinctly noted by this Court in *McCarty*, the funds of the government are appropriated for a specific, enumerated purpose and if they may be diverted or redirected by state process or otherwise, the functioning of the government would

cease. *McCarty*, 453 U.S. at 229, n. 23, quoting *Buchanan v. Alexander*, 4 How. 20 (1845).

It is also beyond debate that Congress' military powers are the direct source of all federal military compensation and benefits provisions for our nation's forgotten warriors. See, e.g., *United States v. Oregon*, 366 U.S. 643, 648-49; 81 S. Ct. 1278; 6 L. Ed. 2d 575 (1961) (stating "Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…for veterans."); *Johnson v. Robison*, 415 U.S. 361, 376, 384-85; 94 S. Ct. 1160; 39 L. Ed. 2d 389 (1974); *McCarty*, 453 U.S. at 232-33, *Ridgway v. Ridgway*, 454 U.S. 46, 54-56; 102 S. Ct. 49; 70 L. Ed. 2d 39 (1981) (applying Congress' enumerated powers to pass laws allowing servicemembers to designate beneficiaries for receipt of federal life insurance benefits, the Court ruled that "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments"), and *Howell*, 137 S. Ct. at 1405, 1406 (holding that under 38 U.S.C. § 5301 (the provision at issue in this case) "[s]tates cannot 'vest' that which (under governing federal law) they lack the authority to give.").

Therefore, all statutory provisions protecting veterans' disability pay are directly supported by Congress' enumerated Military Powers. Of course, Congress' "enumerated powers" are accorded federal supremacy under Article VI, Clause 2 of the Constitution (the Supremacy Clause). By ratifying the Constitution, "the States implicitly agreed that

their sovereignty would yield to federal policy to build and keep the Armed Forces. *Torres*, *supra*.

Consistent with this structural understanding, Congress has long legislated regarding the maintenance of the military forces at the expense of state sovereignty. *Id*. Thus, the Supreme Court has recognized that "ordinary background principles of state sovereignty are displaced in this uniquely federal area." *Id*., citing *Tarble's Case*, 13 Wall. 397, 398 (1872).

If a state court could ignore the directives of a federal statute which prohibits them from entering "any legal or equitable" orders dispossessing veterans of these benefits, and which, by its plain language, declares that any agreement or security for an agreement on the part of the beneficiary to dispossess himself of those benefits is "void from inception," then the state could "subvert the very foundation of all written constitutions" and "declare that an act, which according to the principles and the theory of our government, *is entirely void*; is yet, in practice, completely obligatory." *Marbury v. Madison*, 5 U.S. 137, 178; 2 L. Ed. 60 (1803) (emphasis added). "The *nullity of any act*, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law." *Gibbons v. Ogden*, 22 U.S. 1, 210-211; 6 L. Ed. 23 (1824) (emphasis added). There, the Court expounded upon Congress' enumerated powers: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution" and further, "the sovereignty of Congress, though limited to specified

objects, is plenary as to those objects…." "*Full power* to regulate a particular subject, implies the whole power, and leaves no residuum." *Id*. at 196-197 (emphasis added). Unfortunately, in its opinion, the Nevada Supreme Court ignored these unwavering principles of constitutional hierarchy and shirked its duties to follow them.

In any event, the agreement on the part of Petitioner in this case to dispossess himself of his veterans' disability pay in the future (if he were to become disabled – which is what occurred) simply is, was, and always will be "*void ab initio*", i.e., "void from inception". See 38 U.S.C. § 5301(a)(1) and (3)(A) and (C). A contract that is "void from its inception" is treated as if it never existed. Void contracts do not in effect exist; indeed, the very term 'void contract' is an oxymoron because a contract that is void is not a contract at all. Black's Law Dictionary (6th ed.) (defining 'void contract' as: '[a] contract that *does not exist* at law') (emphasis added).

It is of no moment that Petitioner entered into the agreement, which was then reduced to a state court judgment from which no immediate appeal or challenge was lodged. An agreement that is "void from inception" is an *absolute nullity*. "A void judgment is '[a] judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected *at any time and any place*, *whether directly or collaterally*. From its inception, a void judgment continues to be absolutely null. It is *incapable* of being *confirmed*, *ratified*, or *enforced in any manner or to any degree*." Black's Law Dictionary (7th ed.), p. 848 (emphasis added).

"It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered though the court may have had jurisdiction over the subject matter and the parties." 1 Freeman, Judgments (5th ed.) § 354, p. 733 (emphasis added). If a judgment is, even in part, beyond the power of the court to render, it is void as to the excess. *Ex Parte Rowland*, 104 U.S. 604, 612; 26 L. Ed. 861 (1881) (stating "if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements.") "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v. United States*, 91 U.S. 21, 27; 23 L. Ed.193 (1875). See also, Freeman, *supra*, § 324, pp. 648-649 (citing cases and discussing the severability of and the effects of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)). See also, Freeman, *supra*, § 226, p. 443 ("[T]he court may strike from the judgment any portion of it which is wholly void.") (emphasis added).

All this to say that there is no necessity for a state court to declare the obvious, and there is no heed to be paid to one that ignores it. Here, the decree's provision in which Petitioner obligated himself to use his restricted federal disability benefits to "make up" or "indemnify" Respondent if and when he became disabled is illegal and void per the plain and unambiguous language of 38 U.S.C. § 5301(a). This decree is exactly contrary to this Court's admonition in *Howell* wherein it stated that the state court cannot

circumvent the preemptive effects of federal law by allowing restricted veterans' disability benefits to be "vested" or "obligated" to another in any way. *Howell*, 137 S. Ct. at 1405 (the state cannot vest that which they have no authority to give, citing 38 U.S.C. § 5301).

Any court, *at any time*, can, in fact, must, sua sponte, undo the effects of a judgment or ruling that is declared by federal statute (indeed supreme and absolute federal law) to be void from inception.

This Court ruled in 2017 that pursuant to 38 U.S.C. § 5301(a)(1) a state court has *no authority* under this provision to *vest* any rights to the restricted disability benefits in anyone other than the federally designated beneficiary. *Howell*, 137 S. Ct. at 1405. Following that decision, and fully aware of it, the Nevada Supreme Court ruled that Petitioner's 2015 agreement to dispossess himself of his vested federal disability benefits was res judicata and could not be challenged on the basis of this Court's decision in *Howell*, *supra*.

The 2015 consent agreement was, at the time it was executed, void to the extent that it obligated Petitioner to part with his federal veterans' disability pay. It was, as the statute provides, "void from inception." See 38 U.S.C. § 5301(a)(3)(A) and (C). As previously noted, where a "contract was, as the statute says, 'void'; that word 'void' is the mandate of the statute. It means the ultimate of legal nullity. The English is plain. So is the verity of the lower court's judgment." See, e.g., *Fields v. Korn*, 366 Mich. 108, 110; 113 N.W.2d 860 (1962) (allowing recovery in

restitution where a contract for the sale of real property was void under the statute of frauds).

2. Assuming *arguendo* that the state common law theories interposed by the Nevada Supreme Court to avoid the sweeping preemptive effect of § 5301 could apply retroactively, the state cannot sanction a continuing violation of that provision, which explicitly prohibits state courts from using any legal or equitable order to force the veteran to use his or her disability benefits to satisfy any judgment or order, and such prohibition applies to all payments received or to be received by the beneficiary.

In *Howell*, this Court said of § 5301 that "state courts cannot 'vest' that which they have no authority to give…." The plain language of the provision contains explicit language providing that a state court can use no legal or equitable power whatever to dispossess the disabled veteran of his or her personal entitlement to disability benefits. See 38 U.S.C. § 5301(a)(1). This language, and the Court's clear pronouncement in *Howell*, teaches that the state is under a continuing obligation to respect the mandates of federal law embodied in preemptive federal statutes passed pursuant to Congress' enumerated military powers.

Ridgway, *supra*, addressed a provision identical to § 5301, and ruled that it prohibited the state from using any legal or equitable process to frustrate the veteran's designated beneficiary from receiving military benefits (life insurance). Citing that part of *Gibbons v. Ogden*, 22. U.S. 1, 210-211 (1824), in which this Court declared the absolute nullity of any state

action contrary to an enactment passed pursuant to Congress's delegated powers and *Free v. Bland*, 369 U.S. 663, 666; 82 S. Ct. 1089 ; 8 L. Ed. 2d 180 (1962), the Court said: "[the] relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway*, *supra* at 55 (emphasis added). The Court continued: "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.*, citing *McCarty*, *supra.* "That principle is but the necessary consequence of the Supremacy Clause of the National Constitution." *Id.* In *McCarty* the Court quite plainly said that the "funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *McCarty*, 453 U.S. at 229, n. 23 (emphasis added), quoting *Buchanan v. Alexander*, 45 U.S. 20 (1846).

As with all federal statutes addressing veterans, 38 U.S.C. § 5301 is liberally construed in favor of protecting the beneficiary and the funds received as compensation for service-connected disabilities. *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. at 162 (interpreting 38 U.S.C. § 3101 (now § 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, 440-441; 131 S. Ct. 1197; 179 L. Ed. 2d 159 (2011) ("provisions for

benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Oregon*, 366 U.S. at 647 ("[t]he solicitude of Congress for veterans is of long standing.").

Moreover, 38 U.S.C. § 5301, by its plain language, applies to more than just "attachments" or "garnishments". It specifically applies to "any legal or equitable process whatever, either before or after receipt." See *Wissner*, 338 U.S. at 659 (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary).

This Court in *Ridgway*, in countering this oft-repeated contention, stated that it "fails to give effect to the unqualified sweep of the federal statute." 454 U.S. at 60-61. The statute "prohibits, in the broadest of terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" *Id.* at 61.

Relating the statute back to the Supremacy Clause, the Court concluded that the statute:

> [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*. Accord *McCarty*, 453 U.S. at 229, n. 23.

Indeed, the statute itself states that agreements covered by subsection (a)(3)(A) are "void from their inception." A clearer pronouncement of a court's inability to sanction or otherwise approve of such an agreement could not be imagined. "Void from inception" means the violating provision never could have existed. How can a state court resuscitate an agreement that is void from inception by simply claiming that one who entered into such an agreement cannot subsequently challenge it?

In his influential treatise on judgments, Freeman discussed the effects of void judgments on state court proceedings. "It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered though the court may have had jurisdiction over the subject matter and the parties." 1 Freeman, Judgments (5th ed.) § 354, p. 733 (emphasis added). If a judgment is, even in part, beyond the power of the court to render, it is void as to the excess. *Ex Parte Rowland*, 104 U.S. 604, 612; 26 L. Ed. 861 (1881) (stating "if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements.") "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v. United States*, 91 U.S. 21, 27; 23

L. Ed.193 (1875). See also, Freeman, *supra*, § 324, pp. 648-649 (citing cases and discussing the severability of and the effects of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)). See also, Freeman, *supra*, § 226, p. 443 ("[T]he court may strike from the judgment any portion of it which is wholly void.") (emphasis added).

This analysis would suggest that any ruling by a state court which purports to allow the state to continue to force a disabled veteran to use his veterans' disability pay to satisfy a monetary payment obligation contained in a property settlement agreement would be null and void, and of no force an effect.

The Nevada Supreme Court explicitly ruled that the agreement Petitioner had entered into was enforceable and that res judicata prevents him from challenging it. Whether that is a legitimate means of avoiding explicit federal preemption by statute, Petitioner cannot be forced to violate the federal statute going forward by using his only source of sustenance, his veterans' disability pay, to pay Respondent. The statute prohibits the obligation of these funds through any legal process "paid or to be paid" and yet to be received. See 38 U.S.C. § 5301(a)(1). In other words, the state cannot sanction a continuing violation of federal law, which is what the Nevada Supreme Court effectively did in its opinion holding Petitioner to be forever bound by is void agreement to dispossess himself of his federal disability pay by using it to pay his former spouse monies that she is not entitled to under the provisions of the USFSAP, 10 U.S.C. § 1408. And, indeed, the

state can employ no "legal or equitable" powers to force Petitioner to do that which preemptive federal law prohibits.

CONCLUSION AND RELIEF REQUESTED

Petitioner respectfully requests the Court to grant his petition or summarily reverse the Supreme Court of Nevada as being contrary to preemptive federal law.

Respectfully submitted,

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Dated: November 30, 2023

APPENDIX

INDEX TO APPENDIX

138 Nev., Advance Opinion

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ERICH M. MARTIN, Appellant,
vs.
RAINA L. MARTIN, Respondent.

No. 81810

ERICH M. MARTIN, Appellant,
vs.
RAINA L. MARTIN, Respondent.

No. 82517

Filed
Dec 01, 2022

Consolidated appeals from district court orders enforcing a divorce decree and awarding pendente lite attorney fees. Eighth Judicial District Court, Family Division, Clark County; Rebecca Burton, Judge.

Affirmed.

Marquis Aurbach Coffing and Chad F. Clement and Kathleen A. Wilde, Las Vegas, for Appellant.

Willick Law Group and Marshal S. Willick and Richard L. Crane, Las Vegas, for Respondent.

Kainen Law Group and Racheal H. Mastel, Las Vegas, for Amicus Curiae American Academy of Matrimonial Lawyers.

Pecos Law Group and Shann D. Winesett, Henderson, for Amicus Curiae Family Law Section of the State Bar of Nevada.

BEFORE THE SUPREME COURT, EN BANC.[1]

OPINION

By the Court, STIGLICH, J.:

In this opinion, we consider whether an indemnification provision in a property settlement incident to a divorce decree is enforceable where a divorcing veteran agrees to reimburse his or her spouse should the veteran elect to receive military disability pay rather than retirement benefits. Electing disability pay requires a veteran to waive retirement benefits in a corresponding amount to prevent double-dipping. And so, where a state court divides military retirement pay between divorcing spouses as a community asset, this election diminishes the amount of retirement pay to be divided and thus each party's share. Federal law precludes state courts from dividing disability pay as community property in allocating each party's separate pay, and courts may not order the reimbursement of a nonveteran spouse to the extent of this diminution. We conclude, however, that state courts do not improperly divide disability pay when they enforce the terms of a negotiated property settlement as res judicata, even if the parties agreed on a reimbursement provision that the state court

[1] The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.

would lack authority to otherwise mandate. We also conclude that a court does not abuse its discretion by awarding pendente lite attorney fees under NRS 125.040 without analyzing the *Brunzell*[2] factors because those factors consider the quality of work already performed, in contrast to an NRS 125.040 attorney fee award, which is prospective in nature. Therefore, in this case, we affirm the orders of the district court.

FACTS AND PROCEDURAL HISTORY

Erich and Raina married in 2002 while Erich was serving in the military. They later separated, Erich filed a complaint for divorce, and the district court ordered mediation. Following mediation, the parties put the terms of their divorce agreements into a signed marital settlement agreement. According to the district court minutes, the next day, at the scheduled case management conference, Erich's counsel informed the district court that "the parties reached an agreement resolving all issues, and a Decree of Divorce is forthcoming."

The district court entered the divorce decree in November 2015. In relevant part, the decree allotted to Raina half of Erich's military retirement benefits and provided that Erich shall reimburse Raina for any reduction in that amount if he elects to receive disability pay instead of retirement pay. A year later, the court entered an order incident to the divorce decree to provide sufficient details to allow the

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[2] *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

Defense Finance and Accounting Service (DFAS) and the parties to correctly allocate Raina's percentage of the military retirement benefits in accordance with the divorce decree. The court specified that the order was intended to qualify under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2018). The order further provided that Erich shall pay Raina directly to make up any deficit created if he applies for disability pay. Erich retired from the military in 2019, and Raina began receiving her agreed-upon share of Erich's retirement benefits from DFAS. The following year, DFAS informed Raina that she would no longer be receiving benefit payments from DFAS because Erich opted for full disability pay, waiving all retirement pay. Raina contacted Erich to inquire how she would receive payments from him, and Erich responded that he would not be paying her, claiming he was not required to do so under federal law.

Raina subsequently moved to enforce the divorce decree. Erich opposed, arguing that reimbursement for selecting disability pay is unenforceable under federal statute and United States Supreme Court precedent. Following a hearing, the district court issued an order enforcing the divorce decree. The district court determined that federal law did not "divest the parties of their right to contract" to the terms in the divorce decree requiring Erich to reimburse or indemnify Raina for any waiver of military retirement benefits resulting in a reduction of her payments. The district court also concluded that the decree was binding on the parties as res judicata. The district court accordingly granted Raina's motion to enforce the reimbursement

provision of the divorce decree and ordered Erich to pay Raina monthly installments in the amount she would have been entitled to if Erich had not waived his retirement pay.

After Erich filed a notice of appeal, Raina moved for pendente lite attorney fees and costs for the appeal. Erich opposed, asserting that Raina could afford her own attorney fees. The district court granted Raina's request, although in a reduced amount, awarding $5000 in attorney fees.

Erich appealed both the order regarding enforcement of military retirement benefits and the order awarding pendente lite attorney fees, and the two appeals were consolidated for review. The court of appeals affirmed in part the order awarding attorney fees, reversed in part the district court order enforcing the divorce decree, and remanded. *Martin v. Martin*, Nos. 81810-COA & 82517-COA, 2021 WL 5370076 (Nev. Ct. App. Nov. 17, 2021) (Order Affirming in Part, Reversing in Part, and Remanding). Raina petitioned this court for review under NRAP 40B. We granted the petition and invited the participation of amici curiae. The American Academy of Matrimonial Lawyers (AAML) filed an amicus brief in support of Raina. The Family Law Section of the State Bar of Nevada joined AAML's brief.

DISCUSSION

Erich argues that the district court erred by enforcing the divorce decree and ordering indemnification because federal law, including 10 U.S.C. § 1408 (2018) and *Howell v. Howell*, 581 U.S.

___, 137 S. Ct. 1400 (2017), preempts state courts from dividing military disability benefits. He argues that the United States Congress has directly and specifically legislated in the area of domestic relations regarding the division of veterans' benefits, preempting state law. Erich further argues that the district court's reliance on contract principles and res judicata was misplaced and did not permit the court to enforce the divorce decree.

In response, Raina argues that the district court appropriately ordered indemnification pursuant to the divorce decree. She asserts that the district court correctly determined that res judicata applied because the parties negotiated and agreed to the terms of the divorce decree and that federal law did not preempt the court from enforcing the final, unappealed decree. She argues that Howell is distinguishable because contractual indemnification was never raised in *Howell* and asserts that the United States Supreme Court left open the possibility that parties may consider that a spouse could later waive retirement pay when drafting divorce terms.[3]

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[3] 1n its amicus brief, AAML argues that Howell does not preclude enforcement of indemnification provisions when the parties agreed to the terms in a marital settlement. AAML asserts that federal law does not preempt state courts from enforcing an agreed upon judgment, such as the divorce decree at issue here, when the purpose of the enforcement order is consistent with the intent of the parties. AAML provides examples of other jurisdictions that enforce indemnity clauses in agreements where one party has reduced his or her retirement pay amount in favor of disability benefits.

Howell and Mansell[4] are *distinguishable*.

We review questions of law, including interpretation of caselaw, de novo. *Liu v. Christopher Homes, LLC,* 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (reviewing a district court's application of caselaw de novo); *Wyeth v. Rowatt,* 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) ("Appellate issues involving a purely legal question are reviewed de novo."). Statutory construction likewise presents a question of law that we review de novo. *Leven v. Frey,* 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "[Wlhen a statute's language is plain and its meaning clear, [we generally] apply that plain language." *Id.* at 403, 168 P.3d at 715. Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982. *See* Pub. L. No. 97-252, §§ 1001-02, 96 Stat. 730-35 (1982) (codified at 10 U.S.C. § 1408 (2018)). Pursuant to 10 U.S.C. § 1408(c)(1), courts are authorized to treat veterans' "disposable retired pay" as community property upon divorce. "Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled," less certain deductions. 10 U.S.C. § 1408(a)(4)(A). Disability benefits received involve "a waiver of retired pay" and are deducted from a veteran's "disposable retired pay" amount.[5] *See* 10 U.S.C. § 1408(a)(4)(A)(ii); *see also* 38 U.S.C. § 5305 (2012) (providing that military disability payments require a waiver of retired pay). Thus, where parties

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[4] *Mansell v. Mansell*, 490 U.S. 581 (1989).

[5] The United States Supreme Court has observed that "since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits." *Howell,* 581 U.S. at ___, 137 S. Ct. at 1403.

agree to a particular division of military retirement pay, waiving that pay in whole or part in favor of receiving disability benefits will reduce the share of military retirement pay that each party will receive.

The Supreme Court has held "that the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Mansell v. Mansell,* 490 U.S. 581, 594-95 (1989). While retirement pay may be a community asset subject to division by state courts, disability benefits are not. *Id.* at 588-89. The Court further clarified that a state court may not "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver." *Howell,* 581 U.S. at___, 137 S. Ct. at 1402. When the *Howell* parties divorced, the divorce decree treated the veteran husband's future military retirement pay as community property and awarded the nonveteran wife 50 percent of the retirement pay as separate property. *Id.* at ___, 137 S. Ct. at 1404. After the husband waived some military retirement pay for disability benefits, the wife sought to enforce the decree in state court, and the court ordered the husband to pay the 50-percent portion of the original retirement amount. *Id.* The Supreme Court reversed, concluding any reimbursement was a division of disability benefits by the state court, which federal law prohibits. *Id.* at , 137 S. Ct. at 1406. *Howell* and *Mansell* thus provide that federal law preempts state courts from treating disability benefits as community property that may be divided to reimburse a divorcing

spouse for a lost or diminished share of retirement pay. *Howell,* 581 U.S. at ___, 137 S. Ct. at 1405; *Mansell,* 490 U.S. at 594-95.

Neither of those cases, however, involved the parties agreeing to an indemnification provision in the divorce decree property settlement. *See Howell,* 581 U.S. at ___, 137 S. Ct. at 1404 (involving a state court ordering husband to pay wife the original amount set out in the divorce decree after he waived some military retirement pay for disability benefits); *Mansell,* 490 U.S. at 586 (involving a state court declining to modify a divorce decree where the parties divided disability benefits as community property). The Alaska Supreme Court distinguished *Howell* on this basis, explaining that [a]lthough *Howell* makes clear that state courts cannot simply order a military spouse who elects disability pay to reimburse or indemnify the other on a dollar for dollar basis, *Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." *Jones v. Jones,* 505 P.3d 224, 230 (Alaska 2022); *see also id.* (quoting a treatise on military divorce for the observation that "[ilt's one thing to argue about a judge's power to require . . . a duty to indemnify, but another matter entirely to require a litigant to perform what he has promised in a contract" (alteration and omission in original) (internal quotation marks omitted)).

The instant matter is thus distinguishable. Here, Raina and Erich expressly agreed while negotiating marital settlement terms, as incorporated in the divorce decree, that "[s]hould Erich select to

accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." *Howell* and *Mansell* direct that state courts lack the authority to treat disability pay as community property and to divide it in a divorce disposition. They do not bar parties themselves from taking into account the possibility that one divorcing spouse may elect to receive disability compensation in the future and structuring the divorce decree accordingly.

Federal law does not preempt enforcement

In light of our conclusion that *Howell* and *Mansell* are distinguishable, we proceed to Erich's argument that Congress intended to preempt state law in this instance. The Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, § 2; *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.,* 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The doctrine of federal preemption thus provides that federal law shall apply and preempt state law where Congress intended to preempt state law. *Id.* Preemption may be either express, by explicit statement in the federal statute, or implied, when Congress seeks to legislate over an entire subject or field or when state and federal statutes conflict. *Id.* at 371-75, 168 P.3d at 79-82. While state law typically controls in matters of family law including divorce, *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979), there have been some "instances where Congress has directly and specifically legislated in the area of domestic relations," *Mansell,* 490 U.S. at 587. We review questions of federal preemption de novo.

Nanopierce Techs., 123 Nev. at 370, 168 P.3d at 79. At the outset, we note that neither express preemption nor field preemption apply, as 10 U.S.C. § 1408 contains no specific bar against state enforcement of divorce decrees and as family law matters are typically issues of state law.

We further conclude that conflict preemption also does not apply. The Supreme Court has recognized that Congress, in enacting 10 U.S.C. § 1408, intended to preempt state courts from dividing disability benefits as community property. *Howell,* 581 U.S. at ___, 137 S. Ct. at 1405; *see also* 10 U.S.C. § 1408(c)(1) (providing when a court may treat disposable retired pay as separate or community property in accordance with the laws of its jurisdiction). The Court has observed that section 1408(c)(1) "limit[s] specifically and plainly the extent to which state courts may treat military retirement pay as community property." *Mansell,* 490 U.S. at 590. As discussed, however, that is not what the district court did in this instance. By its plain language, nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute in this regard limits what divisions a state court may impose based on community property laws.

Neither *Howell* nor *Mansell* confronted the intersection of 10 U.S.C. § 1408 and such contractual issues, and the Court intimated that such contractual duties lay beyond the federal preemption in this regard, as *Mansell* observed that whether res judicata applies to a divorce decree in circumstances such as

these is a matter for a state court to determine and over which the United States Supreme Court lacks jurisdiction. *See* 490 U.S. at 586 n.5. And indeed, the Supreme Court's treatment of *Mansell* after remand is instructive. Where *Mansell* reversed a state court order reopening a settlement and dividing military benefits as community property, *id.* at 586 n.5, 594-95, the state court on remand reached the same distribution of assets on res judicata grounds, as the parties also had stipulated to the division of gross retirement pay, and the Supreme Court denied certiorari from this amended disposition, *In re Marriage of Mansell,* 265 Cal. Rptr. 227, 233-34 (Ct. App. 1989), *cert. denied,* 498 U.S. 806 (1990). Similarly, this court has observed that "[a]lthough states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved." *Shelton v. Shelton,* 119 Nev. 492, 496, 78 P.3d 507, 509 (2003) (footnotes omitted). This aligns with the majority practice in state courts following *Mansell. Foster v. Foster,* 949 N.W.2d 102, 124 (Mich. 2020) (Viviano, J., concurring) (recognizing that "[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata" (alteration in original) (internal quotation marks omitted)). Accordingly, we conclude that federal law does not prevent Nevada courts from enforcing Raina and Erich's settled divorce decree. *Cf. Jones,* 505 P.3d at 230 (concluding that *Howell* does not prevent courts from enforcing indemnification provisions in negotiated property settlements).

Nevada law requires enforcement of the decree of divorce.

As federal law does not preempt enforcement of the divorce decree, we turn to analysis under Nevada law. Erich argues the reimbursement provision of the divorce decree is unenforceable on contract grounds and that the district court erred by enforcing the decree through the doctrine of res judicata. In this regard, he contends this court should revisit *Shelton,* contending that the decision is incompatible with federal law concerning veterans' disability benefits.[6] Divorce decrees that incorporate settlement agreements are interpreted under contract principles, *Shelton,* 119 Nev. at 497-98, 78 P.3d at 510, and are subject to our review de novo, *May v. Anderson,* 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). *See also Grisham v. Grisham,* 128 Nev. 679, 685, 289 P.3d 230, 234 (2012) (providing that an agreement between parties to resolve property issues pending divorce litigation is governed by general contract principles). An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." *May,* 121 Nev. at 672, 119 P.3d at 1257. "Parties are free to contract, and the courts will enforce their

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[6] Erich also argues the decree is unenforceable because he did not voluntarily sign the divorce decree. We decline to address this argument because we find no support in the record for Erich's claim that he opposed the division of retirement pay and benefits, and Erich does not identify any supporting evidence. *See* NRAP 28(e)(1) (requiring citations to the record to support every assertion); *cf. Edwards v. Emperor's Garden Rest.,* 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating this court need not consider claims that a party does not cogently argue or support with relevant authority).

contracts if they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero,* 125 Nev. 410, 429, 216 P.3d 213, 226 (2009), *overruled on other grounds by Romano v. Romano,* 138 Nev., Adv. Op. 1, 501 P.3d 980 (2022).

Res judicata, or claim preclusion, applies when "[a] valid and final judgment on a claim precludes a second action on that claim or any part of it." *Univ. of Nev. v. Tarkanian,* 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994), *holding modified on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.,* 114 Nev. 823, 963 P.2d 465 (1998). This court applies a three- part test to determine whether res judicata applies: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (footnote omitted), *holding modified on other grounds by Weddell v. Sharp,* 131 Nev. 233, 350 P.3d 80 (2015). Generally, after parties settle or stipulate to a resolution, "a judgment entered by the court on consent of the parties" "is as valid and binding a judgment between the parties as if the matter had been fully tried, and bars a later action on the same claim or cause of action as the initial suit." *Willerton v. Bassham,* 111 Nev. 10, 16, 889 P.2d 823, 826 (1995). As *Mansell* acknowledges, res judicata as applied to divorce agreements is a state law issue. 490 U.S. at 586 n.5. The application of res judicata, or claim preclusion, is a question of law we review de novo. *Kuptz-Blinkinsop v. Blinkinsop,* 136 Nev. 360, 364, 466 P.3d 1271, 1275 (2020).

This court has held that state courts may enforce divorce decrees as res judicata even if those decrees involve distributions of military disability pay. *Shelton,* 119 Nev. at 496-97, 78 P.3d at 509-10. In *Shelton,* this court considered a divorce decree designating a veteran husband's military retirement pay and disability benefits as community property. *Id.* at 494, 78 P.3d at 508. The parties agreed that the husband would receive $500 as half of his retired pay and $174 in disability pay and that the wife would receive $577 as the other half of the retirement pay. *Id.* After the husband was deemed fully disabled, he waived his military retirement benefits and stopped paying the wife. *Id.* The wife moved to enforce the divorce decree and sought the agreed-upon $577. *Id.* This court concluded that the parties clearly contracted for the husband to pay the wife $577 each month and enforced that obligation as res judicata. *Id.* at 497-98, 78 P.3d at 510-11 (explaining that the parties agreeing to a payment of $577 a month was more specific than simply "one-half' and that this amount was more than the amount the husband would receive from just the military retirement-specific pay). The court determined that *Mansell* and its progeny did not preclude enforcing the husband's obligations pursuant to the divorce decree. *Id.* at 495-96, 78 P.3d at 509. It observed that the husband may satisfy his contractual obligations with whatever monies he wished, even if that involved using disability pay. *Id.* at 498, 78 P.3d at 510-11.

Here, Erich and Raina engaged in negotiations, which were reduced to a signed settlement agreement and incorporated into the divorce decree. This created a valid, unambiguous contract between the parties.

The divorce decree provided that Erich would reimburse Raina in the event that her share of the retirement benefits was reduced by Erich's decision to accept military disability payments. This indemnification provision may be enforced through contract principles, consistent with *Shelton's* embrace of contract law to govern a military disability indemnification provision in a divorce decree. The provision at issue is unambiguous and requires Erich to reimburse Raina for her share of any amount he elects to waive from his retirement pay.

We conclude that res judicata applies, and the obligations set forth in the decree cannot now be relitigated because Raina and Erich are the same parties in the matter, the divorce decree is a valid final judgment, and the action here enforces the original decree without modifying it or introducing matters that could not have been addressed initially. *Cf. Mansell,* 265 Cal. Rptr. at 229, 236-37 (precluding challenge to distribution of disability pay where husband stipulated to its inclusion in property settlement and declining to reopen and modify settlement); *In re Marriage of Weiser,* 475 P.3d 237, 246, 249, 252 (Wash. Ct. App. 2020) (affirming enforcement of divorce decree under res judicata where lower court enforced the original terms and did not modify its property disposition and rejecting argument that *Howell* barred distribution of military disability pay). Accordingly, we find no reason to depart from our decision in *Shelton.* And we therefore conclude the district court properly enforced the divorce decree under contract principles and res judicata.

The district court did not abuse its discretion in awarding pendente lite attorney fees

Erich argues that the district court abused its discretion by awarding Raina $5000 for pendente lite attorney fees. He contends the district court erred by not engaging in a *Brunzell*[7] analysis and that the court did not follow NRS 125.040. Raina argues that the district court properly awarded the attorney fees for the appeal pursuant to NRS 125.040 and *Griffith v. Gonzales-Alpizar,* 132 Nev. 392, 395, 373 P.3d 86, 89 (2016), because it was within the district court's discretion to award her these fees after the court found a significant income disparity between the two parties. "In any suit for divorce the court may…require either party to pay moneys necessary…[t]o enable the other party to carry on or defend such suit." NRS 125.040(1)(c). The court must consider the financial situation of each party before making such an order. NRS 125.040(2). Even so, "a party need not show necessitous circumstances in order to receive an award of attorney fees under NRS 125.040." *Griffith,* 132 Nev. at 395, 373 P.3d at 89 (internal quotation marks omitted). Attorney fees awarded under NRS 125.040(1)(c) are "pendente lite" because they cover fees in an ongoing divorce suit. *See Pendente Lite, Black's Law Dictionary* (11th ed. 2019) ("During the proceeding or litigation; in a manner contingent on the outcome of litigation."). We review

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[7] *Brunzell v. Golden Gate Nat'l Bank,* 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (providing four factors for courts to consider when determining the reasonable value of attorney fees: "the qualities of the advocate[,]…the character of the work[,]... the work actually performed[,]...[and] the result" (emphases omitted)).

an award of pendente lite attorney fees for an abuse of discretion. *See Griffith,* 132 Nev. at 395, 373 P.3d at 89. "[Ain award of attorney fees in divorce proceedings will not be overturned on appeal unless there is an abuse of discretion by the district court." *Miller v. Wilfong,* 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

After Erich filed the initial appeal, Raina moved for pendente lite attorney fees and costs, requesting the district court award her $20,000 to defend against the appeal. The court considered the financial circumstances of both parties and found that "Erich's income currently is about three times as high as Raina's income." The court highlighted that Raina's income had been reduced by COVID issues while Erich was still making his full-time income and that Raina would therefore be more financially impacted by the proceedings. At the same time, the court recognized that Raina's household expenses were reduced by her domestic partner but also noted that her domestic partner was not obligated to assist Raina in paying for these legal proceedings. After considering these circumstances, the court declined to award Raina all attorney fees sought and instead ordered Erich to contribute $5000 to Raina's pendente lite attorney fees.

We ascertain no abuse of discretion in this decision. The district court properly considered the financial circumstances of each of the parties before ordering attorney fees pursuant to NRS 125.040, and the record supports its findings as to the income disparity between the parties. Further, we conclude that the district court was not required to apply the

Brunzell factors because *Brunzell* requires analysis of attorneys' services provided in the past. *See* 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). In contrast, here the district court was considering prospective appellate work to award attorney fees. *See Griffith,* 132 Nev. at 395, 373 P.3d at 88 (distinguishing a decision addressing attorney fees for a previous matter rather than a prospective appeal as was properly within the scope of NRS 125.040); *Levinson v. Levinson,* 74 Nev. 160, 161, 325 P.2d 771, 771 (1958) (observing that attorney fees awarded pursuant to NRS 125.040 contemplate prospective expenses and should not reflect the attorneys' work already performed or expenses already incurred). Therefore, we affirm the district court order awarding pendente lite attorney fees to Raina.

CONCLUSION

Under federal law, state courts may not treat disability pay as community property that may be divided in allocating the parties' separate property. This prohibition does not prevent state courts, however, from enforcing an indemnification provision in a negotiated property settlement as res judicata. As res judicata applies to the divorce decree at issue here, we conclude the district court properly ordered its enforcement. We further conclude that the award of pendente lite attorney fees does not require showing that the *Brunzell* factors are satisfied and that the district court did not abuse its discretion in awarding pendente lite attorney fees. We affirm.

_____, J.
Stiglich

We concur:

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____,J.
Herndon

CADISH, J., with whom PICKERING, J., agrees, concurring:

I agree with the majority that, under our state law principles of res judicata, or claim preclusion, Erich's challenge to the parties' divorce decree is barred, and I would affirm the district court decision on that basis. However, I write separately because I disagree that the *Howell* and *Mansell* cases are otherwise distinguishable or that the fact the parties here entered into a settlement agreement that was later incorporated into the divorce decree prevents the indemnification provision at issue from being preempted under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2018) (USFSPA).

In this case, during their underlying divorce proceedings, the parties reached a marital settlement agreement at a mediation that included provisions by which Erich and Raina would each receive their

portion of Erich's military retirement when he retired, based on a calculation of the community property interest therein. It further stated, "Should [Erich] elect to accept military disability payments, [Erich] shall reimburse [Raina] for any amount her amount of his pension is reduced due to the disability status from what it otherwise would be." The divorce decree subsequently entered by the district court provided in pertinent part, "Raina shall be awarded the following [:] ... One-half (1/2) of the marital interest in the [sic] Erich's military retirement…. Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." The section of the decree awarding property to Erich has a similar provision, including verbatim the last sentence requiring reimbursement by Erich for any reduction in Raina's share of the pension due to his acceptance of disability benefits. These provisions in the decree are contrary to federal law and preempted, under the USFSPA and decisions of the United States Supreme Court interpreting it.

In *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989), the Supreme Court held "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Then in *Howell v. Howell*, 581 U.S. ___, 137 S. Ct. 1400, 1406 (2017), the Supreme Court reiterated this holding, emphasizing that describing the order as just requiring the military spouse to "reimburse" or "indemnify" the nonmilitary spouse for a reduction in retirement pay as a result of such waiver does not

change the outcome, as "[t]he difference is semantic and nothing more." The Court specifically noted that the indemnification there was a "dollar for dollar" payment of the "waived retirement pay." *Id*. In concluding this portion of its analysis, the Court stated, "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted." *Id*. (emphasis added).

The majority attempts to distinguish *Mansell* and *Howell* because those cases did not "involve[ ] the parties agreeing to an indemnification provision in the divorce decree property settlement." Maj. Op., ante at 8. The majority also says that these cases do not deal with the interplay between the USFSPA and "such contractual issues." *Id*. at 10. However, this ignores that the Mansell case did involve a divorce where the parties "entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 585-86. Several years later, Major Mansell asked to modify the divorce decree incorporating this provision to remove the requirement to share the disability portion of his retirement pay. *Id*. at 586. Although the decree provision at issue had been agreed to by the parties as part of their property settlement, the Court nevertheless held it was preempted by the USFSPA. *Id*. at 587-95.

Further, as discussed above, the Court made clear in *Howell* that calling it "indemnification" rather than a division of community property did not avoid the preemptive effect of the USFSPA. 581 U.S. at ___, 137 S. Ct. at 1406. The fact that the disability election came after the divorce decree was finalized, as in the instant case, also did not change that outcome. *Id.* at ___, 137 S. Ct. at 1404-06. The *Howell* Court thus acknowledged that, at the time of divorce, the parties may consider that the value of future military retirement pay may be less than expected should an election for disability pay be made, but simultaneously held that state courts may not account for this contingency by ordering reimbursement or indemnification if that occurs. *Id.* at ___, 137 S. Ct. at 1405-06. The Court held the following:

> [A] family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for spousal support.
>
> We need not and do not decide these matters, for here the state courts made clear that the original divorce decree divided the whole of John's military retirement pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Consequently, the determination of the Supreme Court of Arizona must be reversed.

Id. at ___, 137 S. Ct. at 1406 (citations omitted).

Similarly, here, the provision of the divorce decree at issue discusses the division of the parties' assets and is in an entirely separate section than that covering spousal support, or alimony, as they are separate concepts under Nevada law. *See* NRS 125.150(1)(a) (providing for a permissible award of alimony); NRS 125.150(1)(b) (providing for an equal division of community property between parties to a divorce). The indemnification provision is not based on the factors appropriate for consideration in awarding spousal support, *see* NRS 125.150(9) (listing 11 nonexhaustive factors that must be considered in determining whether, and in what amount, to award alimony), but instead is designed to restore Raina's "lost portion" of Erich's military retirement pay, a community property asset. This is exactly what the Court has said is prohibited, and thus a family court may not enter this type of divorce decree provision because it is preempted by federal law.

The majority asserts that "[b]y its plain language, nothing in [the USFSPA] addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce." Maj. Op., *ante* at 10. But Raina here does not seek to enforce a private contract or assert a claim for breach of a contract; rather, as the majority notes, she "moved to enforce the divorce decree." *Id.* at 4. In response to her motion, "the district court issued an order enforcing the divorce decree." *Id.* Indeed, the majority's analysis of the applicability of res judicata principles acknowledges that this case involves enforcement of a "final

judgment [that] is valid." *Id.* at 13 (quoting *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008)). Thus, the question is not whether a private contract can be enforced, but whether a court entered judgment can be enforced. And the Supreme Court has made clear that such judgments are contrary to federal law and thus preempted, even when containing provisions agreed to by the parties. A state court cannot enter an order that is contrary to federal law—and would thus be preempted—simply because it is entered based on the parties' settlement agreement. *Mansell,* 490 U.S. at 587-95 (holding preempted enforcement of a divorce decree provision based on the parties' settlement requiring payment of half of the military spouse's retirement pay and any portion of the retirement pay waived to receive disability benefits). To the extent we held to the contrary in *Shelton v. Shelton,* 119 Nev. 492, 78 P.3d 507 (2003), it must be overruled in light of *Mansell* and *Howell.*[1] *See State v. Lloyd,* 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (discussing that a decision may be overturned if it has proven "badly reasoned" or "unworkable" (internal quotation marks omitted)); *Armenta-Carpio v. State,* 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013) (recognizing that precedent may be overturned based on clearly erroneous reasoning).

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[1] While *Shelton* also alluded to res judicata principles to support its decision, 119 Nev. at 496, 78 P.3d at 509 (holding that "states are not preempted from enforcing orders that are res judicata"), it provided no analysis of its application to that case. However, I agree that such principles would appear to be applicable in that case.

The majority incorrectly conflates the application of preemption principles to enforcement of the provision in the divorce decree and their application to res judicata or claim preclusion. While the *Mansell* Court recognized that the application of res judicata principles to the parties' divorce settlement was a matter of state law, 490 U.S. at 586 n. 5, the ability to treat disability benefits as divisible even when based on a settlement agreement was entirely a matter of federal law since it was preempted by the USFSPA, *id.* at 594-95. As the Supreme Court of Michigan held in *Foster v. Foster,* while 'the Offset provision in the parties' consent judgment of divorce impermissibly divides defendant's military disability pay in violation of federal law," "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle," and "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes any other final decree may be modified." No. 161892, 2022. WL 1020390, at *6-7 (Mich. Apr. 5, 2022), (quoting, in the last clause, *Pierson v. .Pierson,* 88 N.W.2d 500, 504 (1958)). Similarly, under Nevada law, a decree of divorce cannot be modified or set aside except as provided by rule or statute." *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 3-97 (1980). Thus, while the indemnification provision in the divorce decree is an impermissible division of military disability pay in violation of federal law, I agree with the majority that Erich may not now collaterally attack the decree, which has become final. become final. I thus concur in the majority's decision to affirm.

IN THE COURT OF APPEALS OF THE
STATE OF NEVADA

ERICH M. MARTIN,
Appellant,
No. 81810

vs.

RAINA L. MARTIN,
Respondent.

ERICH M. MARTIN,
Appellant,
No. 82517

vs.

RAINA L. MARTIN,
Respondent.

Filed
Nov. 17, 2021

ORDER AFFIRMING IN PART, AND REVERSING IN PART, AND REMANDING

Erich M. Martin appeals from a district court order regarding enforcement of military retirement benefits, Docket No. 81810-COA, and from a district court order awarding attorney fees pendente lite, Docket No. 82517-COA. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge; Bryce C. Duckworth, Judge.[1] Erich

[1] Shortly after the Honorable Judge Rebecca Burton issued the orders on appeal, the case was reassigned to the Honorable Judge Bryce C. Duckworth.

and Raina L. Martin were married in 2002.[2] In 2015, Erich filed a complaint for divorce in Las Vegas. The district court referred the parties to mediation to see if they could reach an agreement on the terms of divorce. At a hearing, Erich represented to the court that the parties had reached an agreement on the provisions of the divorce. The decree of divorce was signed by both parties, their attorneys, and the district court, and filed in November 2015. There was not a separate unmerged marital settlement agreement.

As pertinent to this appeal, the decree stated, "[s]hould Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." In November 2016, an order incident to decree of divorce was filed and submitted to the military to effectuate the parties' decree of divorce. This order specifically provided that Raina's share of Erich's military retired pay also includes all amounts of retired pay Erich actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any post-divorce waiver made in order to qualify for Veterans Administration benefits…. [It] is intended to qualify under the *Uniformed Services Former Spouses Protection Act,* 10 U.S.C. §1408 et seq.

The order incident to divorce also stated that if Erich obtained a disability waiver, "he shall make payments to Raina directly in an amount sufficient to

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[2] We do not recount the facts except as necessary to our disposition.

neutralize, as to Raina, the effects of the action taken by Erich" and that the court would retain jurisdiction to enforce the award to Raina of military retirement benefits by making an award of alimony.

Erich retired from the military in July 2019. Raina received several monthly payments from Erich's retirement pension. The Department of Veterans Affairs (DVA) eventually determined that Erich was eligible for disability retirement benefits, and Erich ultimately waived his retirement pay in order to receive disability benefits. As a result of his waiver, the DVA determined Raina was no longer entitled to her share of Erich's retirement pay, as Erich exclusively receives disability benefits, and the Defense Finance and Accounting Service stopped sending payments to Raina.

In May 2020, Raina filed in district court a motion to enforce the decree and order incident to divorce, requesting compensation for the loss of Erich's monthly retirement pay as a division of property, and arguing that Erich was obligated to indemnify or reimburse her for the loss. Erich opposed the motion, arguing that federal preemption prohibited the district court from ordering any division of his veteran's disability benefits, citing to *Howell v. Howell,* 581 U.S. ___, 137 S. Ct. 1400 (2017). After the district court conducted a hearing, the court issued an order enforcing the decree and order incident to divorce, finding that Erich "voluntarily" agreed to the indemnification provisions in the decree, and that the *Howell* decision had no impact on the parties' ability "to freely contract." The court ordered Erich to pay Raina the amount of his former

retirement pension in monthly installments that she would have been entitled to had he not waived his retirement pay to receive disability benefits. The district court also awarded Raina $5,000 in pendente lite attorney fees to cover costs associated with defending against Erich's appeal.

On appeal, Erich primarily argues that the district court erred when it ordered Erich to reimburse for his waived military retirement pay as a result of accepting military disability benefits because federal law preempts such an order. *See Howell,* 581 U.S. ___, 137 S. Ct. 1400. Erich also argues that the district court ignored public policy that explicitly seeks to protect disabled veterans by ordering him to reimburse Raina for his waived military retirement pay. He also argues that the support exception contained in *Howell,* 581 U.S. ___, 137 S. Ct. 1400, does not apply. Erich also argues that the indemnification provision is unenforceable on contractual grounds and on the alternative basis of preclusion. Lastly, he argues that the district court abused its discretion in awarding attorney fees pendente lite to Raina.[3]

The district court erred when it ordered Erich to reimburse Raina for his waived military retirement pay as a result of accepting military disability benefits.

Erich argues that federal law, including the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 (2018), and *Howell,* 581

[3] In light of our disposition, we need not address all the arguments Erich raises on appeal.

U.S. ___, 137 S. Ct. 1400, preempted the district court from dividing veteran disability benefits and that any attempt to divide veteran disability benefits via alternatives like indemnification or a settlement agreement is improper. Raina counters by stating that the *Howell* decision is distinguishable from the present facts, as it did not involve an agreement by the parties for the veteran to reimburse the ex-spouse for the retirement amount waived due to claiming disability benefits. The district court concluded that the *Howell* decision did not preempt the indemnification clause contained in the decree of divorce here, as the parties were free to contract, and the terms in the final decree, which was not appealed, specifically provided for Erich to reimburse Raina if he were to claim disability benefits.[4] We agree with Erich.

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[4] We note that Raina also argues that *Howell* should not be applied as it is distinguishable and Erich's appeal is barred by the doctrine of res judicata. We are not persuaded by this argument. At the time the district court decided to enforce the indemnification provision, *Howell* was the controlling law regarding division of military retirement benefits upon divorce and therefore should have governed the court's decision. Further, the indemnification provision could not have been fully litigated until Erich waived his disability pay. Therefore, at the time the divorce decree was entered into by the parties, the issue was not yet ripe for adjudication, thus the fact that the decree itself was not appealed does not form a basis for applying res judicata to bar Erich's appeal on the indemnification provision. *See Alcantara v. Wal-Mart Stores, Inc.,* 130 Nev. 252, 262, 321 P.3d 912, 918 (2014) ("Whether the issue was necessarily litigated turns on whether the common issue was…necessary to the judgment in the earlier suit." (omission in original) (emphasis and internal quotation marks omitted)).

Questions of federal preemption are reviewed de novo. *See Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.,* 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) ("[W]hen a conflict exists between federal and state law, valid federal law overrides, *i.e.,* preempts, an otherwise valid state law."). The Supremacy Clause establishes that the United States Constitution and all federal laws enacted pursuant to the federal constitution are "the supreme Law of the Land." U.S. Const. art. VI, § 2.

There are three basic forms of military retirement for members of the military: (1) non disability retirement, (2) disability retirement, and (3) reserve retirement. *McCarty v. McCarty,* 453 U.S. 210, 213 (1981), *superseded by statute as stated in Howell,* 581 U.S. ___,137 S. Ct. 1400. To prevent double dipping, disabled military retirees may only receive disability benefits to the extent that they waive a corresponding amount of the military retirement pay. *Howell,* 581 U.S. at ___, 137 S. Ct. at 1402-03; *Mansell v. Mansell,* 490 U.S. 581, 583-84 (1989). Military retired pay is taxable, whereas military disability compensation is not. 38 U.S.C.A. § 5301. Under federal law, "a State may treat veterans' 'disposable retired pay' as divisible property, *i.e.,* community property divisible upon divorce." *Howell,* 581 U.S. at ___, 137 S. Ct. at 1403 (quoting 10 U.S.C. § 1408(c)(l)). The USFSPA authorizes state courts to divide "disposable retired pay" among spouses in accordance with community property laws. However, this is not the case for disability payments, as discussed more fully below.

Based on our review of *Howell, Mansell,* and *McCarty,* it is clear that the United States Congress intended to ensure that disability benefits are not community property and cannot be divided by state community property laws during a divorce. The Supreme Court has consistently held that states cannot order a veteran to indemnify or reimburse an ex-spouse for retirement pay waived to receive disability benefits. Nevada has confirmed that such orders are preempted by federal law. *Byrd v. Byrd,* 137 Nev., Adv. Op. 60, ___ P.3d ___ (Ct. App. Sept. 30, 2021).[5]

Raina contends that the indemnification provision, requiring Erich to make up the loss to her because he selected to receive disability benefits, can be enforced on contract grounds. However, the Supreme Court has noted, "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted." *Howell,* 581 U.S. at ___,137 S. Ct. at 1406. We have recognized that federal law is clear that an indemnification provision is invalid, due to the order's effect, regardless of how it is styled. *Byrd,* 137 Nev., Adv. Op. 60, P.3d at ___. The indemnification provision contained in Erich and Raina's decree, even if agreed to, has the same effect that federal law prohibits by requiring Erich to reimburse Raina

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[5] We take this opportunity to acknowledge the district court's comprehensive and well-written order, and recognize that at the time the court prepared its order it did not have the benefit of *Byrd v. Byrd*.

compensation for his waived retirement pay, which he no longer receives because he accepted disability benefits in lieu thereof. Thus, the indemnification provision that requires such reimbursement cannot be enforced.

Raina argues that *Shelton v. Shelton* should be controlling, in which the Nevada Supreme Court held that the veteran was contractually obligated by the divorce agreement to pay his former spouse the sum representing his military retirement pay, when he elected to receive veteran's disability benefits. 119 Nev. 492, 497-98, 78 P.3d 507, 510-11 (2003). The *Shelton* decision stated that while federal law preempts the determination that veteran's disability pay is community property, state contract law is not preempted by federal law. *Id.* However, *Shelton* predates *Howell.* This court addressed *Shelton* in *Byrd* and noted that *Howell* is controlling regarding the scope of federal preemption for indemnification provisions concerning military retirement benefits. *Byrd,* 137 Nev., Adv. Op. 60, ___ P.3d at ___.[6] Additionally, the court in *Shelton* treated the pro se joint petition for divorce as a contract, whereas here we only have a decree and an order incident to divorce that merged all agreements. *See Day v. Day,* 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964) (an

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[6] We acknowledge that an award of alimony to the former spouse may be considered by district courts in light of waived military retirement pay. *Howell,* 581 U.S. at ___, 137 S. Ct. at 1406. Here, however, the district court declined to award permanent alimony and the issue is not before us on appeal. We note, however, that the supreme court stated in *Shelton* that courts are not precluded from reconsidering divorce decrees in this situation. 119 Nev. at 496, 78 P.3d at 509.

agreement merged into a decree loses its character as an independent contract and the parties' rights are based upon the decree). Therefore, we conclude that the district court erred when it ordered Erich to reimburse Raina based on contract principles.

Award of attorney fees pendente lite

Erich argues that the district court abused its discretion when it awarded Raina $5,000 in attorney fees pendente lite, given that both parties work and Raina can afford counsel. We disagree.

The award of attorney fees resides within the discretion of the district court and will not be overturned absent a manifest abuse of discretion. *See Miller v. Wilfong,* 121 Nev. 619, 622, 119 P.3d 727, 729 (2005); *see also County of Clark v. Blanchard Constr. Co.,* 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.,* 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted). Fees awarded pursuant to NRS 125.040(1)(c) are considered "pendente lite" because they cover the costs of the suit while the divorce action is pending. *See Pendente Lite, Black's Law Dictionary* (11th ed. 2019) ("During the proceeding or litigation; in a manner contingent on the outcome of litigation.").

Additionally, "a party need not show necessitous circumstances in order to receive an award of attorney fees under NRS 125.040." *Griffith v. Gonzales-Alpizar,* 132 Nev. 392, 395, 373 P.3d 86,

89 (2016) (internal quotation marks omitted). Family law district courts must also consider the disparity in income of the parties when awarding fees. *Wright v. Osburn,* 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). When ascertaining the amount to award for the appeal, the supreme court confirmed that a $15,000 award is appropriate in appeals relating to contentious litigation. *Griffith,* 132 Nev. at 393, 373 P.3d at 87.

At the time the district court granted the attorney fees pendente lite, Erich's income was three times greater than Raina's. Accordingly, the district court did not abuse its discretion in awarding Raina $5,000 in attorney fees pursuant to NRS 125.040. Just as the court held in *Griffith*, the district court here found that it was warranted to award attorney fees pendente lite to Raina because of the disparity in income, the amount was justified, supported by the motion, and reasonable in light of *Griffith.* Therefore, we conclude that Erich has failed to demonstrate that the district court abused its discretion in awarding fees to Raina pursuant to NRS 125.040.

To the extent that Erich argues that the district court erred in failing to apply the factors of *Brunzell v. Golden Gate National Banh*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), in determining whether to award attorney fees pendente lite, we are not persuaded. Pendente lite fees are prospective and anticipatory, so *Brunzell*, which applies to analyzing attorney fees for work already performed, does not apply here. *Id.* Moreover, Erich fails to support his assertion that *Brunzell* should apply to an award of attorney fees pendente lite. See *Edwards v. Emperor's Garden*

Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Accordingly, we

ORDER the judgments of the district court AFFIRMED in part, REVERSED in part, and REMAND for further proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Rebecca Burton, District Judge, Family Court Division
Hon. Bryce C. Duckworth, District Judge, Family Court Division
Ara Shirinian, Settlement Judge
Marquis Aurbach Coffing
Willick Law Group
Eighth District Court Clerk

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ERICH M. MARTIN,
Appellant,
vs.
RAINA L. MARTIN,
Respondent.

No. 81810

ERICH M. MARTIN,
Appellant,
vs.
RAINA L. MARTIN,
Respondent.

No. 82517

Filed
April 17, 2023

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Stiglich

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

_____, J.
Bell

CADISH and PICKERING, JJ., dissenting:

We would grant rehearing. Therefore, we dissent.

_____, J.
Cadish

_____, J.
Pickering

cc: Marquis Aurbach Chtd.
Willick Law Group
McDonald Carano LLP/Reno
Kainen Law Group
Pecos Law Group

Exhibit 5

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

ERICH M. MARTIN,

Petitioner,

v.

RAINA L. MARTIN,

Respondent.

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

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29 undersigned counsel sent on the below date by first class mail a copy of Petitioner's Writ of Certiorari to the Nevada Supreme Court in the above-captioned case to counsel to Respondent, as follows:

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Dated: December 1, 2023