ORIGINAL

No. 19-7346

IN THE

Supreme Court of the United States

PEGGY JEAN CLARK — PETITIONER

VS.

DEPARTMENT OF THE ARMY, ET. AL. — RESPONDENTS

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Appeals Court err in its judgment affirming the retroactive revocation of benefits on the premise that the initial determination granting the benefits was done in error; in light of 10 U.S.C. §1084? *Bowen v. Michigan Academy of Family Physicians,* U.S. S. Ct. 476 U.S. 667 (1986).

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. United States Army Human Resources Command
2. UNIDENTIFIED PARTIES
3. RYAN D. MCCARTHY, SECRETARY OF THE ARMY

RELATED CASES

PEGGY JEAN CLARK v. U. S. DEPARTENT OF DEFENSE, Civil Action No. 17-cv-7757 C/W 18-2298 (REF: 18-2298)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully
prays that a writ of certiorari issue to review the judgment below.

INTRODUCTION

This Court held that the strong presumption in favor of judicial review is overcome if a congressional intent to preclude review is 1) explicitly shown by statutory language or 2) implied by the overall statutory scheme or legislative history. *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 673, 106 S. Ct. at 2137 (1986). Under 10 U.S.C. § 1084, the strong presumption in favor of judicial review of an administrative action is not precluded altogether, but rather, judicial review is limited to an assertion of fraud or gross negligence. *Phoenix W. Wheeler v. United States,* 27 Fed. Cl.756, 758 (1993). Retroactive revocation of Clark's pre-existing 20/20/20 unremarried former spouse benefits triggered procedural due process requirements. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

OPINIONS BELOW

The Opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix B to the petition and is reported at 2019 WL 917597, *Peggy Jean Clark v. Department of the Army, et al*, Civil Action No. 17-7757 c/w 18-2298, (U.S. Dis. Ct. E.D. Louisiana).

JURISDICTION

The date on which the United States Court of Appeals denied my case was August 19, 2019. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 18, 2019, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. amend. XIV, § 1.

10 U.S.C. § 1062. Certain former spouses

The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph F (i) of section 1072(2) of this title is entitled to commissary and exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services.

10 U.S.C. § 1072 Definitions

(2) The term "dependent", with respect to a member or a former member of a uniformed service means-

(F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years of service during which period the member or former performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, and (ii) does not have medical coverage under an employer-sponsored health plan;

10 U.S.C. § 1073 (a) (1) Responsible Officials

(1) Except as otherwise provided in this chapter, the Secretary of Defense shall administer this chapter for the armed forces under his jurisdiction, the Secretary of Homeland Security shall administer this chapter for the Coast Guard when the Coast Guard is not operating as a service in the Navy and the Secretary of Health and Human services shall administer this chapter for the National Oceanic and Atmospheric Administration and the Public Health Service. This chapter shall be administered consistent with the Assisted

Suicide Funding Restriction Act of 1997 (42 U.S.C. 14401 et. seq).

10 U.S.C. § 1084. Determinations of dependency

A determination of dependency by an administering Secretary under this chapter is conclusive. However, the administering Secretary may change a determination because of new evidence or for other good cause. The Secretary's determination may not be reviewed in any court or by the Comptroller General, unless there has been fraud or gross negligence.

§ 4403 (b) Retirement for 15 years to 20 years of Service

(1) During the active force drawdown period, the Secretary of the Army may--

(B) apply the provisions of section 3914 of such title to an enlisted member with at least 15 but less than 20 years of service by substituting 'at least 15' for 'at least 20'; and

10 U.S.C. § 3914 Applicability of section during period of active force drawdown.

For applicability of the provisions of this section during period of active force drawdown to individuals with least 15 but less than 20 years of service, see Act Oct. 23, 1992, P.L. 102-484, Div. D. Title XLIV, Subtitle A, §4403, 106 Stat. 2702, which appears as 10 USCS § 1293 note.

STATEMENT OF THE CASE

Upon divorce, Peggy Jean Clark, pro se, hereinafter Clark was awarded 20/20/20 unremarried former spouse benefits effective April 6, 2006 by the Secretary of Defense. For years during the periodic re-application / update the process was uneventful. However, on July 7, 2015 and anomaly occurred; Clark was not permitted to verify and sign a copy of the computer printout. Clark sought to remedy the problem by contacting the Army Human Resource Command. On April 17, 2017 Clark was informed by the Army Project Office ("APO") that she was not entitled to any benefits due to her former spouses' early retirement under TERA. Clark filed a complaint on August 11, 2017. On August 29, 2017 the APO retroactively revoked Clark's DoD Uniformed Services Identification and Privilege Card; DD Form 2765 back to December 9, 2015. What due process of law under the Administrative Procedure Act ('APA") has not been determined by the Fifth Circuit in this administrative action. Clark alleged procedural error in the appropriate application of the APA two step Chevron test, *Chevron USA v. Natural Resources Defense Council, Inc.,* at 843-43 (1984); and failure to test the APO's confession of error to determine if "true error" occurred; and judicial jurisdiction error for adjudicating an administrative action when the administering Secretary of Defense is not a party to the lawsuit. *Parlton v.*

United States, 64 APP D.C. 169, 75 F.2d (But our judicial obligation compel us to examine independently the errors confessed). Clark invoked 10 U.S.C. § 1084 to limit judicial review to the TERA issue(s).

A. Proceedings in District Court

On February 25, 2019 the Eastern District Court of Louisiana Ordered that Clark's Motion For Summary Judgment is Denied, and Defendants' Motion for Summary Judgment is Granted. The District Court stated "The regulations relevant here are 10 U.S.C. § 1072 (F), 32 C.F.R. 199.3, and DoDI 1000.13." Footnote 4; (Pet. app. 13a). Throughout the proceedings in Federal Court, Clark maintained that the issue before the court for which the Complaint was filed is the interpretation of § 4403 (b) of Pub. L. 102-484, Temporary Early Retirement Authority ("TERA"), 106 Stat. 2315. Clark maintained that the provisions of TERA under which her former spouse early retired as an enlisted member under § 4403 (b)(B) is pursuant to 10 U.S.C.§ 3914, 60 Stat. 996 (1946) and "For all intent and purposes the equivalent of a 20 year retirement". The District Court determined that 10 U.S.C. § 3914 pertain to a "certain officer". (Pet. app. 11a).

The District Court then expanded its adjudication of one administrative action to improperly include defining 10 U.S.C. § 1072 (F), 32 C.F.R. 199.3, DoDI 1000.13. and the 20/20/20 rule" (Pet. app. 13a-14a) of the

Uniformed Services Former Spouse Protection ("USFSPA"). The Secretary of Defense administers and adjudicates the USFSPA. Clark invoked 10 U.S.C. § 1084 and 32 C.F.R. part 367.5, but to no avail. The District Court reasoned Clark do not meet the definition of a 20/20/20 unremarried former spouse due to SSG Williams' early retirement under TERA, thus an error had occurred when at first Clark was determined to be a 20/20/20 unremarried former spouse. The District Court reasoned that the subsequent retroactive revocation of Clark's DoD ID card was not arbitrary, capricious or otherwise contrary to law and warrants deference. (Pet. app 14a).

B. Proceeding in the Court of Appeals

In the Court of Appeals for the Fifth Circuit, Clark challenged that 1) the District Court does not apply the text of 4403 (b) (B) of FY 1993 (P.L. 102-484 to an enlisted member, 2) District Court does not acknowledge Title 10 U.S.C. § 3914 as part of the Administrative Record. In her petition for a rehearing alleged 1) the exclusion of 10 U.S.C. § 3914 / § 4403 (b) of TERA, from the administrative record is simply because it was ignored, *James E. Antosh v. Federal Election Com'n* ("The commission simply ignored this evidence"); 2) the procedural defect in the application of the appropriate standard of review; *Chevron USA v. Natural Resources Defense Council, Inc.* 467 U.S. at 842-43, 837 (1984); and 3) the lack of examination to determine if

the Army Project Office ("APO"'s) – a federal auxiliary of the Defendants– confession of error is "true error" *Parlton v. United States,* 64 APP. D.C. 169, 75 F.2d 772 (But our judicial obligation compel us to examine independently the errors confessed). (Pet. Rehear. 9-13).

According to the Fifth Circuit Court of Appeals, "On March 31, 1994 Williams retired from the Army under a voluntary early retirement program ("TERA") which allowed servicemembers to retire up to five years before the completion of a 20-year period of service." Footnote 3: Pub. L. No. 102-484, § 4403, 106 Stat, 2315 (1993).

The Fifth Circuit does not state however, that TERA offered several retirement programs, for example under §4403(b) pursuant to 10 U.S.C. §3914 early retirement provided immediate, lifelong benefits to the retiree in contrast with § 4403 (g)-(h) pursuant to 10 U.S.C. §§ 1174, 1174(a) and 1175 early retirement under TERA with different, lesser benefits. The Appeals Court's imprecise characterization of SSG Williams' military-retired status gives no information or insight that early retirement under § 4403 (b) pursuant to 10 U.S.C. §3914 for all intent and purposes is equivalent to the 20 year retirement— but with one exception, the formula used for calculating the amount of retired pay to be received. Clark's former spouse's DD Form 214—block 18— states upon request at age 62 should the retiree work the

remainder time to complete 20 years — in SSG Williams' case 3 years, 5 months and 28 days—in a civilian capacity at certain public service jobs a recalculation would be granted; 106 Stat. 2702 / § 4464 of the same law.

The Fifth Circuit opined, at (Pet. app. 2a-3a)

> On appeal, Clark's main contention is that the district court failed to apply the text of TERA—which directs that the Secretary of the Army may substitute "at least 15" for "at least 20" in certain enumerated statutes. As the district court correctly held, Clark offers no support for the extension of that directive—beyond the enumerated instances in TERA—to the statute establishing the 20/20/20 rule. Accordingly, we affirm for essentially the reasons given by the district court.

This is where the judicial review line gets crossed; the leap from a legal issue; Clark's former spouse's military-retired status under TERA—administered by the Secretary of the Army; to a wholly separate administrative action involving the Uniformed Services Former Spouse Protection Act ("USFSPA") — administered by the Secretary of Defense.

Pursuant to 10 U.S.C. § 1084: chapter 55, once the administering Secretary of Defense makes a dependency determination as to health care benefit eligibility the determination is "*conclusive*". Judicial review is limited to two allegations 1) fraud and 2) gross negligence. A confession of error is insufficient for termination of DoD Uniformed Services Identification and

Privilege Card—benefits are accessed via this card—much less retroactive revocation.

The United States Court of Appeals, Federal Circuit held that "absent an assertion of fraud or gross negligence, the court was statutorily precluded from reviewing the determination of the Secretary of Defense of an applicant's dependency status with respect to eligibility for benefits under the Civilian Health And Medical Program of the Uniformed Services ("CHAMPUS")". *Phoenix W. Wheeler v. United States,* 27 Fed. Cl.756, 758 (1993); Also *Wheeler v. United States,* 11 F.3d 156 (1993). Because there is no assertion of fraud or gross negligence by either party; the 20/20/20 rule under the USFSPA is not properly before the Circuit Court nor is the administering Secretary of Defense a party to this lawsuit.

REASON FOR GRANTING THE WRIT

I. **The strong presumption in favor of judicial review of administrative action is overcome if a congressional intent to preclude review is: (1) explicitly shown by statutory language or (2) implied by the overall statutory scheme or legislative history however, the Fifth Circuit Court of Appeals' judgment affirming the retroactive revocation of Clark's "Property Interest" on the premise that the initial favorable determination was done in**

error, conflicts with this Court's decision in light of Title 10 U.S.C. §1084. *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 673, 106 S. Ct. at 2137 (1986).

A. The Fifth Circuit Court improperly prefaced Title 10 U.S.C. §1062 with "The statutory scheme governing the provision of benefits to current and former servicemembers and their dependents provides that certain unremarried former spouses shall receive benefits" and the Fifth Circuit's omission from the statute "The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph F(i) of section 1072(2) of this title is entitled to commissary and exchange privileges" Laid the foundation for the Fifth Circuit to find that Clark offers no support for the extension of that directive—beyond the enumerated instances in TERA— to the statute establishing the 20/20/20 rule.

The 20/20/20 rule is included in the USFSPA administered by the Secretary of Defense. Because Title 10 U.S.C. § 1062 pertains, exclusively, to the 20/20/20 unremarried former spouse and the surviving widow of the deceased active duty military-retired member with respect to commissary

and exchange privileges, it is erroneous to preface the statute with the categories of current and former servicemembers and their dependents. "Courts may not engraft upon a statute language which has been clearly excluded therefrom by the legislature." *Giurichich v. Emtrol Corp.,* 449 A.2d 232, 34 A.L.R. 4 th 1 (Del.1982).

The statutory scheme the Fifth Circuit construes is ambiguous. The use of the phrase "former servicemembers" to preface the statutory scheme presents a mischaracterization of Clark's former spouses' military-retired status. The administrative record includes a copy of SSG Williams, Retired DD Form 214 / Certificate Of Release Or Discharge From Active Duty at block 2. Department, Component and Branch has the designation ARMY/RA. RA means Regular Army as oppose to — non-Regular Army or Irregular Army. See. Army Regulation (AR 635-5, 15 September 2000).

> Purpose of definition section in statute or regulation is to give terms there defined precise meaning intended by draftsmen whenever one of those terms is used in statutes rather than what might otherwise appear to be their meaning in common usage or in other contexts and thereby to exclude doubts and disputes based on reference to such extrinsic usage. *Chapman Bros. Stationery & Office Equipment Co. v. Miles-Hiatt Investments, Inc.,* 282 Or. 643, 580 P.2d 540, 95 A.L.R. 3d 1198 (1978).

The administrative record includes a copy of Department of Defense Instruction ("DODI') 1003.13, December 5, 1997; the definition of Former Member is as follow:

> E2.1.8 Former Member. For the purpose of this Instruction, a former member refers to an individual who is in receipt of retired pay for non-Regular service under Chapters 1223 of 10 U.S.C. (reference (dd), but who has been discharged from the Service and who maintains no military affiliation. These former members and their eligible dependents are only entitled to medical care. They are not entitled to commissary, exchange, or morale, welfare, and recreation privileges. These former members and their eligible dependents will be issued the DD Form 1173.

Reference (dd) is "Chapter 1223 of title 10, United States Code, 'Retired Pay for Non-Regular Service'". Clark's DoD Uniformed Services Identification and Privilege Card that the Fifth Circuit's judgment affirmed retroactive revocation of was DD Form 2765. Title 10 U.S.C. § 1074 pertains to medical and dental care for members and certain former members. Title 10 U.S.C. § 1076 pertains to medical and dental care for dependents: general rule and 10 U.S.C. § 1079. Non-Regular Service retirees and their dependents may be granted commissary and exchange and other privileges on a discretionary basis but the privileges are not an entitlement for them as it is for the 20/20/20 unremarried former spouse and the surviving widow of a deceased active duty retired member. See, 10 U.S.C. § 1062.

The Fifth Circuit's substitution of the word "current" in place of "member" is strange because the referenced sponsor in 10 U.S.C. § 1062 is deceased and therefore not current. Also, the word "current" is not included in the language of 10 U.S.C. §§ 1074, 1076, 1079 or in 32 CFR Part 199 – Civilian and Health and Medical Program of the Uniformed Services (CHAMPUS); § 199.2.

B. By removing the administering Secretary of Defense from the language of the statute, 10 U.S.C. § 1062, the Fifth Circuit improperly conceals the identity of the responsible official and make possible the erroneous idea that the Secretary of the Army has administering authority over 10 U.S.C. § 1062.

Title 10 U.S.C. § 1073 (a) (1) and 32 C.F.R part 367.5 identifies the Secretary of Defense as the responsible official with jurisdiction to administer benefits determination for the armed forces; Army, Navy and Air Force. Removing the Secretary of Defense from the language of 10 U.S.C. § 1062 instill the erroneous idea that the cause of action before the court— the APO's denial of Clark's re-application / update for a new DoD Uniformed Services Identification and Privilege Card on the basis that her former spouse early retired under TERA; plus the subsequent retroactive revocation of Clark's

20/20/20 unremarried former spouse benefits under the USFSPA is the same cause of action.

The Departmental Appeals Board, Appellate Division made a distinction between a denial of an application for enrollment / revalidation in the Medicare program retroactively pursuant to a specific regulation from revocation of enrollment and billing privileges in the Medicare program pursuant to a different regulation. *Precision Prosthetic, Inc.,* DAB CR 3187 (2014)(ALJ Decision); held "On remand, CMS must also consider whether, given the law stated above, it meant to retroactively deny Petitioner's application revalidation in 2006 rather than revoke billing privileges." *See Arizona Boutique, LLC.* DBA CR2674, at 7 (2012), Remand Order at 3.

The one cause of action properly before the court is the denial of Clark's re-application / update for a new DoD Uniformed Services Identification and Privilege Card on the basis that her former spouse early retired under TERA. The subsequent retroactive revocation of Clark's 20/20/20 unremarried former spouse benefits is a wholly separate administrative action that would involve different defendants were it the case that CHAMPUS had given Clark written notice of ineligibility.

So far as the characterization of SSG Williams, Retired, military-retired status is concerned absent certification from the Department of

Defense to the contrary, SSG Williams' military-retired status is that of an active duty retired member of the armed forces as evidenced by DD Form 214 / Certificate Of Release Or Discharge From Active Duty. Block 23. Type of separation is / RETIREMENT. Block 24. Character of Service / HONORABLE. See Army Regulation (AR 635-5, 15 September 2000).

Other evidence of SSG Williams' military-retired status as an active duty military-retired member is the recent COLA increase effective with check dated December 31, 2019 — reflected in my income increase on the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*. As an active duty military-retired member SSG Williams is entitled to Cost of Living Allowance ("COLA") increases and I am entitled to fifty percent of the increase.

C. In light of Title 10 U.S.C. § 1084 dependency determination, the Fifth Circuit's judgment affirming the retroactive revocation of Clark's pre-existing 20/20/20 unremarried former spouse benefits conflicts with the United States Court of Appeals, Federal Circuit decision in *Phoenix W. Wheeler v. United States*, 27 Fed. Cl. 756, 758 (1993). Also filed as Phoenix W. Wheeler v. United States, 11 F.3d 156 (1993).

> Ms. Wheeler is the unremarried former spouse of Charles E. Whitsett, a retired member of the United States Air Force. During their marriage,

> which lasted from 1958 – 1983, Mr. Whitsett served 19 of his 20 years of service in the military, thus satisfying the durational requirements for dependency set forth at 10 U.S.C. § 1072 (2) (G) (i) (Supp. I 1992). When Ms. Wheeler and Mr. Whitsett were divorced in 1983, she purchased a limited health care policy that Mr. Whitsett's insurance company, Government Employees Hospital association, Inc. (GEHA), offered as a conversion plan to avoid the customary requirements of listing pre-existing conditions and providing evidence of her health status on the application. Ms. Wheeler received CHAMPUS health care on several occasions between 1985 and 1987. On January 20, 1988, however, CHAMPUS informed Ms. Wheeler that her GEHA medical coverage rendered her ineligible for CHAMPUS benefits because her GEHA policy was an "employer-sponsored health plan" within the meaning of 10 U.S.C. § 1072 (2)(G)(ii). Ms. Wheeler thus cancelled her GEHA policy on December 31, 1988. Consequently on January 1, 1989, Ms. Wheeler became eligible for, and continues to receive CHAMPUS health benefits. The Government, however, sought to recover $2000 in medical payments made by CHAMPUS on behalf of Ms. Wheeler between 1985 and 1989.
>
> At 158, In May 1991, Ms. Wheeler filed a class action suit in the United States District for the District of Arizona, *Wheeler v. Cheney*, No. CIV 91-244 TUC JRM (D.Ariz. filed May 3, 1991), seeking, *inter alia*, the recovery of more than $10,000 that she personally paid for medical treatment when she was denied CHAMPUS benefits. *Id.*

Ms. Wheeler's notice of eligibility denial for CHAMPUS benefits came from CHAMPUS and she named the Secretary of Defense as a party.

CHAMPUS informed Ms. Wheeler of the reason for her ineligibility — she was covered by an "employer-sponsored health plan".

> Ms. Wheeler alleged that the Secretary of Defense (1) violated the intent of Congress, exceeded statutory authority, and acted in an arbitrary and capricious manner in construing 10 U.S.C. § 1072(2)(G)(ii) to preclude Ms. Wheeler from eligibility for CHAMPUS benefits because of her coverage under the GEHA plan, and (2) violated Ms. Wheeler's procedural rights under the Due Process Clause of the Fifth Amendment by acting pursuant to 32 C.F.R. § 199.10 (a)(6(iv)(A)(1993), which precludes judicial review of the Secretary's CHAMPUS eligibility determinations. At. 158.

The Government responded by filing a motion to dismiss Ms. Wheeler's complaint for failure to state a claim upon which relief can be granted. The Court of Federal Claims granted the Government's motion and dismissed Ms. Wheeler's complaint. *Id.* The United States Court of Appeals, Federal Circuit reviews judgments of the Court of Federal Claims to determine whether they are premised on clearly erroneous factual determination or otherwise incorrect as a matter of law. *Transamerica Ins. Corp. v. United States,* 973 F.2d. 1572, 1576 (Fed. Cir.1992). The United States Court of Appeals, Federal circuit reviews *de novo* whether the Court of Federal Claims possessed jurisdiction and whether the Court of Federal Claims properly dismissed for failure to state a claim upon which relief can be granted, as

both are questions of law. *Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992).

This petition for a writ of certiorari to the Supreme Court of the United States is most closely fashioned after *Bowen v. Michigan Academy of Family Physicians,* United States S. Ct. 476 U.S. 667 (1986) where the issue is "May the strong presumption in favor of judicial review of administrative action be overcome if a congressional intent to preclude review is (1) explicitly shown by statutory language or (2) implied by the over all statutory scheme or legislative history?" The Supreme Court of the United States held, "Yes." Invoking and relying on the expressed language of 10 U.S.C § 1084 Clark has, in her appeal, asserted that all information she has provided is "true" and there can be no genuine allegation of fraud on Clark's part. Neither has the APO asserted fraud on Clark's part or gross negligence on its part.

In the case of *Phoenix W. Wheeler v. United States,* The court held that absent an allegation of fraud or gross negligence the dependency determination of the Secretary of Defense is *conclusive,* at 159. The United States Court of Appeals, Federal Circuit opined, "Congress placed the administration of CHAMPUS for the armed forces under the Secretary of Defense 10 U.S.C. § 1073 (1988)." Title 10 U.S.C. § 1084 (1988), which states:

> A determination of dependency by an administering Secretary under this chapter *159 is conclusive. However, the administering Secretary may change a determination because of new evidence or for other good cause. *The Secretary's determination may not be reviewed in any court or by the General Accounting Office, unless there has been fraud or gross negligence.* (emphasis added). *Id.*

Similarly, with respect to the above statute, because there is no assertion of fraud from either party or an assertion of gross negligence, the Fifth Circuit err in its judgment affirming retroactive revocation of the dependency determination made by the administering Secretary of Defense on the premise that the initial favorable determination was done in error.

> The unambiguous language of section 1084 provides that the determination of dependency status, which requires resort to definitions under section 1072 in its entirety, be withdrawn from judicial scrutiny, absent an assertion of fraud or gross negligence. Section 1084 does not distinguish between factual questions, such as the finding of dependency, and legal questions, such as the interpretation of a statutory term. *Id.*
>
> Section 1084, however does not preclude judicial review of dependency determination altogether. A plain reading of the statute shows that Congress clearly intended simply to limit review by the courts to cases involving fraud or gross negligence. See Bowen, 476, U.S. at 673, 106 S. Ct. at 2137 (stating that specific statutory language that reliably indicates congressional intent overcomes the presumption in favor of judicial review). At 159.

> 10 U.S.C. § 1084 (1988). The unambiguous language of the statute indicates that Congress did not intend for courts to second-guess dependency determinations absent fraud or gross negligence. See. *United States v. Johnson*, 166 F. Supp 640, 643 (M.D.N.C. 1958). Plaintiff did not allege fraud or gross negligence. Cited from *Wheeler v. U. S.* 27 Fed. Ct. 758, Westlaw.

D. **The Question Presented is Important.**

Much of the research I have done in preparing the complaint and this petition produced very little concerning 20/20/20 unremarried former spouses that are similarly situated as I; those whose former spouse early retired under TERA in the 1990's. From 1993 through 1999; just after the conclusion of the Cold War there were excess soldiers in the armed forces in certain fields. Reducing the number of soldiers in overcrowded fields became priority and the sudden shift in objective caught many soldiers and their families by surprise. The anticipation of a 20 year enlistment in the armed forces was no longer possible for a large number of Army soldiers. To ease and assist soldiers and their family; bonuses, separation packages, retirement benefits, and other privileges were obtainable to those meeting the varying eligibility criteria.

Spouses of active duty soldiers that early retired under TERA of the 1990s, who later became former spouses; such as I, for the most part had a

hard time learning and coming to understood how Congress had made provision for them also. Congress made provisions for the former spouse of the early retiree to receive health care benefits, commissary and exchange privileges and other privileges by making an exception to the USFSPA for the years 1993 through 1999. The exception is found in footnotes of Appendixes in a publication of the Administrative and Civil Law Dep't, The Judge Advocate General's Legal Center and School, U.S. Army JA 274, Uniformed Services Former Spouses' Protection Act Guide, (November 2005) [hereinafter JA 274].

The first footnote references a chart. Footnote 1 reads: "Pub. L. 97-252, Title x, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, P.L 103-160 (1993)."

The chart found at Appendix E-1 places footnote at the captions that represent an exception to the general rule for the varying categories of former spouses.

The third footnote 3 reads:

> Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the

> Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999)].

The intent of Congress has; since the enactment of the USFSPA, (1982) amended; been for the 20/20/20 unremarried former spouse to have equal access to health care benefits, commissary, exchange and other privileges on the same equal basis as the military retiree. A grant for writ of certiorari do aid other similarly situated 20/20/20 unremarried former spouses traverse the military divorce puzzle.

It does not help that the Fifth Circuit has presented a statutory scheme that effectively over rules *Bowen v. Michigan Academy of Family Physicians* and its holding that the presumption of judicial review may be overcome if a congressional intent to preclude review is (1) explicitly shown by statutory language or (2) implied by the overall statutory scheme or legislative history. The Fifth Circuit combined issues involving TERA – administered by the Secretary of the Army; and a wholly separate administrative action involving USFSPA– administered by the Secretary of Defense into one administrative action. The Secretary of Defense is not a party to the suit Clark filed because the basis for the complaint is an issue

involving TERA— the initial issue being the APO's after-the-fact / second guess characterization of Clark's former spouse's military-retire status under TERA. For years there was no issue concerning Clark's former spouse's military-retired status.

The Fifth Circuit's judgment acknowledges SSG Williams' early retirement under TERA, but based on the statutory scheme the Fifth Circuit has construed, and the imprecise characterization ascribed to SSG Williams' military-retired status the Fifth Circuit has erred. The Fifth Circuit's judgment affirms the District Court's judgment that Clark's former spouse's retirement was not pursuant to 10 U.S.C. § 3914. The suggestion is he must have retired pursuant to 10 U.S.C. §§ 1174, 1174a, or 1175, but not pursuant to 10 U.S.C. § 3914. The Fifth Circuit then goes on to interpret 10 U.S.C. § 1072 (2) to support its judgment; which of course cannot be done properly without first certifying the precise characterization of the retiree's military-retired status. Dependent benefits and privileges flow from their relationship with the retiree. In the case of a non-Regular Service former member's retirement from the armed services, they are entitled to medical and dental benefits only, commissary and exchange privileges are not entitlements. See. E2.1.8 Definition of Former Member; DoDI 1000.13, December 5, 1997.

The Fifth Circuit's judgment has been and continues to be hurtful to Clark. Clark is under increased economic distress due to the loss of valuable health care benefit through CHAMPUS / TRICARE. The loss of Clark's commissary and exchange privileges has resulted in higher cost for food and grocery items that could be purchased at lower cost with a surcharge but no tax at the commissary and exchange. Clark's quality of life has been reduced due to loss of moral, welfare and recreation privileges.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted.

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