No. __-____

In the Supreme Court of the United States

DAX CARPENTER,

Petitioner,

v.

JULIE ELIZABETH CARPENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Congress's enumerated military powers preempt all state law concerning disposition of military benefits. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017). Where Congress has not affirmatively granted the state authority to treat veterans' benefits received by a non-retired, disabled service member as "income" for purposes of support obligations to dependents, and, in fact, excludes such benefits from being considered as income and affirmatively protects these benefits from "all legal and equitable process whatever" whether "before or after receipt" by the veteran, is *Rose v. Rose*, 481 U.S. 619 (1987), which ruled that the state could count such benefits as an available asset for purposes of calculating a disabled veteran's support obligations in state court divorce proceedings, a legitimate basis for the State of Michigan to usurp the Supremacy Clause and, in direct conflict with positive federal law, order Petitioner, a non-retired, disabled veteran to include these monies as "income" available for purposes of calculating his child support obligations?

2. Where, after *Rose*, *supra*, Congress gave the Secretary of Veterans Affairs exclusive jurisdiction to "decide *all questions of law and fact* necessary to a decision" affecting "the provision of benefits…to veterans *or the dependents* or survivors of veterans," see 38 U.S.C. § 511 (emphasis added); and, "as to any such question" made such decisions "final and conclusive" and unreviewable "by any other official *or by any court*," *id.* (emphasis added); and created an Article I Court in the Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, for

exclusive appellate review of such decisions, does a state court have jurisdiction or authority to directly or indirectly order a disposition of these benefits in a manner contrary to the initial benefit determination?

PARTIES TO THE PROCEEDING

Petitioner, Dax Carpenter, was the Plaintiff-Appellant below. Respondent, Julie Elizabeth Carpenter, was the Defendant-Appellee.

There are no other parties involved in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dax Carpenter, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Michigan.

OPINIONS BELOW

The January 30, 2020 opinion of the Michigan Court of Appeals is attached as App. 1a – 8a, Case Number 344512, 2020 Mich. App. LEXIS 780.[1]

The Supreme Court of Michigan denied an Application for Leave to Appeal on September 8, 2020, Case Number 161111, 947 N.W.2d 794 (2020), attached as App. 9a.

On November 24, 2020, the Michigan Supreme Court denied Petitioner's Motion for Reconsideration. (App. 10a).

The Eaton County Circuit Court (Family Division) issued substantive orders on February 28, 2018, App. 11a – 12a, and September 20, 2017, App. 13a – 21a.

The aforementioned are the substantive rulings Petitioner seeks to appeal.

JURISDICTION

The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257. The Michigan Supreme

[1] The appendix is presented as a single document numbered in seriatum, 1a, etc.

Court's order denying Petitioner's application for leave to appeal issued on January 30, 2020. (App. 9a). Petitioner's motion for reconsideration was denied by the Michigan Supreme Court on November 24, 2020 (App. 9a).

On March 19, 2020 this Court issued a Miscellaneous Order automatically increasing the time to file Petitions for Certiorari from 90 days to 150 days from the date of the lower court judgment or order denying rehearing or reconsideration.

This Petition for Certiorari is being filed within the above-mentioned suspense date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, § 8, clauses 11 to 14

The Congress shall have power…

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

U.S. Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

38 U.S.C. § 5301

(a)(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary….

38 U.S.C. § 511

(a) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b) [not relevant here], the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

42 U.S.C. § 659

(a) Consent to support enforcement. Notwithstanding any other provision of law (including…section 5301 of

title 38, United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law…and regulations of the Secretary under such subsections, and to any other legal process brought by a State agency administering a program under a State plan approved under this part…to enforce the legal obligation of the individual to provide child support or alimony.

***

(h) Moneys subject to process.

(1) In general. Subject to paragraph (2), moneys payable to an individual which are considered to be based upon remuneration for employment, for purposes of this section –

(A) consist of…

(ii) periodic benefits…or other payments…

(V) by the Secretary of Veterans Affairs as compensation for a service connected disability paid…to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation….

(B) do not include any payment…

(iii) of periodic benefits under title 38, United States Code, except as provided in subparagraph (A)(ii)(V)

STATEMENT OF THE CASE

1. Introduction

In 1987, this Court held that state courts could consider veterans disability benefits as "income" for purposes of calculating child support obligations and could force the veteran to use his disability benefits to satisfy such obligations. *Rose v. Rose*, 481 U.S. 619 (1987). That decision was contrary to the Supremacy Clause and in conflict with express federal law.

Congress's authority over military benefits originates from its enumerated "military powers" under Article I, § 8, clauses 11 through 14 of the Constitution. Congress has *never* ceded jurisdiction to the states in matters governing the compensation and benefits provided to veterans. In fact, Congress affirmatively prohibits the state from counting these benefits as property or income and protects them against "any legal or equitable process whatever." 10 U.S.C. § 1408(a)(4); 42 U.S.C. § 659(h)(1)(B)(iii); 5 C.F.R.§ 581.103(c)(7); 38 U.S.C. § 5301(a)(1).

Even where Congress *has authorized* the states to count these benefits in state court proceedings, the grant is precise and limited. *Howell*, 137 S. Ct. at 1404; *Mansell v. Mansell*, 490 U.S. 581, 588 (1989) (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 disposable retired pay as divisible property); 42 U.S.C. § 659(h)(1)(A)(ii)(V) (state may consider partial *retirement* disability as "remuneration for employment", i.e., income, 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). In fact, for the benefits at issue in this case, Congress affirmatively protects them from all state court jurisdiction and control. 38 U.S.C. § 5301 (prohibiting states from exercising "*any legal or equitable process whatever*" with respect to these benefits).

Petitioner is one-hundred percent service-connected disabled. He is not a retiree. Therefore, he does not receive disposable retired pay or disability retirement pay. Rather, he receives VA disability compensation for his service-connected injuries. Such benefits are explicitly excluded as remuneration for employment, i.e., "income", for purposes of calculating his child support obligations in state court. 42 U.S.C. § 659(h)(1)(B)(iii).

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 (1878) (canvassing legislation applicable to military benefits); *Ridgway v. Ridgway*, 454 U.S. 46, 61 (1981). This Court construes this provision liberally in favor of the veteran and regards these funds as "inviolate" and inaccessible to all state court process. *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162 (1962).

The Court recently reconfirmed that federal law preempts all state law concerning the disposition of VA benefits in state domestic relations proceedings.

Howell v. Howell, 137 S. Ct. 1400, 1404, 1406 (2017). 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. The Court concluded that this prohibition applied to all disability pay because Congress's preemption had never been expressly lifted. *Id*. at 1406, citing *McCarty v. McCarty*, 453 U.S. 210, 232-235 (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.

While the Court in *Howell* cited *Rose*, *supra*, it merely confirmed what federal law allows, i.e., "some military *retirement pay* might be waived" and partial disability paid in lieu may be used to calculate spousal support. *Id*. at 1406. This is consistent with 42 U.S.C. § 659(h)(1)(A)(ii)(V), which recognizes the availability of a limited portion of waived disposable *disability retired pay* consistent with 10 U.S.C. § 1408(e)(4). But, federal law *excludes* veteran's disability pay from this definition. 42 U.S.C. § 659(h)(1)(B)(iii). Such benefits are those which Congress appropriated for disabled veterans under its enumerated powers without any grant of authority to the states to consider them as an available asset in state court proceedings. The state does not have *any* 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 (1988).

Although the Court in the latter case distinguished *Rose*, Congress quickly acted to remove any speculation that authority had been ceded to state courts over these veteran's benefits. *Rose*, 481 U.S. at 630 (citing congressional testimony that veterans' disability benefits are "intended to 'provide reasonable and adequate compensation for disabled veterans and *their families*.'") (emphasis in original). In direct response to the Court's conclusions in *Rose* that states have concurrent authority over these disability benefits despite the lack of an express grant and despite Congress's affirmative protection in 38 U.S.C. § 5301, see 481 U.S. at 629, Congress amended 38 U.S.C. § 211 and enacted the Veterans Judicial Review Act (VJRA) leaving no doubt that primary and exclusive jurisdiction lies with the Secretary of Veterans Affairs who "*shall decide all questions of law and fact* necessary to a decision…that affects the provision of benefits by the Secretary to veterans *or the dependents* or survivors of veterans." (emphasis added). Whereas § 211 only provided "decisions of the Administrator on any question of law or fact" would be "final and conclusive", § 511 now provides that it is the Secretary that shall first decide any such question. Second, Congress removed the limitation alluded to in *Rose*, that only federal, and not state courts, were

excluded from concurrently reviewing veterans' benefits decisions by replacing the phrase "any court of the United States" with the broader reference to "any court". 38 U.S.C. § 511(a) (second sentence). See also *Henderson v. Shinseki*, 562 U.S. 428, 440-441 (2011) (discussing the VJRA's comprehensive scheme for benefits determinations for *both* veterans and dependents, Congress's longstanding solicitude for veterans, and the Court's established "canon" of liberally construing legislation protective of veterans' rights). Congress went a step further and created an Article I Court (the United States Court of Appeals for Veterans Claims) to exclusively review all benefits decisions. 38 U.S.C. §§ 7251, and 7261, respectively.

These post-*Rose* analyses, along with the plenary statutory and regulatory program already in place concerning veterans' compensation and benefits, leaves no doubt that veterans' benefits decisions are primarily and exclusively within the jurisdiction of the Department of Veterans Affairs. *Any* decision by a state court that forces a disabled veteran to pay these funds over to another is unquestionably a "decision…that affects the provision of benefits…to veterans" even before a statutory "apportionment" is made at the request of the dependent or the guardian. 38 U.S.C. § 511; 38 U.S.C. § 5307.

Thus, Congress directly responded to this Court's approval in *Rose* of the state's implied "concurrent" jurisdiction and authority to control disposition of these benefits without any federal statutory authority to do so. The states have ignored these developments in the law and have instead relied on *Rose* despite the explicit statutory changes that exclude most veterans'

benefits from consideration and affirmatively protect them from all legal and equitable process *whatever*. 42 U.S.C. § 659(h)(1)(B)(iii) (veterans' disability benefits are not considered remuneration for employment and therefore are not available to be garnished (while in the hands of the government) for satisfaction of state child support obligations); 38 U.S.C. § 5301(a)(1) (veterans' disability benefits are not subject to "any legal or equitable process *whatever*, either *before* or *after* receipt" by the beneficiary, that is, either while still in the hands of the government or in the hands of the veteran beneficiary) (emphasis added).

Finally, despite the Court's analysis of legislative history in *Rose* to conclude that veterans had an obligation to support their dependents and its extrapolation of that history to mean that 100 percent of a veteran's disability benefits may be considered by a state court considering the veteran's support obligations to his or her dependents, federal law already provides the exclusive means by which dependents may seek a portion of these disability benefits for support where they demonstrate a need through the process of apportionment. 38 U.S.C. § 5307; 38 C.F.R. § 3.450 – 3.458 (regulations governing apportionment). Jurisdiction to do this also lies primarily and exclusively with the Secretary of Veterans Affairs, and all decisions on any benefit determination (whether an initial determination or on a request for apportionment) is final and conclusive as to *all other courts*. 38 U.S.C. § 511(a). Review can only be sought in the Article I court established by Congress after *Rose*. See 38 U.S.C. §§ 511(a), 7251, 7261.

Petitioner is among the large number of permanently disabled veterans who never attained sufficient time in service to retire and who is receiving only service-connected veteran's disability pay. Congress has never authorized states to count these monies as income for the benefit of others. However, this is what states do on a routine basis. It is time for this Court to reconsider *Rose*.

In *Howell*, this Court addressed the state's attempt to encroach on military benefits for a third time in as many decades. *McCarty v. McCarty*, 453 U.S. 210 (1981) and *Mansell v. Mansell*, 490 U.S. 581, 588-592 (1989) clearly expressed the absolute federal preemption of state law in this area. The travesty lies in the fact that disabled veterans, who have limited resources and capacity, must consistently seek recourse in *this* Court because 50 different states have seemingly devised as many ways of defining out or getting around the limitations imposed upon them by the Supremacy Clause.

However, as this Court stated long ago, the Constitution "presumed (whether rightly or wrongly [this Court] does not inquire) that *state attachments*, *state prejudices*, *state jealousies*, and *state interests*, might sometimes obstruct, or control…the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816) (emphasis added). Of these wayward tergiversations, Justice Story spoke of the "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347-48.

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

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

finished the point by citing to the last sentence of the Supremacy Clause:

> The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding." *Id.*

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

For decades, disabled veterans have suffered immeasurably under this Court's *wholly judicial* (and immediately abrogated) creation in *Rose* of an exception to the explicit protections afforded them by Congress's exercise of its enumerated powers. Self-interested lawyers and state machinations have collaborated to raise a clamor to prevent the self-evident and explicit preemptive law from taking effect. But the swell of defiance does not make these parties any more correct, nor can it insulate state courts from those who seek to regain and restore to themselves their constitutional entitlements. The

passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed. This Court has recently expressed this sentiment in overturning more than a century of reliance on erroneous legal principles. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). There, Justice Gorsuch, writing for the majority stated:

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

The federal statutes and regulations passed pursuant to Congress's enumerated military powers contain no allowance to the states to sequester the veterans' disability benefits at issue in this case and force them to be paid over to any other individual, including children, for state-imposed support obligations. Rather, these benefits are (and always have been) explicitly excluded from state jurisdiction and control, *before*, 42 U.S.C. § 659(h)(1)(B)(iii), and *after*, 38 U.S.C. § 5301(a)(1), their receipt.

Logically, the only allowance for support of dependents lies within the primary and exclusive jurisdiction of the Secretary of Veterans Affairs to whom Congress has given primary authority and exclusive jurisdiction to make all decisions affecting benefits for veterans and their dependents. 38 U.S.C. § 511(a). Congress also provided for an "apportionment" of disability benefits for the

dependents of veterans *if* the Secretary determines that the veteran will not suffer undue hardship and the dependent is in need of a portion of these otherwise restricted benefits. 38 U.S.C. § 5307.

2. Factual Background

Petitioner is a combat veteran of the Iraq war. (App. 22a). He was honorably discharged as a private first class after three years of service. (App. 22a-23a). He was discharged because he was injured and disabled as a result of his military service. (App. 23a). He is a totally and permanently disabled veteran. *Id*.

Petitioner was not able to retire, nor will he ever be able to claim retirement pay from the military because he did not attain the qualifying years in service. *Id*. Appellant therefore does not receive monies as remuneration for any employment he held with the United States military; he receives no "disposable retired pay" under the Uniformed Servicemembers Former Spouses Protection Act (USFSPA), 10 USC 1408. *Id*. He receives no "remuneration for employment" within the meaning of the Child Support Enforcement Act, 42 U.S.C. § 659(h)(1)(A)(ii)(V).

3. Procedural History

Petitioner initially challenged the use of his veterans' disability benefits in the calculation of his child support obligation to his former spouse in response to a motion filed by Respondent to increase support payments. Both parties filed briefs to present this issue to the Circuit Court.

Petitioner explained that 42 USC 659(a); (h)(1)(A)(ii)(V) and (h)(1)(B)(iii) statutorily codified the classification of Petitioner's specific type of disability benefits as being off limits to state court orders for child support. (App. 22a-23a). Petitioner explained he was not eligible for retirement pay and thus he never waived such pay to receive his service-connected disability benefits. *Id*. He further argued that his disability benefits were not based on earnings and could not be considered income. *Id*. Petitioner also argued that 38 USC 5301 protected the specific disability benefits he receives. *Id*. at 24a – 25a).

Finally, Petitioner argued that Congress responded to *Rose* by passing the VJRA, Pub. L. 100-527, which granted the VA exclusive (rather than concurrent) jurisdiction over all claims for benefits by veterans and their dependents. (App. 25a-26a). Petitioner pointed out that 38 U.S.C. § 211 (now § 511) was also amended to exclude state courts from considering claims for benefits by dependents. *Id*.

On September 20, 2017, the Friend of the Court issued a "proposed" order, which included in pertinent part the following:

> 1. The Veterans disability benefits were includable in Petitioner's income for purposes of calculating his child support obligation….;
>
> 2. Petitioner's child support obligation was to be based on the Veterans disability income…. (App. 37a-38a).

The Eaton County Circuit Court conducted a hearing on February 28, 2018. (App 40a-61a). The court addressed Petitioner's substantive arguments concerning federal preemption and the extent to which *Howell v. Howell*, 137 S. Ct. 1400 (2017), prohibited the state from counting his disability pay to calculate child support. The Circuit Court ordered an increase in Petitioner's child support to reflect his disability pay. The Court concluded:

> [V]eterans' administration benefits are income…. Income is income, and all income has to be included….
>
> And if this *Howell* case actually overrules *Row[sic]* and…if Congress has indicated that this income does not have to be calculated for child support, then…the Court of Appeals can reverse me, and then all the judges in Michigan can know that there's a new case in the land. (App. 55a – 56a).

Petitioner appealed arguing that federal law preempts state law concerning the disposition of his federal benefits based on classification of his status as a non-retiree recipient of veterans' disability pay. If federal law preempted state law, Petitioner argued, Michigan courts lacked jurisdiction and authority to issue an order contrary to that law. Therefore, as a threshold matter, Petitioner argued that the Court of Appeals had to consider whether the lower court even had authority to issue an order that contravened federal law. If it did not, Petitioner contended, the

trial court could never have considered his disability pay in calculating his support obligation (past, present, or future).

The Court of Appeals affirmed. (App. 1a-8a). It reasoned that *Rose* still applied and VA disability pay could be included as income. The court reasoned that 42 U.S.C. § 659(h)(1)(B)(iii) did not preclude the state from counting a veteran's disability pay as income. (App 4a-6a). The court concluded that this provision applied to a state's right to garnish a veteran's disability pay, and the fact that the state is prohibited from garnishing veteran's benefits not considered income by that provision did not mean that the benefits were off limits to state courts. *Id*. "[T]hat [Petitioner's] benefits cannot be garnished is not dispositive of whether they can be considered for the purpose of calculating child support obligations." (App 6a).

Petitioner appealed to the Michigan Supreme Court, which denied his application and his motion for reconsideration. (App. 62a-93a). Petitioner now seeks leave to appeal to this Court.

REASONS FOR GRANTING THE PETITION

1. The protection of veterans' disability pay is an issue of significant national interest because of the number of disabled veterans that depend on such pay. There is a substantial and growing population of disabled veterans, many of whom have had their careers cut short by injuries they incurred while serving and which have rendered them totally and permanently disabled. These veterans need and deserve every protection federal law affords.

There is more than just a waning number of disabled veterans from the post-Vietnam era and prior. *Rose* was a 1987 case addressing an entirely different population. Since that decision gratuitously allowing states to unilaterally exercise authority and control over veterans' benefits which are (and always have been) explicitly protected by federal law, the nation has been at war for the better part of three decades. VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4.[2]

Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. *Id.* By 2014, the number was 3.8 million. U.S. Census Bureau, Facts for Features.[3] As of March 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id.* See also VA, National Center for

[2] www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf

[3] www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html

Veterans Analysis and Statistics, What's New.[4] The number was above 4.5 million as of May 2019 with an annual increase of 117 percent.[5]

Finally, disabilities among younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability of 70 percent or higher in 2014. Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017).[6] Thus, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get the severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014).

Inevitably, progress comes with a price. Physical injuries received in combat are horrific. *Id.* See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis

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[4] www.va.gov/vetdata/veteran_population.asp

[5] www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL_2018.PDF

[6] www.disabilitystatistics.org (Cornell University).

L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries due to the suddenness and arbitrariness of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family Perceptions of Post-Deployment Healthcare Needs of Iraq/Afghanistan Military Personnel, 7(3) Mental Health in Family Medicine 135-143 (2010).

Combat-related post-traumatic stress negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicide. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom–Veterans and Spouses, available from Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995). These conditions are magnified for returning veterans and their families due to the stress caused by absence and separation. Thus, despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separation and divorce is common. See DeBaun, The Effects of Combat Exposure on the Military Divorce Rate, Naval Postgraduate School, California (2012). Families, already stretched by the extraordinary burdens and sacrifices of national service, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with

his or her family even more challenging. See Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Finally, it cannot go without mention that an estimated 17 to 22 veterans commit suicide every day and the number may actually be much higher.[7] The stressors faced by the disabled veteran are only exacerbated when engaged in state court proceedings involving the disposition of the veteran's benefits, which are supposed to be used to compensate that veteran for his or her service-connected disabilities and which are all too often his or her only means of subsistence. The consequences of these situations are inevitably magnified and extremely stressful for these particular veterans.

2. This is why the Court has emphasized that the judiciary must not delve into the consequences of applying clearly expressed federal law in this subject matter. *Mansell v. Mansell*, 490 U.S. 581, 588-592 (1989). It does not have to inquire into policies of Congress when the law is expressly authorized by the Constitution. This is precisely why military service and compensation has historically been protected under exclusive and preemptive federal law.

Congress has exercised exclusive legislative authority in these premises since the earliest days of the Republic. See, e.g., *Hayburn's Case*, 2 U.S. 409

[7] www.militarytimes.com/news/pentagon-congress/2019/10/09/new-veteran-suicide-numbers-raise-concerns-among-experts-hoping-for-positive-news/

(1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L. Rev. 1081, 1084 (2010). For an excellent discussion by the Court concerning the nature of these benefits and the importance of protecting them see *United States v Hall*, 98 US 343, 349-355, 25 L Ed 180 (1878).

As explained herein, *Rose* was and still is contrary to the overarching principle that where Congress acts in the exercise of an enumerated power state law is preempted *unless* Congress says otherwise. Further, *Rose* rejected federal law excluding veterans' disability benefits from state consideration and ignored the law protecting them from "any legal or equitable process whatever." See, respectively, 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1). Finally, just after *Rose*, Congress acted to remove all doubts that state courts have *any* jurisdiction or authority to consider these restricted benefits by creating an Article I Court with exclusive appellate jurisdiction over all benefits determinations as to "any court" and by giving the Secretary of Veterans Affairs exclusive authority to make decisions on *all questions of law and fact* necessary to the disposition and division of these benefits in the first instance. 38 U.S.C. §§ 7251, 7261; 38 U.S.C. § 511. See also *Henderson v. Shinseki*, 562 U.S. 428, 440-441 (2011).

Stripped of its veneer, the *only* remaining rationale provided by *Rose* as justification to ignore express federal law is based on congressional testimony and

the notion that state law is primary in the area of domestic relations. Both of these reasons have been rejected. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *McCarty*, 453 U.S. at 220; *Ridgway*, 454 U.S. at 55; *Mansell*, 490 U.S. at 592-596; *Hillman v. Maretta*, 569 U.S. 483, 490-91 (2013); and *Howell*, 137 S. Ct. at 1401-1407 (2017).

It is time for this Court to reconcile *Rose's* reliance on speculative congressional intent with the plain language of federal law protecting disabled veterans and insulating their benefits from being repurposed for unauthorized use. Petitioner's federal disability benefits are specifically excluded from consideration as income by federal law, 42 U.S.C. § 659(a); (h)(1)(A)(ii)(V) and (h)(1)(B)(iii). As such, they are jurisdictionally protected from *any legal process* whatever by 38 U.S.C. § 5301(a)(1).

Federal law, and only federal law, authorizes the Secretary of Veterans Affairs to decide whether these restricted benefits may be used to support dependents. 38 U.S.C. § 511(a); 38 U.S.C. § 5307. Absent such a determination, the decision of the Secretary on the question of a veteran's entitlement to these benefits is absolute and review may only be sought through the Article I Court expressly created by Congress *after Rose* for that purpose. 38 U.S.C. §§ 7251, 7261. *Henderson*, *supra*.

Federal law exclusively, comprehensively and completely addresses this issue. Yet, state courts continue to blindly cite *Rose* for the proposition that states have unfettered access to these disability benefits. This has caused a systemic destruction of the

ability of disabled veterans to sustain themselves and their families. The greatest tragedy, of course, is the effect that this has had on the disabled veteran community as a whole. Homelessness, destitution, alcoholism, drug abuse, criminality, incarceration and, in too many cases, suicide, are an all too frequent and direct result of a blind adherence to an outdated and anomalous decision by this Court which was not grounded on the absolute principle of federal supremacy in this particular subject.

3. Veterans benefits originate from Congress's enumerated "military powers". U.S. Const. Art. I, § 8, cls. 12 – 14. *United States v. Oregon*, 366 U.S. 643, 648-649 (1961); *McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981); *United States v. Comstock*, 560 U.S. 126, 147 (2010), citing *United States v. Hall*, 98 U.S. 343, 351 (1878) and stating that "the Necessary and Proper Clause, grants Congress the power, in furtherance of Art. I, § 8, cls. 11-14, to award 'pensions to the wounded and disabled' soldiers of the armed forces and their dependents."

Congress's control over the subject is "plenary and exclusive" and "[i]t can determine, without question from any State authority, how the armies shall be raised,…the compensation…allowed, and the service…assigned." *Tarble's Case*, 80 U.S. 397, 405 (1871). In this particular area, "[w]henever…any conflict arises between the enactments of the two sovereignties [the state and national government], or in the enforcement of their asserted authorities, those of the National government must have supremacy…." *Id*.

Congress's powers in military affairs are "broad and sweeping. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in these matters unless Congress itself cedes such authority or exceeds its constitutional limitations in exercising it. *Rumsfeld v. Forum for Adad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Congress has been given no "greater deference than in the conduct and control of military affairs." *McCarty*, *supra* at 236, citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

This Court recently reaffirmed the principle that military compensation and disability benefits fall exclusively under Congress's enumerated military powers. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017) (*McCarty* with its rule of federal preemption, still applies" and "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 (describing the federal interests in attracting and retaining military personnel.")).

Disability benefits, unlike other military benefits, are a separate and distinct class of benefits. Military retired pay is considered current remuneration for services rendered (consideration for the fact that the military servicemember is still in the effective rolls of potentially serviceable members of the armed forces) and permanent disability pay is not. *United States v. Tyler*, 105 U.S. 244, 245 (1881) (explaining the "manifest difference" in the two kinds of military pensions: active military retirement and permanent and total disability); *Barker v. Kansas*, 503 U.S. 594, 599 (1992) (noting that "[m]ilitary retirees

unquestionably remain in the service and are subject to restrictions and recall; in these respects they are different from other retirees").

Permanent disability does not replace or substitute for waived current retired pay of a still serviceable member. Permanent disability is not considered an available asset or income, whether as property, or for child support or alimony. See *Howell*, 137 S. Ct. at 1405-1406 (citing 38 USC § 5301(a)(1) (state courts cannot vest that which they have no authority to give) and 42 USC § 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) (noting the distinction between the disability pay paid to a partially disabled recipient of military retired pay which is considered remuneration and therefore potentially countable as income and the total and permanent disability benefits provided under Title 38 (those at issue in this case) for a former servicemember who is 100 percent totally and permanently disabled and was either medically retired or injured during service and discharged before attaining the requisite number of years to qualify for retirement pay).

4. Despite the preemption of state law and the plain and unambiguous language of the federal statutes, the Court in *Rose* ignored the principle of absolute preemption, ignored the statutory exclusion of veterans' disability benefits from consideration as an available asset, ignored the blanket and sweeping prohibition in 38 U.S.C. § 5301, and ruled that because veterans have a general obligation to support dependents, 100 percent of their benefits could be counted as income, leaving the state free to unilaterally repurpose these federal appropriations.

Despite explicit federal statutory law that protects veterans disability benefits "due or to become due" from "*any legal or equitable process whatever*, either *before* or *after* their receipt", see 38 U.S.C. § 5301(a)(1) (emphasis added), the Court gave the state carte blanche to assert dominion and control over these benefits and order that they be paid by the disabled veteran to satisfy support obligations. *Rose*, 481 U.S. at 630-631, rejecting application of 38 U.S.C. § 5301.[8]

The Court also rejected the argument, made by both the United States[9] and the disabled veteran, that the Veterans Administration had exclusive jurisdiction under 38 U.S.C. § 211 (amended and renumbered as 38 U.S.C. § 511) over veterans' benefits and determinations of how such benefits should be distributed.

As pointed out by Petitioner, just after *Rose*, Congress passed the VJRA and amended 38 U.S.C. § 211. See *Larrabee v. Derwinski*, 968 F.2d 1497, 1498-

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[8] *Rose* only applies to child support. Minor children of the veteran are "dependents." Federal law only allows apportionment of disability benefits to "dependents", see 38 U.S.C. §§ 101, 102, 103 (defining spouses, children and certain parents as dependents); and 38 U.S.C. § 5307 (describing the VA's process for requesting apportionment for support of *dependents*). See also 79 Fed. Reg. 2, Part II, pp. 430-462 (2014).

[9] The Solicitor General filed a brief supporting the veteran, arguing that 38 U.S.C. § 211(a) gave exclusive jurisdiction to the Department of Veterans Affairs over disposition of veteran's disability pay . See https://www.justice.gov/osg/brief/charlie-wayne-rose-appellant-v-barbara-ann-mcneil-rose-and-state-tennessee

1502 (2d Cir. 1992). Congress made two substantial changes. First, Congress created an independent Article I Court (the Board of Veterans Appeals) and gave it exclusive jurisdiction over appeals from final decisions of the Secretary of Veterans Affairs.

Second, Congress replaced the phrase from § 211 "Court of the United States" with "any court". In direct response to the discussion in *Rose* concerning the scope of a state court's authority and jurisdiction over veteran's disability benefits, Congress affirmed that the VA was the only entity with authority and exclusive jurisdiction to decide whether veterans' benefits should be paid to a dependent. 38 U.S.C. § 511.

In 2017, this Court ruled that under 38 U.S.C. § 5301(a)(1) state courts do not have authority to assert control over veterans' benefits to the extent that governing federal law says otherwise. *Howell v. Howell*, 137 S. Ct. 1400, 1404 (2017), citing *Mansell v. Mansell*, 490 U.S. 581, 588 (1989). In doing this, the Court reaffirmed pre-*Rose* case law that held absolute federal preemption over state domestic law issues is the rule, *unless* Congress says otherwise. "*McCarty* with its rule of federal preemption, *still applies*." *Id.* (emphasis added). The Court also reconfirmed what it had said in *Mansell*, that when Congress does give the state jurisdiction and authority over these benefits, the grant is precise and limited. *Id.*

The state lacks authority because these federal benefits originate from Congress's enumerated military powers, U.S. Const. Art. I, § 8, cls. 11 – 14. *United States v. Oregon*, 366 U.S. 643, 648-649 (1961);

McCarty v. McCarty, 453 U.S. 210, 232 (1981); *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017). If the state could invade the benefits appropriated by Congress for the express purpose of support and maintenance of the military and veterans, the function of government would cease. *McCarty*, *supra* at 229, n. 23, citing *Buchanan v. Alexander*, 45 U.S. 20, 20 (1846) ("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.") (emphasis added).

Congress has only given state courts jurisdiction and authority over veterans' benefits in two specific circumstances. First, a former servicemember may be compelled to part with up to 50 percent of his or her disposable military retired pay. 10 U.S.C. § 1408. Second, Congress allows the federal government to pay direct support orders where a former servicemember receives retired pay and waives only a portion of that retired pay for disability. 42 U.S.C. § 659(h)(1)(A)(ii)(V). Such portion, along with the remaining retirement pay, are defined as "remuneration for employment" and thus, as "income" subject to legal process.

Consistent with the absolute preemption of state law over *all* military benefits, excluded from the amounts which Congress has given states jurisdiction over, are benefits paid to retirees who have become totally disabled (the retiree is no longer among the rolls of the serviceable military retirees) and those disabled veterans who never attained time in service

to quality for retirement. 42 U.S.C. § 659(h)(1)(B)(iii). As to all veterans' benefits that are *not* specifically allowed by *Congress* to be subjected to state process, 38 U.S.C. § 5301(a)(1) prohibits state courts from using "any legal or equitable process whatever" to divert them through any type of court order, whether *before* (that is, while in the hands of the government) or *after* receipt by the beneficiary.

Here, the state court ignored these significant developments, and, like many other states, ruled that this Court's decision in *Rose* allows the state to include a veteran's disability benefits as income for purposes of his child support obligations. Yet, nowhere has Congress given the states the "precise and limited" authority required to exercise jurisdiction and control over these benefits. *Howell*, 137 S. Ct. at 1404; *Mansell v. Mansell*, 490 U.S. 581, 588 (1989). In fact, by way of 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1), Congress excluded such benefits from state court jurisdiction and control. Despite a continuous line of cases from this Court declaring that federal law preempts all state law governing the economic and domestic relations of the parties, see, e.g., *McCarty*, *supra*; *Ridgway*, *supra*; *Mansell*, *supra*, and *Howell*, *supra*, state courts continue to ignore the requirement that Congress must give it explicit authority to dispossess the veteran of these benefits.

Ridgway 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 (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. 159, 162 (1962) (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, 441 (2011) ("provisions for benefits to members of the Armed

Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("legislation…liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (laws protecting servicemembers from discrimination "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *United States v. Oregon*, 366 U.S. 643, 647 (1961) ("[t]he solicitude of Congress for veterans is of long standing.").

Moreover, contrary to the state court's reasoning (App. 5a-8a), 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 v. Wissner*, 338 U.S. 655, 659 (1950) (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary). 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.

Despite this plain statutory law and the uninterrupted jurisprudence holding that federal law in this subject preempts state law, this Court held in *Rose* that state courts could force veterans to use their disability benefits to satisfy state-imposed support orders.

In 1988, after *Rose*, Congress overhauled both the internal review mechanism and § 211 in the Veterans Judicial Review Act (VJRA). Pub. L. No. 100-687, 102 Stat. 4105. See also *Veterans for Common Sense v. Shinseki*, 678 F. 3d 1013, 1021 (9th Cir. 2012). In doing this, Congress "made three fundamental changes to the procedures and statutes affecting review of VA decisions." *Id*.

First, the VJRA created an Article I Court, the United States Court of Appeals for Veterans Claims, to review decisions of the VA Regional Offices and the Board of Veterans' Appeals. 38 U.S.C. §§ 7251, 7261. *Veterans for Common Sense*, *supra*. Congress

explained it "intended to provide a more independent review by a body…which has as its sole function deciding claims in accordance with the Constitution and laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808. Congress also noted that the Veterans Court's authority extended to "*all* questions involving benefits under laws administered by the VA. H.R. Rep. No. 100-963, at 5, 1988, U.S.C.C.A.N. at 5786." *Id.* (emphasis in original). Congress conferred the Veterans Court with "*exclusive* jurisdiction" and "the authority to decide any question of law *relevant to benefits proceedings*." 38 U.S.C. § 7252(a); 38 U.S.C. § 7261(a)(1), respectively (emphasis added).

Second, the VJRA vested the Federal Circuit with "exclusive jurisdiction" over challenges to VA rules, regulations and policies. 38 U.S.C. § 502; 38 U.S.C. § 7292. Decisions of the Veterans Court are now reviewed exclusively by the Federal Circuit which "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(a), (c), (d)(1).

Third, Congress *expanded* the provision precluding judicial review in former § 211. Under the new provision, eventually codified at 38 U.S.C. § 511,[10] the VA "shall decide *all questions of law and fact* necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a) (emphasis added). Whereas § 211(a) prohibited review of "decisions on

[10] Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991).

any question of law or fact…under any law…providing benefits to veterans," 38 U.S.C. § 211(a) (1970), § 511(a) prohibits review of the Secretary's decision on "*all questions of law and fact necessary to a decision*…that affects the provision of benefits," 38 U.S.C. § 511(a) (2006). This change places primary and exclusive authority over the initial benefits determination in the VA Secretary.

In keeping with this removal of state court jurisdiction over decisions affecting veterans' benefits, whereas § 211 precluded any other "official or court *of the United States*" from reviewing a decision, § 511 now precludes review "by *any court*…." (emphasis added). This of course, would apply to preclude state courts from making any initial or subsequent disposition of veteran's disability benefits, which are considered off-limits by existing federal statutes, particularly, 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301. Any other court or entity making a decision that disturbs the calculated benefits determination would be an usurpation of the Secretary's exclusive authority and an extra-jurisdictional act. Moreover, as Petitioner pointed out in his arguments below, there is (and always has been) a process for the VA to pay disability benefits to dependents in need. 38 U.S.C. § 5307. Consistent with 38 U.S.C. § 511 and the VJRA, the process for a dependent to seek these benefits is through the apportionment procedures outlined in 38 U.S.C. § 5307 and as described in the memorandum. *Id*.

5. The Court of Appeals ignored Petitioner's argument that 38 U.S.C. § 5301 independently protected his benefits from any legal process. (App.

6a). The Court also misstated the argument concerning *Howell*, concluding that Petitioner only argued that *Howell* supports the proposition that veteran's disability pay remains expressly protected by § 5301(a)(1). (App 6a). While this proposition is true, because *Howell* reaffirmed that *all federal law* preempts *all state law* in the area of military benefits, and thus, only federal law can say when a particular benefit is available to a state court for consideration, *Howell* also specifically said that *federal law* must be consulted *before* a state court can make a determination of whether the specific benefits to which the veteran is entitled are available for consideration as income. *Howell*, 137 S. Ct. at 1403-1404, citing *Mansell*, 490 at 588, 589.

In such cases, 38 U.S.C. § 5301 applies to *all state court process* (equitable or legal) and *jurisdictionally prohibits* state courts from considering funds both before and after receipt, *unless otherwise authorized by federal (not state) law*. See 38 USC 5301(a)(1). Section 659(h)(1)(B)(iii) of Title 42 clearly excludes the VA disability benefits at issue from being considered income. The federal government will not pay such benefits to a state court in compliance with an order that requests funds directly from the federal government, 42 USC 659(h)(1)(B)(iii), and 38 USC 5301 directly and explicitly prohibits a state court from unilaterally forcing the veteran to directly or indirectly pay these monies over to another by counting them as available income.

Thus, not only has Congress *not included* Petitioner's benefits as available for direct garnishment in state court proceedings, Congress *has*

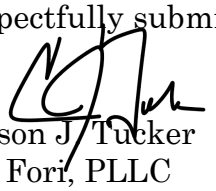
indeed indicated that Appellant's veterans disability benefits are not income and may not be subject to calculations for child support awards in state domestic relations proceedings. Furthermore, *Howell did rule* that with respect to such disability benefits, 38 USC 5301 erects a jurisdictional bar to a state court's exercise of authority over such funds.

CONCLUSION

Congress has full, plenary and exclusive authority over the disposition of military disability pay. *Tarble's Case*, 80 U.S. 397, 408 (1871). This Court has recognized this absolute preemption still applies. *Howell*, 137 S. Ct. at 1404, 1406. The Court has also recognized that Congress *may* give states authority over military benefits, but when it does, the grant is "precise and limited." *Id.* at 1404. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). Moreover, when the veterans' benefits statutes discussed herein are construed under this Court's pronounced "canon" that they are to be "construed in the beneficiaries' favor," there simply is no room for the state to assert jurisdiction or authority over the disability benefits at issue in this case.

Petitioner respectfully requests the Court grant his petition.

Respectfully submitted,



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