No. 21-1511

IN THE SUPREME COURT OF THE UNITED STATES

DAX ELLIOT CARPENTER,

Petitioner,
v

JULIE ELIZABETH CARPENTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Index of Authorities iv

Counter-Statement of Questions Presented..... vi

Statement of the Case 1

Counter-Statement of Facts 3

Argument:

I. THE EXISTING LAW REGARDING THE AUTHORITY OF THE STATES TO USE FEDERALLY MANDATED CHILD SUPPORT FORMULAS WHICH INCLUDE VETERANS SERVICE CONNECTED DISABILITY BENEFITS AS INCOME CONSTITUTES AN APPROPRIATE ACCOMMODATION OF FEDERAL AND STATE INTERESTS IN PROVIDING FOR THE WELFARE OF THE VETERAN AND HIS DEPENDENTS. 10

A. The statute creating the Michigan Child Support Formula applicable to this case, MCL 552.650, mandates the inclusion of veterans disability benefits as income for purposes of establishing the appropriate level of child support..... 10

B. Congress has mandated that the states include all of a noncustorial parent's earnings, income and other evidence of ability to pay. 11

II. FEDERAL LAW REGARDING VETERANS ADMINISTRATION DISABILITY BENEFITS DOES NOT PRECLUDE STATES FROM CONSIDERING SUCH BENEFITS AS INCOME FOR PURPOSES OF DETERMINING THE APPROPRIATE LEVEL OF CHILD SUPPORT. STATUTES ENACTED FOLLOWING THE *ROSE* CASE DO NOT CONFLICT WITH STATE COURT CHILD SUPPORT GUIDELINE FORMULAS COUNTING THOSE BENEFITS AND THEREFORE, DO NOT PREEMPT THE STATE COURT ACTION IN THIS CASE. 14

A. By failing to properly object to the use of the Michigan child support formula in lower court proceedings on the basis of federal preemption, Petitioner has failed to preserve this issue for review and certiorari should be denied. 14

B. *Rose v Rose, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987*) held that VA disability benefits may be considered by state courts in determining the level of child support even where those benefits are the sole source of income for the veteran and would require that he pay his support from the benefit he receives. 15

C. *10 USC §1408* did not create a federal exemption for Petitioner's disability benefits barring them for consideration in determining the what level of child support is best for his family..... 17

D. *42 U.S.C.. § 659* was designed to afford state courts greater access to by a veterans dependents to his disability benefits for purposes of paying child and spousal support and does not exempt Petitioner-Appellant's VA disability benefits

from consideration for purposes of determining the appropriate amount of child support. 21
E. The Michigan Court of Appeals opinion correctly applied the doctrine of federal preemption and correctly interprets the statutes involved in light of and as required by this Court's decision in *Rose v Rose*, supra..... 25

III. PETITIONER HAS PROVIDED NO COGENT REASON FOR THIS COURT TO UNDERTAKE A REVIEW OF ITS DECISION IN ROSE V ROSE AND OVERTURN SETTLED LAW RELIED UPON AND IMPLEMENTED BY THE STATES. 27
A. Statistical data regarding claimed increases in the occurrence and severity of service connected injuries is not properly before the Court because it was not made a part of the record in either the state trial court or appellate courts. Moreover, Petitioner offered no evidence that this data was used by Congress in formulating a change in the law regarding the ability of state courts to consider disability benefits in determining the level of child support..... 27
B. The apportionment procedure was intended to adjudicate claims that a veteran's use of his disability benefit fails to fulfill his responsibility for child support in the context of what the state courts have ordered..... 29
C. Congressional enactments regarding limits on the accessibility of disability benefits to legal process do not constitute evidence that Congress intended there was no room for the States to act when determining the appropriate level of a veteran's support obligation..... 30
D. This Court's decision in *Howell* did not overrule or undermine *Rose* and did not suggest that State child support guideline laws are preempted. 32
E. Current law with regard to the right of States to consider VA disability benefits as income for purposes of child support determination does not "repurpose" federal law creating those benefits. 34
F. The fact that Congress is not expressly preclude the State courts from using VA disability benefits in child support calculations is significant evidence that the current law is an appropriate accommodation of the state and federal laws dealing with the relationship between the federal benefit and the state laws regarding how those benefits relate to the appropriate level of child support. 36

Relief 38

INDEX OF AUTHORITIES

Cases:

Allen v. Allen, 650 So. 2d 1019, 1019–20 (Fla. Dist. Ct. App. 1994) 21

Alwan v Alwan, 70 Va App 599; 830 SE 2d 45 (2019) 22

Batcher v Wilkie, 975 F. 3d 1333, 1335 (2020) 29

Casey v. Casey, 79 Mass. App. Ct. 623, 634–35, 948 N.E.2d 892, 901–02 (2011) 21

City of Springfield v Kibbe, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987) 14

Howell v Howell, 581 U.S. ____, 137 S Ct. 1400, 197 L Ed 2d 781 (2017) 9, 14, 15

In re Braunstein, 236 A.3d 870 (2020) 22

In re Marriage of Anderson, 522 N.W.2d 99, 101–02 (Iowa Ct. App. 1994) 17

In re Marriage of Hopkins, 142 Cal.App.3d 350, 360, 191 Cal.Rptr. 70, 77 (1983) 20

In re Marriage of Stanton, 190 Cal. App. 4th 547, 551, 118 Cal. Rptr. 3d 249, 252 (2010) .. 16

In re Marriage of Wojcik, 362 Ill. App. 3d 144, 164–67, 838 N.E.2d 282, 299–301 (2005) ... 17

Keinz v. Keinz, 290 Mich.App 137, 141; 799 NW2d 576 (2010) 22

Kitchen v. Kitchen, 465 Mich. 654, 661; 641 NW2d 245 (2002) 23

Loving v. Sterling, 680 A.2d 1030, 1031–33 (D.C. 1996) 17

Lesh v Lesh, ___ NC App __, 809 SE 2d 890 (2018) 26

McCarty v. McCarty, 453 U.S. 210 (1981) 18

Massey v. Mandell, 462 Mich. 375, 379; 614 NW2d 70 (2000) 23

Murphy v. Murphy, 302 Ark. 157, 158–59, 787 S.W.2d 684, 684–85 (1990) 21

Nelms v. Nelms, 99 So. 3d 1228, 1230–33 (Ala. Civ. App. 2012) 17

Parker v. Parker, 750 P.2d 1313, 1313–15 (Wyo. 1988) 21

Paylor v. Allegheny Cty. Family Div./Domestic Relations, No. 2:16CV1071, 2017 WL 4235944, at *8–9 (W.D. Pa. Sept. 25, 2017) 16

People v. Grant, 445 Mich. 535, 552–553, 520 N.W.2d 123 (1994) 12

Repash v. Repash, 148 Vt. 70, 72–74, 528 A.2d 744, 745–46 (1987) 20

Rose v Rose, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987) 1, 10, 11, 15, 18, 30, 33

Smith v. Khouri, 481 Mich. 519, 526; 751 NW2d 472 (2008) 23

Varran v Granneman, 312 Mich App 591, 601; 880 N.W. 2d 242, 248 (2015) 1

Statutes/Regulations:

MCL 552.605 10

MCL 552.519. 10

MCL 600.2591(1)..... 22

10 U.S.C. § 1408 .....12, 17, 18, 20

10 U.S.C. § 1201..... 20

38 U.S.C. § 3105 20

42 U.S.C.. § 659 .....12, 23

42 U.S.C. 667 .....11, 27

45 C.F.R. § 302.56......11, 27

38 U.S.C. §1115 27

38 USC §3107(a)(2) 5

38 U.S.C. §5301 29

38 U.S.C. §5307 29

38 C.F.R. §3.450(a)(1)(ii) 29, 35, 37

Court Rules:

MCR 7.202(6)(a)(I)..... 1

MCR 7.212(B)(4) 1

MCR 7.202(6)(a)(iv) 1

MCR 7.203(A)(1) 1, 2

MCR 7.202(6)(a)(iii-v) 2

MCR 7.216(C)..... 4

MCR 3.215(f)(3).....8, 14

Miscellaneous:

2017 Michigan Child Support Formula Manual § 2.01, 2017 MCSF § 2.01..... 11

5th Amendment United States Constitution 8

S. REP. 97-502, S. Rep. No. 502, 97TH Cong., 2ND Sess. 1982, 1982 U.S.C.C.A.N. 1596, 1982 WL 26722 (Leg.Hist.)..... 18

COUNTER- STATEMENT OF ISSUES PRESENTED

1. Whether this Court should reverse and/or abandon a 30 year old precedent established in ***Rose v Rose, 481 U.S. 619; 107 S. Ct. 2029; 95 L. Ed. 2d. 599 (1987)*** which afforded state courts flexibility in dealing with their responsibility to insure the financial support of minor children in cases where a divorced parent is entitled to veterans disability benefits? Should this Court reject or modify the long held principal that federal preemption of state court domestic relations law is limited to instances where Congress has expressly declared such preemption and where state law conflicts with federal law in such a manner as to do "major damage" to clear and substantial federal interests?

2. Whether Congressional enactments in regard to the creation, award and payment of VA benefits for service connected disability conflict with federally mandated state law child support guideline enactments which recognize those benefits as income for purposes of determining the appropriate amount of support where those VA disability benefits were created for the purpose of providing financial support for both the veteran and his dependent children?

3. Whether the post-***Rose*** amendments to federal statutes dealing with access to VA disability benefits create a conflict with the state law enactments which recognize them as income for the purpose of determining the appropriate level of child support and whether those Congressional declarations constitute a positive and direct enactment of federal preemption over state law where those declarations fail to state such a purpose and fail to provide an appropriate alternative method of insuring that the veteran's dependants would receive any share of those benefits or a means of calculating an amount of support which is appropriate?

4. Whether state law enactments which include VA disability benefits as income for purposes of determining the appropriate level of support does major damage to clear and substantial federal interests?

5. Whether the interpretation of the Congressional enactments relied upon by Petitioner is so absurd and illogical as to require rejection where that interpretation is not premised upon any clear and substantial federal interest, where no evidence was presented to the lower courts identifying such federal interest and where Petitioner has failed to establish standing to assert that he is in the class of individuals who he claims are entitled to having his disability benefits exempt for consideration in determining the level of child support?

6. Whether this Court should adopt an interpretation of federal enactments which precludes state family law courts from considering VA disability benefits as income for purposes of determining the appropriate level of child support, a responsibility long entrusted to the states and recognized by Congress as its mandate?

7. Whether this Court should adopt an interpretation of federal law which has been uniformly rejected by this Court and state courts throughout this country and which would require massive recalculations of child support at great expense to the states, their courts and their citizens and require the VA to undertake untold number of apportionment claims?

STATEMENT OF THE CASE

Petitioner declares that federal law preempts the States, including the State of Michigan, from considering his VA disability benefits as income for purposes of determining and ordering the amount of child support he must pay under the federally mandated child support guidelines. These guidelines were designed to insure that child support reflects the real cost of rearing children, to improve the consistency and uniformity of child support awards and to improve efficiency in the adjudication and collection of child support. Congress required states to design guideline formulas that reflected the paying parent's ability to pay and required orderly and efficient enforcement of them in their courts as a condition of receiving federal assistance for dependent children. There is no express Congressional prohibition on the States barring their use of VA disability benefits in calculating support. Instead, Petitioner asserts that federal statutes limiting use of state legal processes with respect to the payment of those benefits have implied such a prohibition. His arguments have already been rejected by this Court. Over 30 years ago the same preemption arguments were rejected in ***Rose v Rose, 481 U.S. 619; 107 S. Ct. 2029; 95 L. Ed. 2d. 599 (1987)***. State courts deciding the question have uniformly followed this case and rejected his claim. State courts have complied with the Congressional mandate to create and enforce child support guidelines, including consideration of VA disability benefits as income. Petitioner cannot cite a single state or federal decision which has adopted his claim of federal preemption. There are no state courts of last resort that have issued decisions which conflict with the resolution of this issue by Michigan Courts which relies on ***Rose.*** There are no federal appeals court decisions in conflict with the ***Rose*** decision.

Petitioner's claimed statutory support for preemption is premised on the false assumption that federal preemption in this area is presumed and absolute. This Court has long adhered to the

principle that in the area of domestic relations there is a strong presumption against preemption of state law and regulation. This principle guided the ***Rose*** decision adjudicating the very issues Petitioner has raised here. Nowhere in his Petition has he mentioned that Congress mandated the very system the State of Michigan put in place to meet Congressional requirements and goals with regard to the implementation and collection of child support for dependent children.

Moreover, Petitioner's conduct renders him unworthy of the attempt to vest him with complete control over his disability benefits. Years after his divorce, he convinced the state court that the disability qualifying him for veterans benefits prevented him from paying support in the amount in effect before his disability limited his earning capacity and obtained a significant reduction. Despite agreeing that this reduction was subject to retroactive modification based upon his becoming eligible for VA disability benefits, he fraudulently concealed receipt of disability benefits for the very time period for which the court reduced his support. He received and spent over $131,000.00 in disability benefits between May, 2013 and April, 2017. He presented no evidence in the Michigan courts establishing that he spent any of it on the support of his two (2) minor children, both of whom were in the custody of Respondent. Once his fraud was discovered, Michigan courts ordered retroactive modification of his support. He has yet to pay the resulting arrearage of over $54,000. He wants this Court to change its long held approach to this issue to absolve him of that responsibility and to reduce his current support order because it included his VA disability benefit in determining the amount. He claims that federal law allows him to retain every red cent of his tax free disability benefits. He claims that he and every other veteran receiving service connected disability benefits that include enhanced amounts for minor children in the other parents custody and who have not retired from the military are

exempt from having the level of his or her child support determined by the amount of those benefits.

The statutes Petitioner relies upon to support his preemption claim do not conflict with state court legislation which include veterans disability benefits as income in determining support. Petitioner attempts to create a conflict by adopting an absolute preemptive bar where Congress has failed to do so. Congress has not expressly enacted a bar to state law dealing with these benefits. Amendments enacted after this Court's decision in ***Rose*** affecting the laws identified by Petitioner could have easily preempted state inclusion of these benefits to make them untouchable but did not. Petitioner's fictional construct designed to create a conflict that does not exist should not be basis for this Court to undertake the review he requests.

COUNTER-STATEMENT OF FACTS

Petitioner provided virtually no factual background for the issues in this case in his Petition for Writ of Certiorari. He elected to include what he claims are "relevant facts", i.e. legal arguments made in the trial court supporting his exemption theory. However, the context in which these benefits came to be included in his child support determination and the process by which these benefits became the basis for the trial court's decision is both relevant and decisive. Therefore, Respondent is compelled to provide this vital information.

Petitioner enlisted in the army in April, 2010 for four (4) years. Before he had completed his enlistment, he was discharged in September, 2012 at his request due to hardship related to the service connected injury he incurred. (Respondent's Appendix A, 5-5-2017 Tr 10-11) Petitioner failed to provide any evidence that he was retired, eligible for military retirement or had waived military retirement benefits to receive VA disability benefits at this evidentiary hearing. Following his discharge he was employed at different businesses, but ultimately worked in a

part-time capacity earning minimal income claiming he was disabled due to a service connected injury incurred during his military service. As a result, he sought and obtained a reduction in his child support. On January 7, 2013, three (3) separate Uniform Child Support Orders were entered by agreement of the parties dramatically reducing Petitioner-Appellant's child support obligation from $543.00 to $168.00 per month. (Respondent's Appendix B, Docket Entry No. 98) Each order also contained the following provision:

> "Respondent reserves the right to petition to modify this order retroactively should it be determined that Petitioner receives or is granted veteran's benefits that could have been included in his income under the child support formula and/or veteran's benefits that could be apportioned as child support."

In return for a 69% reduction in his monthly support obligation, he agreed to have his support retroactively amended should he be awarded VA disability benefits. To preserve Respondent's right to retroactive modification based upon the receipt of those benefits, she filed a Motion to Increase Child Support on January 2, 2014. (Docket Entry No. 97)

At a show-cause proceeding in late November or early December, 2016, Petitioner-Appellant was asked about his pursuit of VA disability benefits. He acknowledged that he had requested benefits, but no decision had been made by the VA. The Friend of the Court referee presiding over this proceeding instructed Petitioner-Appellant to bring evidence of the status of his claim to the next show cause which was scheduled for January 5, 2017. At that proceeding, Petitioner-Appellant presented a letter from the VA indicating that he had been awarded VA disability and that his benefit was over $3,400.00 per month. (Respondent's Appendix C, 5-5-2017 Tr 16-22) Armed with this information, Respondent-Appellee filed an Amended Motion to Increase Child Support on January 24, 2017. (Docket Entry No. 121) This motion was then

referred to the Friend of the Court for initial disposition on February 17, 2017. (Docket Entry No. 125)

Referee hearings on Respondent's amended motion were commenced on May 5, 2017. At that hearing, Petitioner repeatedly claimed the 5th Amendment on questions posed to him about his receipt of VA disability benefits. He refused to say when those benefits commenced and the amount he was receiving. (Respondent's Appendix D, 5-5-2017 Tr 20-23) After a counsel conferred off-the-record, the parties indicated to the Referee that in return for a stipulation as to an exhibit from the VA District Counsel's office showing the dates and amounts Petitioner had received in VA disability benefits since they were instituted, Respondent would consider dismissing contempt proceedings against Petitioner. (Respondent's Appendix E, 5-5-2017 Tr 24-25) Petitioner then filed a request for apportionment of his benefits with the VA pursuant to ***38 USC §3107(a)(2)***. The VA denied this request because Petitioner lacked standing to make a such a request. (Respondent's Appendix F, Exhibit 2, 7-17-2017 Tr 3-18)

Petitioner admitted that he applied for VA disability benefits in 2012 and claimed that he began receiving them in 2014. (Respondent's Appendix G, 7-17-2017 Tr 22-23) However, the stipulated record of benefits showed that he received a lump sum payment in the amount of $17,211.00 on November 1, 2013 the very month that he signed the Uniform Child Support Order that reduced his support from $534.00 to $168.00. (Respondent's Appendix H - Exhibit 4; 7-17-2017 Tr 31) In other words, Petitioner failed to disclose the receipt of a significant amount of disability benefits deemed income for purposes of child support at the same time he was telling Respondent and the Friend of the Court he was receiving part-time pay that justified only $168.00 per month in support. Not only did he fail to disclose this information, he signed the

proposed order which included a provision that his receipt of VA benefits would retroactively impact his support obligation. For months he fooled everyone. However, since he could not bring himself to pay even the minimal $168.00 support, despite receiving thousands of dollars in VA benefits, the Friend of the Court issued show cause proceedings for non-payment. It was during this process that the award and receipt of benefits was finally discovered and acknowledged by Petitioner. (Respondent's Appendix I, 7-17-2017 Tr 30) As Respondent's Appendix H, Exhibit 4 shows, from 2012 to April 2017, Petitioner received over $131,000.00 in VA disability benefits and paid no child support based on that un disclosed income. He acknowledged that his application for VA disability was based on his representation that the two (2) children he is obligated to support in this case were listed as dependents to enhance the amount of his benefit. (Respondent's Appendix J, 7-17-2017 Tr 32, 36-37)

Petitioner claimed he was not required to disclose his VA disability benefits because it was not income for any purpose under the law. (Respondent's Appendix K, 7-17-2017 Tr 33-35, 85-86) He claimed that he spent every cent of the $131,000.00 he received in benefits. (Respondent's Appendix L, 7-17-2017 Tr 67) Nothing was reserved in case he had to pay retroactive support in accordance with the language in the support orders he signed and agreed to in November, 2013. The language of those orders clearly recognized that those benefits would impact Petitioner's child support. See Respondent's Appendix B.

Other than his testimony, Petitioner presented no evidence during the referee hearing. Respondent filed a trial brief arguing that the child support guideline formula expressly included Petitioner's VA disability benefits as income to be considered in determining the level of support and that the resulting support amount should be adjusted retroactively based on the agreement of

the parties and the Petitioner's knowing and intentional refusal to report the receipt of these benefits. Petitioner filed his responsive trial brief, a collection of disjointed, numbered paragraphs in which he claimed that federal law prohibited the circuit court from considering his VA disability benefits as income, but did not claim federal preemption and did not present the theory espoused in his appeals. (Petitioner's Appendix D, pp 22a-30a)

The Friend of the Court Referee issued detailed findings within the statutory period and presented a proposed order increasing Petitioner's child support retroactive to May 1, 2013 in an amount consistent with the Michigan Child Support Formula, including his disability benefits.. The Referee found the legal arguments offered by Petitioner "inapplicable, unsupported, confusing, legally-contorted and totally unpersuasive. ... [B] ased on nothing more than a selfish, self-serving desire to avoid being responsible for and paying any meaningful child support to Respondent Mother ..." The Referee found that Petitioner Father willfully concealed over $130,000.00 in income for a four-year period and that his credibility was suspect because he made false statements to the Referee during the show cause proceedings and repeatedly refused to provide details about the receipt of VA disability benefits on ***5th Amendment*** grounds during the hearing on Respondent's motion to increase support. Finding that Petitioner had made false statements and had engaged in conduct which unreasonably protracted the hearing, the Referee also awarded Respondent-Appellee sanctions under ***MCR 3.215(f)(3)***. (Respondent's Appendix M - Proposed Referee Order) Petitioner filed a written objection to the Referee's findings claiming that "FOC calculations" were inaccurate as to how much he had received in benefits and that inclusion of VA disability benefits violated ***MCSF 2.01***, a provision of the child support formula that was irrelevant. He did not claim that his disability benefits were exempt from

support guideline applications due to federal preemption. (Respondent Appendix N, Objection to Referee Recommendation, Docket Entry No. 142) Petitioner failed to schedule his objections for hearing and the proposed order submitted by the Referee was entered by the Court. Petitioner then filed a Motion to Set Aside the recommended order claiming that there was a substantial defect in the proceedings. (Docket Entry No. 144) He amended this motion to include a claim that Respondent's counsel had acted improperly in obtaining VA records showing the date and amount of each monthly benefit he had received. (Respondent's Appendix O, Amended Motion to Set Aside Order, Docket Entry No. 147). Petitioner filed no brief in support of these motions. These motions never challenged the order submitted by the Referee on the grounds that federal law pre-empted the Michigan statute creating the child support formula provision requiring the inclusion of VA disability benefits as income. Nowhere in these documents did Petitioner claim as he does in this appeal, that his VA disability benefits were precluded from consideration in determining the amount of child support.

Petitioner argued these motions before the Circuit Court Judge on February 28, 2018. At that hearing he did make a claim that VA disability benefits were excluded from income based upon case law from the United States Supreme Court, i.e. ***Howell v Howell.***[1] However, he was unable to show the trial judge how the cited case overruled the ***Rose*** case and could not even provide the Court with a proper citation. He offered no support for his federal preemption challenge. He cited no case or statute and made no attempt to provide a logical legal rationale for his argument. The Court remarked: "... [T]here's nothing in this motion that I would consider

[1] ***Howell v Howell, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017).***

a meritorious defense because you haven't outlined it." (2-28-2018 Tr 7; Respondent's Appendix A) The Court refused to set aside the recommended order. The Court also made the determination of the amount of support, including the retroactive amounts, fully enforceable. The Court also made awarded sanctions against Petitioner and his attorney under ***MCR 3.215(F)(3)*** because the motion was deemed frivolous. An order regarding all of these matters was entered on the day of the hearing. (Respondent's Appendix A) A judgment in the amount of $3,310.46 was entered on April 20, 2018 as sanctions against both Petitioner and his attorney, jointly and severally. Neither Petitioner nor his counsel have paid these sanctions.

Petitioner then filed an appeal of right from the revised child support order and the order regarding sanctions. While Petitioner had an appeal of right from the sanctions order, the revised child support order was not a final order and not subject to an appeal as of right.

The Court of Appeals issued its decision in an opinion dated January 30, 2020. See Slip Opinion, Petitioner's Appendix A. The Court affirmed the revised retroactive support order finding that Petitioner's legal claims were "devoid of arguable legal merit" given the United States Supreme Court decision in ***Rose v Rose, 481 US 619; 17 S Ct 2029; 69 L Ed 2d 478 (1987)***. The award of sanctions by the trial court was also affirmed. (Slip Opinion p 8.) The Michigan Court of Appeals refused to award appellate sanctions against Petitioner, one judge indicating that his appeal was frivolous and the other two finding that it was not.

ARGUMENT

I. THE EXISTING LAW REGARDING THE AUTHORITY OF THE STATES TO USE FEDERALLY MANDATED CHILD SUPPORT FORMULAS WHICH INCLUDE VETERANS SERVICE CONNECTED DISABILITY BENEFITS AS INCOME CONSTITUTES AN APPROPRIATE ACCOMMODATION OF FEDERAL AND STATE INTERESTS IN PROVIDING FOR THE WELFARE OF THE VETERAN AND HIS DEPENDENTS.

A. The statute creating the Michigan Child Support Formula applicable to this case, MCL 552.650, mandates the inclusion of veterans disability benefits as income for purposes of establishing the appropriate level of child support.

MCL § 552.605 provides:

"(1) If a court orders the payment of child support under this or another act of the state, this section applies to that order.

(2) Except as otherwise provided in this section, the court **shall** order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the Friend of the Court Act, ***MCL 552.519.*** ..."

The Michigan Child Support Formula provides as follows:

"2.01(A) The term "net income" means all income minus the deductions and adjustments permitted by this manual. A parent's "net income" used to calculate support will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes.

2.01(B) The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support.

2.01(C) Income includes, but is not limited to, the following:

* * *

(4) Military specialty pay, allowance for quarters and rations, housing, **veterans' administration benefits**, G.I. benefits (other than education allotment), or drill pay.

2017 Michigan Child Support Formula Manual § 2.01, 2017 MCSF § 2.01

B. Congress has mandated that the states include all of a noncustorial parent's earnings, income and other evidence of ability to pay.

Federal law requires that states establish guidelines for child support. Those guidelines create a rebuttable presumption that the amount of support determined by application of the guidelines is correct. ***42 U.S.C. §667.*** Congress enacted this system and it became effective in 1987. In the same year, this Court decided ***Rose v Rose, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987*)** holding that state courts were not precluded from using VA disability benefits as income in determining and awarding child support.

Regulations to implement this statute defined income broadly and declared that the states must take into consideration all earnings and income of the noncustodial parent.:

"(a) Within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of child support guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.
(b) The State must have procedures for making the guidelines available to all persons in the State.
(c) The child support guidelines established under paragraph (a) of this section must at a minimum:
(1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:
(i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent)" ***45 C.F.R. § 302.56.***

Petitioner asks this Court to reverse or ignore a 30 year old precedent which allows the states to include these benefits in calculating child support. He claims Congress created a benefit which is exempt from these calculations. He is unable to cite any statute which declares such an exemption. Instead, he relies upon an inference that certain language in statutes regulating the extent to which a state is able to assign or allocate those benefits. While he argues these statutes expressly prohibit the state from counting these benefits in computing support, he ignores the Congressional directive to the contrary. He does not mention that when the amendments to these statutes, i.e. ***10 USC §1408*** and ***42 USC §659,*** were passed, state courts had a long history of using VA disability benefits in calculating presumptive child support levels. Despite that history, Congress did not expressly provide that a state court was prohibited from using these benefits in federally mandate guideline calculation in either of these enactments. Congress did not provide a procedural method or the institutional resources by which the VA would decide child support levels consistent with these mandatory guidelines in every state in regard to every divorce where a veteran entitled to disability benefits under the apportionment procedure. Yet there is an express Congressional declaration that in determining support the states **must** at minimum "provide that the child support order is based on the noncustodial parent's earnings, income and other evidence of ability to pay that ... [t]akes into consideration **all earnings and income of the noncustodial parent.**"

Petitioner claims that two federal statutes, ***10 USC §1408*** and ***42 USC §659***, exempt him from the operation of this state statutory scheme. Petitioner claims Michigan's statutory scheme is an unconstitutional exercise of state authority over a federal benefit. He makes this claim without recognizing the federal law that is the source of the very power he claims must be

preempted. He fails to acknowledge that it was Congress which mandated the inclusion of "all earnings and income of the noncustodial parent" in calculating child support. His theory that Congress intended to preempt the field in regard to veterans disability benefits is expressly refuted by the Congressional mandate that Michigan and other states establish child support guidelines that include all earnings and income. None of the federal statutes cited by Petitioner relating to disability benefits expressly prohibits states from using these benefits in calculating support. The attempt to imply such a prohibition based upon an Petitioner's interpretation of language in those statutes is inconsistent with reason, logic or common sense. There is no authority for this interpretation and none is cited by Petitioner. Moreover, the proposed interpretation defeats the very purpose and intent of those statutes and skews applicable rule of statutory construction.

II. FEDERAL LAW REGARDING VETERANS ADMINISTRATION DISABILITY BENEFITS DOES NOT PRECLUDE STATES FROM CONSIDERING SUCH BENEFITS AS INCOME FOR PURPOSES OF DETERMINING THE APPROPRIATE LEVEL OF CHILD SUPPORT. STATUTES ENACTED FOLLOWING THE *ROSE* CASE DO NOT CONFLICT WITH STATE COURT CHILD SUPPORT GUIDELINE FORMULAS COUNTING THOSE BENEFITS AND THEREFORE, DO NOT PREEMPT THE STATE COURT ACTION IN THIS CASE.

A. By failing to properly object to the use of the Michigan child support formula in lower court proceedings on the basis of federal preemption, Petitioner has failed to preserve this issue for review and certiorari should be denied.

Respondent did not raise the issue of federal law preemption in either his objections to the Referee's proposed order (Respondent's Appendix O) or in his amended motion to set aside that order. (Respondent's Appendix N) Accordingly, the main issue raised by Petitioner in this appeal was never properly preserved in the lower courts. Respondent raised the lack of issue preservation in the Michigan appellate courts. They failed to reach the issue and denied

Petitioner relief on substantive grounds. Because the issue was not properly preserved in the Michigan lower courts, review on a writ of certiorari is unwarranted. ***City of Springfield v Kibbe, 480 U.S. 257, 107 S. Ct. 1114, 94 L.Ed. 2d 293 (1987).***

Pursuant to Michigan procedure in post-judgment child support litigation, an aggrieved party must commence proceedings to modify child support by filing a motion in the trial court. The matter is then referred to the Friend of the Court for a contested hearing before a referee. The referee makes a decision on the substantive legal and factual claims of the parties and prepares a proposed order consistent with those findings. The proposed order becomes the ruling of the trial court unless 1) a party files a written objection which "must include a clear and consise statement of the specific findings or application of the law to which an objection is made" and 2) schedules a hearing before a trial judge to have his objections heard. See ***Michigan Court Rules, MCR 3.215(E)(4)***. While Petitioner did file a written objection to the referee's proposed order it did not allege that it was invalid because of federal preemption. Even though he filed a trial brief with the referee detailing his claim that federal law prevented an order of support based on his disability benefits, he did not object to the referee's rejection of those arguments. Under Michigan law, Petitioner should have been barred from raising the claim in any future appellate proceedings. Since Petitioner did not schedule the matter for hearing, the trial court judge signed the referee's proposed order. After this order was entered, Petitioner scheduled a hearing in the trial court and attempted to have the order set aside based preemption and on this Court's decision in ***Howell v Howell, supra***. At he hearing he acknowledged that this claim was not included in his written objection or motion. Petitioner's attorney acknowledged that his only written objection stated as follows: 1) FOC calculations are are (sic) inaccurate and

incorrect as to the amounts received by Plaintiff-Father, 2) the referee made an incorrect analysis based off a very broad interpretation of 2.01(C)(4) [guideline formula provision that includes veterans disability benefits] and Plaintiff's VA Disability benefits that has been narrowed by 2.01(1)[guideline formula reference which does not exist] and the case law provided." Respondent's Appendix, O. He also claimed that the ***Rose*** case had been overturned by ***Howell***. These objections did not preserve the issue raised on appeal in the Michigan Courts or in this Petition.

B. *Rose v Rose, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987*) held that VA disability benefits may be considered by state courts in determining the level of child support even where those benefits are the sole source of income for the veteran and would require that he pay his support from the benefit he receives.

The United States Supreme Court established a 30 year precedent holding that VA disability benefits can be considered by state courts in determining the proper level of child support. The Court found that federal statutes establishing the benefits, their distribution, apportionment and protection from collection by creditors did not preempt state-court jurisdiction over those benefits. An important component of the Court's rationale was the finding that VA disability benefits are specifically designed to support not only the veteran, but the veteran's family as well. State court orders with regard to child support are designed to insure that the veteran's family receives that intended benefit. This decision has never been overturned and fully justifies the retroactive increase in support for Petitioner's children.[2] Its

[2] Petitioner-Appellant argued that Rose had been "superceded" by ***Howell v Howell, 137 S Ct 1400 2017)***, at the hearing on February 28, 2018. (2-28-2018 Tr 14) However, he never explained why he held this view. In the ***Howell*** opinion the Supreme Court favorably referred to the ***Rose*** case, finding that its recognition of broad state control over spousal and child support would allow state divorce courts flexibility in dealing with potential injustices in application of claims of federal preemption.

justification is enhanced in this case because Petitioner was found to have willfully and intentionally concealed the receipt of these benefits for the purpose of avoiding his support obligation. Moreover, when he obtained a 69% reduction in his child support effective May 16, 2013 based upon the service connected disability which became the basis for VA benefits, Petitioner understood and agreed to retroactive effect to any increase in support those benefits justified. Equity demands that his fraud be corrected not absolved. He has waived any claim that his disability benefits must be excluded by agreeing that once received, they could be used to help support his children. He is estopped from claiming otherwise in either the trial court or in this appeal.

Petitioner claims that ***Rose*** was wrongly decided or superceded. He suggests that its viability has been undermined by Congressional enactments designed to deal with attempts to divide VA disability benefits in the divorce setting. He cites no federal or state case law to support his argument. To the contrary, courts throughout the country follow the declaration in ***Rose*** that family law support matters are within the province of state law unless "Congress has positively required by direct enactment that state law be pre-empted." See the following sampling of cases: ***In re Marriage of Stanton, 190 Cal. App. 4th 547, 551, 118 Cal. Rptr. 3d 249, 252 (2010)*** holding the military expense pay can be treated as income for child and spousal support determinations. ***Paylor v. Allegheny Cty. Family Div./Domestic Relations, No. 2:16CV1071, 2017 WL 4235944, at *8–9 (W.D. Pa. Sept. 25, 2017)*** holding that the state court's enforcement efforts were consistent with the legislative intent of the federal statutes relied on by the Petitioner to argue exemption. In other words, "the purpose of the federal exemption statute is to serve as a shield for the veteran and his dependents, not to serve as a sword to be used by the veteran

against his dependents." The court in ***Nelms v. Nelms, 99 So. 3d 1228, 1230–33 (Ala. Civ. App. 2012)*** adopting the rationale expressed in ***Rose***, held "that a spouse whose income includes VA disability benefits can be ordered to pay periodic alimony, even when all or a portion of the alimony necessarily will be paid from those benefits." ***Loving v. Sterling, 680 A.2d 1030, 1031–33 (D.C. 1996)*** held that ***Rose*** justified garnishment of a veteran's bank account to collect child support even though it was the depository of his disability benefits. ***In re Marriage of Wojcik, 362 Ill. App. 3d 144, 164–67, 838 N.E.2d 282, 299–301 (2005)*** held that "barring express preemption by Congress, a trial court should not ignore the circumstance that one party receives monthly income in the form of a government benefit payment" and "that a trial court may properly consider a party's receipt of veterans' disability benefits in determining a party's obligation to pay maintenance, as well in determining whether the party is entitled to an award of maintenance. ***In re Marriage of Anderson, 522 N.W.2d 99, 101–02 (Iowa Ct. App. 1994)*** held that since veteran's benefits are not solely for the benefit of the veteran, but for his family as well, an award of alimony out of those benefits was allowable where the remainder left him with sufficient income to live comfortably.

Given the breadth of the decision in ***Rose,*** its declaration that disability benefits would not be exempt absent an express Congressional declaration on the matter and its recognition that VA disability benefits are specifically designed to benefit the veterans family this Court must reject Petitioner's attempt to undermine its continued viability.

C. *10 USC §1408* did not create a federal exemption for Petitioner's disability benefits barring them from consideration in determining the what level of child support is best for his family.

We need to be clear about the Petitioner's goal. He seeks to bend and contort the language of this statute to create an unlimited exemption for his VA disability benefits insuring that they will never be used by the courts of this state or any other state in determining how much he should pay in support. Without any regard for the limited purpose of the legislation he relies upon or the purpose of the benefit so restricted or its dramatic impact on the dependents of veterans, he blithely concludes the Congress intended to enforce the selfish and irresponsible interpretation that he has espoused in his Petition. His argument is absurd and illogical. His interpretation of the statute contorted and inconsistent with the manner in which Congress has accommodated the federal and state interests involved.

First, Petitioner-Appellant erroneously claims that there is a presumption that whenever Congress enacts a benefit law or a law designed to shield that benefit from state legal process, preemption is absolute. He claims that a state court's ability to act upon or issue process with respect to those benefits must be authorized by express statutory language. This premise was properly rejected in ***Rose v Rose, supra***. This Court's long standing recognition that where a state court is acting the family law field, federal preemption is not presumed, but must be "positively required by direct enactment" continues to be the appropriate approach to state and federal interaction when it comes to relationship between federal benefits law and state court child support law.

"We have consistently recognized that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States. On the rare occasion when state family law has come into conflict with federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be preempted. Before state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests." ***481 US 919, 625.***

Petitioner rejects this approach and claims express language in federal benefits statutes must expressly provide authority for the states to act. He argues for adoption of this test without regard to its detrimental affect on existing law and the protections Congress sought to put in place by mandating states to enact guidelines for determining appropriate support and providing for efficient enforcement of support orders in state courts.

Petitioner provides no authority for his interpretation of ***10 USC §1408.*** No case has held that Congress intended this legislation to exempt state courts from considering VA disability benefits as income in determining child support. The statute was "to remove the effect of the United States Supreme Court decision in ***McCarty v. McCarty, 453 U.S. 210 (1981)***... by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation." The legislative history makes no mention of the purpose claimed by Petitioner in his Petition. See ***S. REP. 97-502, S. Rep. No. 502, 97TH Cong., 2ND Sess. 1982, 1982 U.S.C.C.A.N. 1596, 1982 WL 26722 (Leg.Hist.)***. It does not deal with child support. Its provisions do not even apply to Petitioner because he is not a retired service member and does not receive VA disability benefits in lieu of retirement benefits. This statute was designed to make military retirement subject to state court division, not to restrict the state courts from considering military pensions in the division of property in a divorce setting. Congress was **not** engaged in "a direct enactment" designed to preempt state law. It was clearly trying to expand the reach of state court authority to protect the spouses of military retirees. Petitioner-Appellant's attempt to turn a law designed to limit a service member's ability to treat his benefit as exempt from state domestic relations court authority into a law which creates a

whole new exemption must be seen as an absurdity. It is an interpretation that is wholly without legal or factual support.

Second, the purpose of the language added to §1408 that he relies upon was never designed to create an exemption or a conflict with state court action . The statute was titled the "Uniform Services Former Spouses' Protection Act". It was enacted in 1982 to overrule the ***McCarty*** decision of the United States Supreme Court which did preclude a state court from dividing military pensions as part of a divorce disposition.. See ***In re Marriage of Hopkins, 142 Cal.App.3d 350, 360, 191 Cal.Rptr. 70, 77 (1983).*** Its purpose was to permit state courts to treat military retired pay as either separate or marital property, according to state law. It addresses property division of retirement pay, not disability benefits, and permits a trial court to award up to 50 percent of "disposable retired or retainer pay" to a nonmilitary spouse. It did create an exception, however, for disability benefits in ***§ 1408(a)(4).*** It is this exception that Petitioner rests his claim for an exemption. This exception was designed solely to prevent double counting of benefits. Nothing in the statute suggests that it was designed to create an exemption of the proportion suggested by Petitioner-Appellant. Only disability benefits received in lieu of retirement benefits are not subject to division. See ***10 U.S.C. § 1201; 38 U.S.C. § 3105.*** Here, Petitioner's disability benefits were not received in lieu of retirement pay and this case does not involve a property division. Therefore, it falls outside the authority of ***10 U.S.C. § 1408.*** Petitioner's disability benefits were therefore not precluded from being considered in an award of child support. See ***Repash v. Repash, 148 Vt. 70, 72–74, 528 A.2d 744, 745–46 (1987)*** holding that the language of the exception for disability benefits paid in lieu of retirement did not preclude the trial court's consideration of VA disability benefits in determining spousal support.

In this case there is no evidence that Petitioner-Appellant received or was entitled to receive military retirement pay. Therefore, there was nothing for him to "waive". Moreover, this case did not involve property division. Respondent-Appellee was not seeking to directly divide Petitioner's disability benefit or order the VA to pay a portion of them to Respondent as child support. Accordingly, the statutory provision relied upon by Petitioner for an exemption does not apply to him. The argument that it does is absurd. The argument that this provision created a vast limitation on the power of a state family court to use VA disability benefits in determining the appropriate level of child support is preposterous. Petitioner's inability to provide any case law to support his claim is not surprising. Indeed, even in cases where the veteran has waived retirement to receive disability benefits, courts interpreting the exemption have held that it only applies to restrict state courts from making direct divisions of disability benefits. Those courts have held that they are not limited in considering both retirement and disability benefits in calculating the entitlement and amount of spousal or child support. See ***Murphy v. Murphy, 302 Ark. 157, 158–59, 787 S.W.2d 684, 684–85 (1990); Allen v. Allen, 650 So. 2d 1019, 1019–20 (Fla. Dist. Ct. App. 1994); Parker v. Parker, 750 P.2d 1313, 1313–15 (Wyo. 1988); Casey v. Casey, 79 Mass. App. Ct. 623, 634–35, 948 N.E.2d 892, 901–02 (2011).***

Rather than arguing that this exemption applies only to an individual who actually receives military retirement pay and actually waives it in order to collect VA disability benefits, Petitioner argues that anyone receiving VA disability benefits is entitled to an exemption because they could never have waived military retirement pay. This conclusion is truly absurd and defeats the underlying purpose of the legislation. Petitioner is unable to point any language in the statute that supports this result.

Petitioner's argument has been was put forward before other state courts and rejected. Petitioner's counsel filed an appeal in Virginia raising the same issues in this case. In a published decision the Virginia Court of Appeals in ***Alwan v Alwan, 70 Va App 599; 830 SE 2d 45 (2019)*** upheld the Virginia statute treating veterans disability benefit as income for child support purposes and disposed of his claims of statutory preemption as follows:

"[The veteran] ... contends that ***Rose*** and its progeny, including ***Lambert***, do not apply here. As he argued in the trial court, father cites certain federal statutes to counter the viability and reach of the Rose decision. However, the statutes he cites are essentially the same statutes that were rejected as controlling in Rose. Therefore, we disagree with father's argument that veterans' disability benefits should be excluded from income calculations when determining support obligations based on the referenced federal statutes. We further disagree with his contention that the decision in Howell requires his veterans' disability benefits be excluded from the definition of income for purposes of calculating a parent's child support obligation. Howell addressed the treatment and division of military disability benefits as "property" in divorce, not as income used to support a veteran's dependents. ***Howell, —— U.S. at —— – ——, 137 S. Ct. at 1403-06***. The United States Supreme Court stated that it "need not and ... [will] not decide" how a state court can "take account of the contingency that some military retirement pay might be waived, or ... take account of reductions in value when it calculates or recalculates the need for spousal support." Id. at ——, 137 S. Ct. at 1406. Howell did not address the calculation of a veteran's income for child support purposes." ***Alwan v. Alwan, 70 Va. App. 599, 610-11 (Va. Ct. App. 2019).***

In re Braunstein, 236 A.3d 870 (2020) contained an explicit rejection of Petitioner's assertions by the New Hampshire Supreme Court:

"In Brownell, we relied upon "the logic of ***Rose***" to hold that federal law does not preclude a state court from including veterans' disability benefits as income for alimony purposes. Brownell, 163 N.H. at 598-99 (quotation omitted). We did not then have occasion to apply ***Rose*** to child support calculations. We now join the courts that have applied ***Rose*** and hold that the trial court in this case did not err by including Husband's veterans' disability benefits as income for the purposes of calculating child support.

To the extent that Husband contends that ***Rose*** has been "overruled" by subsequent amendments to the pertinent federal statutes, he is mistaken. The statutes upon which Husband relies "to counter the viability and reach of the ***Rose*** decision . . . are essentially the same statutes that were rejected as controlling in ***Rose***." Alwan, 830 S.E.2d at 50; see Iannucci v. Jones, No. 345886, 2019 WL 6977116, at *4 (Mich. Ct. App. Dec. 19, 2019) (reviewing the current versions of 42 U.S.C. § 659 and 38 U.S.C. § 5301(a)(1) and deciding that they "do not prevent state courts from

considering veterans' disability benefits as income in calculating child support and . . . do no[t] preempt state law in this field").

Husband is also mistaken to the extent that he argues that ***Howell v. Howell, 137 S. Ct. 1400 (2017)***, abrogated ***Rose.*** "***Howell*** addressed the treatment and division of military benefits as 'property' in divorce, not as income used to support a veteran's dependents." ***Alwan, 830 S.E.2d at 51; see Howell, 137 S. Ct. at 1403-06.*** "Howell did not address the calculation of a veteran's income for child support purposes." ***Alwan, 830 S.E.2d at 51; see Lesh v. Lesh, 809 S.E.2d 890, 899 (N.C. Ct. App. 2018)*** ("Nothing in ***Howell*** alters the holding in **Rose** that military disability benefits are not required to be excluded from the definition of income for the purposes of calculating the resources a party can draw upon to fulfill child support obligations.").

In fact, Petitioner's position has been rejected by every state court addressing the issue.

He has cited no authority to the contrary.

D. *42 U.S.C.. § 659* was designed to afford state courts greater access to by a veterans dependents to his disability benefits for purposes of paying child and spousal support and does not exempt Petitioner-Appellant's VA disability benefits from consideration for purposes of determining the appropriate amount of child support.

Petitioner-Appellant takes a statutory provision designed to expand access to a veteran's disability benefits by the legal process of state family courts and attempts to impose an interpretation that does the opposite. The language of the statute is as follows:

§ 659. Consent by United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations

(a) Consent to support enforcement
Notwithstanding any other provision of law (including section 407 of this title and section 5301 of Title 38), 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 enacted pursuant to subsections (a)(1) and (b) of section 666 of this title 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 or by an individual obligee, 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 (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments--

(V) by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary 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).

This statute clearly indicates in subsection (a) that veterans disability benefits are monies paid by the federal government to individuals the entitlement to which is based upon renumeration for employment and are, therefore, subject to the legal process of the state court for the purpose of collecting child and spousal support. Petitioner-Appellant ignores this more general and expansive grant of accessibility to state court process and, by contorted construction, reads the more specific and restricting provisions in subsection (h) as the sole basis for such access. The restrictions in subsection (h) were included to deal with the potential of double-dipping into VA disability benefits, and were not included to define the only scope of state court legal process. If this Court were to read subsection (h) as defining the scope of state court access an anomaloy is created, i.e. only veterans who are also receiving military retirement pay and have waived that entitlement to receive VA disability payments are subject to state legal process, while veterans not entitled to those benefits are not. There is no rational basis for this distinction. A large class of dependents of the latter group of veterans are disadvantaged in collecting child

and spousal support without cause. Petitioner's interpretation is contrary to purpose of the statute and deviates from the guidance provided in ***Rose, supra*.** Petitioner places his dependents outside the benefitted class without a showing of an express Congressional intent to do so and without showing how this classification is justified. This Court must reject this anomalous and self-serving interpretation.

Moreover, **§659** does not contain language which precludes a state court from including VA disability benefits in Petitioner's income to determine the level of child support he is required to pay. The statute addresses the use of various collection devices that a state court can use to access VA disability benefits directly. It is Respondent's position that this access extends Petitioner's benefits and allows her to garnish or levy against those benefits. However, no such a authority is required in this appeal because the only access granted by the trial court in this case was the inclusion of VA disability benefits in Petitioner's income to determine the amount of support to be paid. The trial court was not ordering the garnishment or attachment or levy of Petitioner's disability benefits. Therefore, any restriction on the trial court that can be implied from ***§659*** does not apply to this case.

E. The Michigan Court of Appeals opinion correctly applied the doctrine of federal preemption and correctly interprets the statutes involve in light of and as required by the United States Supreme Court in *Rose v Rose*, supra.

Rejecting Petitioner's claim that federal legislation creating veterans benefits is "absolute", the Court said:

"... Our United States Supreme Court has clarified that traditionally, 'domestic relations is ... the domain of state law. ... 'There is therefore, a presumption against preemption of state laws governing domestic relations.' ... Family and family-property law must 'do major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overriden.'" (citations omitted) (Slip Opinion p 4)

The court found that the statutes relied upon by Petitioner did not expressly prohibit state courts from considering the amount he received in disability benefits in calculating the appropriate amount of support. Therefore, the state court was not preempted by federal law.

The Court also properly held that the ***Rose*** decision had authoritatively passed on the issue and held that since the federal statutes did not unequivocally indicate that VA disability benefits were to provide solely for a veterans' support, but were intended as compensation for disabled veterans and their families, no federal preemption precluded the inclusion of those benefits in the veterans income for determining child support. (Slip Opinion p 5) The Court examined each statute and found that neither of them contained such an express restriction on state court power. (Slip Opinion pp 5-6)

The Court also rejected any suggestion that the United States Supreme Court decision in ***Howell v Howell, supra***, had any impact on the viability of the ***Rose*** decision.

"Additionally, at the trial level, Petitioner argued that the United States Supreme Court's decision in ***Howell, ___ US ___; 137 S Ct 1400***, overturned **Rose** and supported his assertion that veterans' disability benefits are not subject to division by state courts. Petitioner has not raised the same argument on appeal, but rather he now indicates that ***Howell*** supports the proposition that veterans' disability funds remain expressly protected under ***38 USC 5301(a)(1)***, leaving state courts without any authority to enter an order affecting these benefits. However, this argument also lacks merit because the ***Howell*** decision says nothing about the propriety of a state court's consideration of such benefits in calculating an award of child support. Rather, ***Howell*** addressed only the treatment and division of military disability benefits as "property" in divorce, not as income used to support a veteran's dependents. Id. at ___; 137 S Ct at 1403-1406. Accordingly, we disagree with Petitioner's contention that the Howell decision had any impact on the viability of the *Rose* decision. This is further buttressed by the fact that after the United States Supreme Court released its ruling in ***Howell*** in 2017, several state courts continued to hold that veterans' disability benefits could be considered as income for child support purposes. See, e.g., ***Lesh v Lesh, ___ NC App ___; 809 SE2d 890 (2018); Nieves v Iacono, 162 App Div 3d 669; 77 NYS2d 493 (2018).***

III. PETITIONER HAS PROVIDED NO COGENT REASON FOR THIS COURT TO UNDERTAKE A REVIEW OF ITS DECISION IN ROSE V ROSE AND OVERTURN SETTLED LAW RELIED UPON AND IMPLEMENTED BY THE STATES.

A. Statistical data regarding claimed increases in the occurrence and severity of service connected injuries is not properly before the Court because it was not made a part of the record in either the state trial court or appellate courts. Moreover, Petitioner offered no evidence that this data was used by Congress in formulating a change in the law regarding the ability of state courts to consider disability benefits in determining the level of child support.

Petitioner argues that Congress intended that veterans with service connected disabilities be exempt from having their child support affected by their disability benefit. To explain why this was intended, Petitioner recites statistical information about a claimed increase in the incidence and severity of service connected injuries. He did not present this evidence in the trial court and did not obtain consent from the Michigan appellate courts to make this evidence part of the record on appeal. He offered no such argument in the trial court. On appeal, he simply appended these statistics to his argument as if their accuracy and relevancy were inherently admissible. As a result, Petitioner's analysis and conclusions have never been tested. More importantly, he presents no legislative history to show that this information prompted any of the legislation he claims created this special class of exempt disabled veterans. He offers no Congressional findings identifying these statistics as justification for the abrupt abolishment long established state court efforts to comply with Congress's mandate requiring the states to rationalize, equalize and maximize child support***. 42 U.S.C. §667; 45 C.F.R §302.56***. He urges adoption of a benefit program that ignores and violates the express provisions Congress did enact to insure that service connected disability benefits provided for both the veteran and his dependents. See ***38 U.S.C §1115.*** He does not offer evidence that increasing the disabled veteran's benefit at the expense of his dependent children will cure the ills he outlines. Why

would Congress vest the disabled veteran with the discretion to make the initial determination of how much his dependent children should receive from his benefit?

This part of Petitioner's plea argues for a public policy change. He wants this Court to implement it by agreeing to hear his appeal and then making a wholesale alteration in what has been the law governing federal-state relations for over 30 years. Apparently this Court will assess whether the new exemption from state court action will make the veteran whole. How does exempting the veteran's disability benefits from consideration in determining state orders regarding child support advance the cause of the disabled veteran? How does this unprecedented interpretation insure that Congressional concerns for the support of the veteran's dependent children are satisfied? Shouldn't we assume that a concerned, mentally competent and compassionate disabled veteran would want his dependent children living with their other parent to be supported? Why would we make that disabled veteran the sole determiner of the amount of support those dependents receive without any apparent standard by which to guide his or her decision?

Petitioner hardly fits the profile of the sympathetic, disadvantaged disabled veteran. By the time the litigation over child support ended he was gainfully employed and earning a substantial income. There was no testimony that he faced challenges to his mental health or was suicidal. There was no testimony presented at the trial level to suggest that he was suffering any great financial hardship. In fact, he could not recall how he spent the $131,000 in veterans disability benefits he received between May 2013 and April 2017. He acknowledged that none of it was left. Because he concealed the receipt of these benefits, the family court did not assess child support based upon the receipt of this money. If anything, the factual circumstances of this

case demonstrate why Petitioner's claim to complete control of his benefits fails to insure the goal of sustaining someone who became disabled in the service of his country so that he can provide for himself and his family..

B. The apportionment procedure under 38 U.S.C. §5307 was intended to adjudicate claims that a veteran's use of his disability benefit fails to fulfill his responsibility for child support in the context of what the state courts have ordered.

Petitioner suggests that the Veterans Administration should make the decision on how much dependent children in the custody of their other parent should receive by making an apportionment under ***38 U.S.C. §5307***. However, under the express authority given the Secretary of the Deparment of Veteran's Affairs, apportionment is limited to those situations where the veteran is "not reasonably discharging his or her responsibility for the children's support." ***38 C.F.R §3.450(a)(1)(ii); Batcher v Wilkie, 975 F. 3d 1333, 1335 (2020)*** The Veterans Administration is required to make a determination in isolation and without the guidance of the child support guidelines mandated by Congress and fashioned to meet the characteristics of the state that created them. The statutes relied upon by Petitioner to justify overturning settled law did not include the procedural rules and personnel resources needed for the Veteran's bureaucracy to handle a new role formally undertaken by the state courts in making these determinations and enforcing them.

C. Congressional enactments regarding limits on the accessibility of disability benefits to legal process do not constitute evidence that Congress intended there was no room for the States to act when determining the appropriate level of a veteran's support obligation.

None of the statutory provisions which Petitioner claims require overturning the existing law which allows state courts to consider Veterans disability benefits in determining the appropriate amount of child support. **38 U.S.C. §5301** does not say that state courts cannot

consider disability benefits as income for purposes of establishing the appropriate level of child support. It's prohibition on assignability, exemption from taxation, and exemption from the claims of creditors cannot be used to infer a prohibition on the right to consider disability benefits in determining child support. Forbidding attachment, levy or seizure under legal or equitable process is not the same as prohibiting a state family court from considering disability benefits in formulating a child support award. The process which a state court is barred from using is a legal or equitable process by which attachment, levy or seizure is obtained. No rational argument can be made that this language constitutes a bar to a state family court considering disability as income for purposes of implementing child support guidelines mandated by Congress. In fact, in ***Rose***, this Court has already rejected Petitioner's interpretation of the same language in the current statute.

"... Though the legislative history for this provision is also sparse, it recognizes two purposes: to avoid the possibility of the Veteran's Administration ... being place in the position of a collection agency and to prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income. ... Neither purpose is constrained by allowing the state court in the present case to hold appellant in contempt for failing to pay child support. The contempt proceeding did not turn the Administrator into a collection agency; the Administrator was not obliged to participate in the proceeding or to pay benefits directly to the appellee. Nor did the exercise of state-court jurisdiction over appellant's disability benefits deprive the appellant of his means of subsistence contrary to Congress' intent for these benefits are not provided to support appellant alone." ***481 U.S. 619, 630 (1987).***

This Court also determined that the grant of authority to the Secretary of Veterans Affairs to apportion benefits to a dependent child did not evidence an intent to prohibit a state court from ordering child support based on the veteran's disability award, even if that was the only income he had available to him.

"This jurisdictional framework finds little support in the statute and implementing regulations. Neither mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on the court's ability to enforce such an order.

The statute simply provides that disability benefits may be apportioned as may be prescribed by the Administrator.… **The regulations broadly authorize apportionment if the veteran is not reasonably discharging his or her responsibility for children support.… In none of these provisions is there an express indication that the administrator possesses exclusive authority to order payment of disability benefits as child support. Nor is it clear that Congress envisioned the Administrator making independent child-support determinations in conflict with existing state court orders. The statute gives no hint that the exercise of the Administrator's discretion may have this effect. The regulations contain few guidelines for apportionment and no specific procedures for bringing apportionment claims.**

Apart from these inadequacies, to construe the statute as appellant suggests could open for reconsideration a vast number of existing divorce decrees affecting disabled veterans and lead in future cases to piecemeal litigation before the state courts and the Administrator. Given the traditional authority of the state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes that do contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would have would surely have been more explicit had it intended the Administrator's apportionment power to displace the state court's power to enforce an order of child support. Thus, we do not agree that the implicit preemption appellant finds in the statute is 'positively required by direct enactment' or the state courts award of child support from appellant's disability benefits does major damage to any clear and substantial federal interest created by this statute." (Emphasis supplied) ***481 U.S. 619, 626-628.***

This analysis continues to provide proper guidance. Petitioner has failed to advance any reason to adopt his absolutist approach to federal preemption. The impact of applying such an approach does great harm to the goals of veterans benefit law to provide financial assistance to both the veteran and his dependents.

This deleterious impact can be seen in this case. Petitioner reduced the amount of support for his children by claiming disability and by concealment and deception appropriated every dollar of his disability benefits to his own benefit and control despite his legal obligation to support his children and to use his disability benefit for that purpose. It is regrettable that Petitioner cannot acknowledge the harmful effect of his refusal to pay a share of his benefit to his dependent children simply because they were in the custody of his former spouse. The manner in

which existing statutory interpretations accommodate the interaction of state and federal law in this area should not be rejected by the absolute approach urged by Petitioner. His conduct in this case was outrageous, fraudulent and an unprincipled violation of his duty to support his children. The law in effect at the time he did this clearly required disclosure and, if necessary to meet his support obligation, payment from those benefits for that purpose. Petitioner did not seek declaratory relief on the basis of his claimed absolute right to control what the VA would pay on behalf of he and his children. He did not pay the benefits into escrow pending the outcome of such litigation. He concealed his receipt of the funds and spent them in a manner which he can no longer recall, despite the fact that the amount paid in benefits included allocations for his dependent children. Now, at great expense to Respondent, Petitioner comes to this Court requesting that it sanction these deceitful actions by adopting his proposed change in the law. He does so even though he and his attorney were sanctioned for their conduct in the presentation of this litigation and have still not paid those sanctions.

D. This Court's decision in *Howell* did not overrule or undermine *Rose* and did not suggest that State child support guideline laws are preempted.

This Court's decision in ***Howell*** did not overrule ***Rose*** and did not create the exemption Petitioner espouses. When Congress enacted legislation which gave state family law courts the power to divide military retirement pay ***Howell*** held that this power did not extend to such pay that is waived in order to receive veterans disability pay. States had no power to divide disability benefits even though a reduction in a former spouses share of military retirement pay resulted from the waiver. Disability payments did not take on the divisible nature of the military retirement pay when it was selected in lieu of military retirement pay upon the veterans disability. However, this Court's decision expressly stated that it was not overturning ***Rose*** and that while

state family courts could not merely order payment of an equal portion of the VA disability benefits, they were free to take the potential reduction in the value of the divisible military retirement pension into account in awarding other property or calculating or recalculating the need for spousal support.

This flexibility afforded state family law courts is also appropriate with respect to child support. While a State court could not order the Veterans Administration to pay disability benefits to a custodial parent as child support, it could use the amount of benefits awarded and paid to the non-custodial parent in calculating the amount child support he or she is required to pay. The freedom and flexibility afforded by allowing this calculation insures that the disability benefit is available to the non-custodial parent's dependent children. This accommodation to the States insures that children are financially supported and recognizes the fact that the level of disability benefits themselves are based upon the non-custodial veteran's dependents. The veteran in ***Rose*** conceded that nothing in the structure or payment of disability benefits could be seen as a bar to a state family law court from considering the amount of the benefit in determining the appropriate amount of child support. ***Rose v Rose, 481 U.S. 619, 626.*** Petitioner began receiving disability benefits long after the divorce settlement was entered. The child support provisions of divorce decree were subject to post-judgment modification based upon a change in circumstances. As a result, Petitioner commenced this litigation by filing a request to reduce his child support based upon his disabling service connected injury. While it was acknowledged that his decline in earning capacity due to this injury justified a reduction in the level of his support the order reducing support allowed reinstatement of his support obligation should he be awarded veterans disability benefits. Petitioner agreed that the receipt of

disability benefits would be a basis for reopening and recalculating his support obligation retroactively. His fraudulent concealment of the receipt of these benefits prevented summary reinstatement of his support obligation and allowed him to misappropriate that portion of his benefit that should have been paid to his dependent children. His concealment of his receipt of these benefits also rendered apportionment by the Veterans Administration impossible. For over three years he failed to contribute any of his benefits to his dependent children even though the amount of money he was receiving was enhanced by claiming them as such. His outrageous conduct and dishonest misappropriation should disqualify his effort to enlist this Court's help in changing the long established law so as to justify his behavior after the fact and by rendering State courts powerless to rectify the wrong and enforce the agreement that allowed him to reduce his support obligation in the first place. Petitioner should be estopped from seeking relief in light of his conduct. He effectively waived any claim to the newly fashioned exemption he urges upon this Court.

E. Current law with regard to the right of States to consider VA disability benefits as income for purposes of child support determination does not "repurpose" federal law creating those benefits.

Petitioner claims that permitting the states to consider veterans disability benefits as income in determining the appropriate level of support constitutes a "repurposing" of the benefits. This claim is absurd and provides no rationale for changing the law.

First, allowing the states to make provision for the support of dependent children is a goal embodied in the creation of the disability benefit. Congress recognized that a service connected disability reduced the veteran's earning capacity and impacted his ability to pay support. Therefore, the level of the benefit is enhanced by the disabled veterans claim that he has a

dependent spouse and children. Congress intended dependent children to benefit from the veterans disability award and was an essential purpose or goal of the award.

Second, Congress is charged with knowledge that the law was well settled when the disability benefit was created and statutory restrictions were imposed. The amendments to the statutes cited by Petitioner as basis for his exemption were enacted after the decision in ***Rose***. This Court's decision in ***Rose*** made it clear that states were permitted to determine the appropriate level of child support based upon the enhancement of income the benefit affords. It would be absurd to do otherwise. The undertaking of such a goal is wholly consistent with the nature of the benefit.

Third, in establishing an apportionment option, Congress recognized that the Veteran's Administration should be able to insure that dependents are taken care of by making direct payments to them. In creating this option, however, Congress recognized that the VA should only be involved in ordering such payments where the dependent children do not reside with the disabled veteran and only upon a finding that the veteran is "not reasonably discharging his or her responsibility for the ... children's support." ***38 C.F.R. §3.450(a)(1)(ii)***. The Secretary of the Department of Veterans Affairs was fully aware that state family courts establish support levels consistent with the needs of the children and the resources of the parents and that the Department's role would be limited to cases where the veteran failed to use is benefit for the welfare of his dependent children.

Fourth, if Congress intended to create a disability benefit that was impregnable and off limits to the states, they could have expressly said so. They did not. Moreover, if that was Congress' intent to do so why did it not create a nation-wide system complete with federal child

support guidelines and require an apportionment in every state divorce case where a disabled veteran has minor children and/or in every state court post-judgment case where there has been a change in circumstances? We know they did not because it was not Congress' intent. They were creating a benefit that was subject to restrictions, but capable of being considered by the long established state law system and practice designed to make rational decisions about the needs of dependent children.

Current law does not "repurpose" veterans service connected disability benefits by using state resources to insure that those benefits are allocated in a manner that benefits both the veteran and his dependent children. The system Petitioner urges upon the Court is one that fails to insure that dependent children are take care of and allows the veteran to control disposition of his benefit even though it may deprive his children of the financial support they need. It is a system Petitioner took of advantage of by concealing receipt of his benefits and making them unavailable to meet his children's needs.

F. The fact that Congress is not expressly preclude the State courts from using VA disability benefits in child support calculations is significant evidence that the current law is an appropriate accommodation of the state and federal laws dealing with the relationship between the federal benefit and the state laws regarding how those benefits relate to the appropriate level of child support.

Petitioner claims that his absolute preemption approach must be adopted because Congress did not specifically preclude the states from considering VA disability benefits in calculating child support. Respondent asserts that existing law in this area views this same fact as evidence that there is no Congressionally created bar on the power of the states to do so. The more appropriate and settled view is that the failure of Congress to prohibit what the Michigan legislature has done in response to federal mandates means that Michigan's guidelines which

allow the consideration of disability benefits in determining the appropriate level of child support do not violate federal law and are not preempted by Congressional enactments creating and limiting access to these benefits.

Petitioner's approach is fraught with dangers for which there are no Congressional cures built-in. The divorced veteran with dependent children living with the other parent would be free to conceal his disability benefits and spend them on whatever he wishes, preventing the state courts from formulating a support order that meets the actual cost of rearing children. The Congressional goals of improving the consistency and equity of child support awards are sacrificed. Improved efficiency of the court procedures mandated in the child support guideline system for adjudicating and enforcing child support awards is lost. In its place, Petitioner offers the apportionment process which is dependent upon the custodial parent making and litigating a claim. Not only is there no mandatory processing of such claims arising from any state court custody order, there is no guarantee the custodial parent would even be aware of the veteran's eligibility for, pursuit of or actual receipt of the benefit. There is no federal guideline to insure a reliable, uniform and efficient support system. Congress left the VA Administrator with the obligation to determine whether "the veteran is not reasonably discharging his or her responsibility for the ... children's support." ***38 C.F.R. §3.450(a)(1)(ii)***. Congress did not direct the Secretary to research these issues and formulate standards for what is appropriate or sufficient support. Not only is this formula amorphous and without standards it is framed in the negative. Rather than pledging a search for an amount of support that it actually takes to rear children, this formula focuses upon a claimed insufficiency without a standard for determining what is sufficient.

If, as Petitioner argues, Congress created a singular benefit conferring complete control to the disabled veteran as a means of attracting people to the military, it will have done so on the backs of the veterans's dependents. There is no evidence that Congress made such a choice. This Court should not overturn the settled law in this area. The current law creates a workable accommodation of state and federal interests by allowing the disability benefit to meet the needs of both the veteran and his family.

RELIEF

Respondent requests that this Court deny Petitioner's Petition for Writ of Certiorari.

June 28, 2021

Respectfully submitted,

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