No. __-____

In the Supreme Court of the United States

ROGER HAWES,
Petitioner,

v.

WILLIAM STEPHENS, BRAD LIVINGSTON, AND PAMELA PACE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Fifth Circuit held that veterans' disability benefits deposited in Petitioner's inmate trust fund (ITF) account are not protected from being used for a state-mandated $100 co-payment charged for medical care under 38 U.S.C. § 5301, which prohibits any legal or equitable process whatever from allowing attachment, seizure, levy or garnishment before or after their receipt when due or to become due. The Fifth Circuit reasoned that because the federal disability benefits protected by this provision were comingled with other funds in Petitioner's ITF they lost their protected status under this provision.

The Fifth Circuit therefore affirmed the District Court's decision that Petitioner could not state a claim under 42 U.S.C. § 1983 because there had been no violation of 38 U.S.C. § 5301.

Both the Third Circuit and Ninth Circuit have held that 38 U.S.C. § 5301 preempts state statutes allowing similar seizures of veterans' benefits and that because the statute protects veterans' benefits at all times, a cognizable § 1983 claim can be brought for an unlawful state invasion of these funds.

Did the Fifth Circuit err in holding Petitioner's federal disability benefits were not protected by 38 U.S.C. § 5301 where they were deposited into his ITF and in further holding that he was precluded from suing Respondent state actors under 42 U.S.C. § 1983 when the state applied funds in his account to satisfy the state-mandated co-payment requirement?

PARTIES TO THE PROCEEDING

Petitioner, Roger Hawes, was the Plaintiff-Appellant below. Respondents, William Stephens, Brad Livingston, and Pamela Pace were the Defendants-Appellees.

Respondent, William Stephens is Director of the Texas Department of Criminal Justice, Correctional Institutions Division and was sued in his official and individual capacity.

Respondent, Brad Livingston, is the Executive Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and was sued in his official and individual capacity.

Respondent, Pamela Pace, is the practice manager of the University of Texas Medical Branch and was sued in her official and individual capacity.

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Roger Hawes, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit issued July 9, 2020.

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued a final opinion on July 9, 2020. (App. 1a–11a), in Case Number 19-40341.[1]

The magistrate's report and recommendation issued on February 4, 2019 in Case Number 6:16-cv-00442 (App. 12a–49a). The district court adopted the magistrate's recommendation and granted summary judgment on March 19, 2019 in Case Number 6:16-cv-01313 (App. 50a–60a).[2]

These decisions comprise the substantive rulings Petitioner seeks to appeal.

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[1] The appendix is presented with the select documents from the record numbered in seriatum at the bottom center, 1a, etc.

[2] The District Court consolidated 6:16-cv-01313 with 6:16-cv-00442.

JURISDICTION

The Fifth Circuit entered judgment on July 9, 2020. (App. 1a–11a). On March 19, 2020, this Court issued a Miscellaneous Order 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 on or before Monday, December 7, 2020.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Congress shall have power…

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

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.

TEXAS GOV'T CODE § 501.063

(a)(1) An inmate confined in a facility operated by or under contract with the department, other than a halfway house, who initiates a visit to a health care provider shall pay a health care services fee to the department in the amount of $13.55 per visit, except that an inmate may not be required to pay more than $100 during a state fiscal year.

***

(3) The inmate shall pay the fee out of the inmate's trust fund. If the balance in the fund is insufficient to cover the fee, 50 percent of each deposit to the fund shall be applied toward the balance owed until the total amount owed is paid….

STATEMENT

1. Introduction

Texas law authorizes collection of annual $100 co-payments for health care costs incurred by inmates. TEX. GOV'T CODE § 501.063. Pursuant to the statute, "[a]n inmate confined in a facility operated by or under contract with the department…who initiates a visit to a health care provider shall pay a health care services fee to the department in the amount of $100." TEX. GOV'T CODE § 501.063(a)(1). The state is authorized to establish inmate accounts for payment of certain authorized fees. TEX. GOV'T CODE § 501.014.

The "department" for purposes of the statute is the state agency of which Respondents Stephens and Livingston are director and executive director, respectively, the TDCJ. TEX. GOV'T CODE § 491.001(a)(3). The Fifth Circuit has previously ruled that the state may take funds from an inmate's trust fund (ITF) account for medical care. *Morris v. Livingston*, 739 F.3d 740, 748 (5th Cir. 2014), *cert denied*, 573 U.S. 909; 134 S. Ct. 2734 (2014).

Petitioner, a disabled veteran, is an inmate at the Michaels Unit of TDCJ in Anderson County, Texas. His sole source of income is VA disability benefits. (App. 51a). In December 2015, $100 was deducted from his ITF as a co-payment for his medical care pursuant to TEX. GOV'T CODE § 501.063.

Petitioner filed a civil rights complaint *pro se* and *in forma pauperis* under 42 U.S.C. § 1983 against Stephens, Williams, and Pamela Pace, a University of

Texas Medical Board practice manager, in their official and individual capacities. Petitioner alleged that Respondents violated 38 U.S.C. § 5301(a)(1) when they garnished, levied, or seized his veteran's disability benefits (VA benefits) from his ITF account to cover the statutory co-payment. Petitioner asserted that the deduction constituted a direct violation of 38 U.S.C. § 5301(a)(1) and governing federal regulations. See 31 C.F.R. § 212 (Section 212).

Petitioner claimed that the TDCJ Respondents violated § 5301 by garnishing his protected disability benefits to satisfy his medical co-payment, failed to implement institutional policies to identify other disabled veteran prisoners who received funds protected by this provision, and engaged in a conspiracy to convert funds belonging to him. By way of this alleged theft, Petitioner alleged, the TDCJ Respondents deprived him of the ability to purchase items necessary to supplement his diet, observe religious holy days, and maintain personal hygiene.

Petitioner also alleged that while he had filed grievances, the grievance process was grossly inadequate and failed to provide any meaningful resolution. Specifically, Petitioner alleged he was denied due process of law because the grievance process "virtually precludes access to any recourse due to financial hardships and burdens." Petitioner also alleged that Respondent Pace had failed to thoroughly investigate his grievances.

Petitioner sought declaratory and injunctive relief, reimbursement and compensatory damages. He requested that Respondents be ordered to stop taking

money from his ITF until another source of income could be established, that TDCJ be required to create a policy and a plan to identify those prisoners who receive VA benefits, and to exempt or otherwise sequester those funds so that they are protected by 38 U.S.C. § 5301(a) from levy, seizure or garnishment by the state. Petitioner also requested third-party oversight of prisoner grievances by an independent committee.

The parties filed cross motions for summary judgment. Petitioner argued that like other financial institutions covered by 38 U.S.C. § 5301 and 31 C.F.R. § 212, the TDCJ through its establishment of ITF accounts was a "financial institution" that had to provide notices of garnishments and to comply with the prohibitions in 38 U.S.C. § 5301, which protects VA disability benefits due or to become due from any attachment, levy, seizure or garnishment whether before or after receipt through any legal or equitable process whatever.

In support of their motion, Respondents relied on the case of *Purvis v. Crosby, et al.*, Case No. 3:05-cv-00025, in which the District Court adopted a magistrate's opinion and recommendation 2006 U.S. Dist. LEXIS 44731; 2006 WL 1836034 (N.D. Fla. 2007), holding that because the veteran inmate's benefits were deposited into his inmate trust account from money orders that came from another bank account, the VA benefits lost their exempt status and where therefore subject to the state-mandated payments.

2. Legal Rulings

An assigned magistrate recommended summary judgment be granted for all Respondents. (App. 12a–49a). The magistrate adopted the same reasoning as the District Court magistrate had in *Purvis*, *supra*, holding that because the VA benefits were withdrawn from one account and placed into the ITF, they lost their exempt status. (App. 21a–22a). Thus, the magistrate concluded that Respondents' imposition of a lien on and collection from the funds in Petitioner's account did not violate 38 U.S.C. § 5301.

Characterizing it as an issue of "first impression", the magistrate addressed whether Petitioner could bring a federal statutory claim for damages under 42 U.S.C. § 1983 for an alleged violation of the restrictions in 38 U.S.C. § 5301. The magistrate concluded that 38 U.S.C. § 5301 created a federal right enforceable under 42 U.S.C. § 1983. (App. 28a–29a).

However, the magistrate agreed with Respondents that because Petitioner had moved money including veterans' benefits from another bank account to his ITF account, and there had been no "garnishment" of his VA disability payments, 38 U.S.C. § 5301 would not apply to the state's withholding of the $100 medical co-payment. (App. 34a–35a). The magistrate recommended summary judgment be granted for Respondents because they did not violate Petitioner's statutory rights under 38 U.S.C. § 5301 as the co-payment was drawn from "unprotected funds." (App. 37a).

The magistrate also concluded that while veterans have constitutionally protected property interests in VA benefits, citing *Cushman v. Shinseki*, 576 F. 3d 1290, 1298 (Fed. Cir. 2009), since the funds in Petitioner's ITF account were not protected by 38 U.S.C. § 5301, he had no due process claim (App. 38a). The magistrate concluded that the Fifth Circuit's decision in *Morris v. Livingston*, 739 F.3d 740, 748 (5th Cir. 2014), *cert denied*, 573 U.S. 909; 134 S. Ct. 2734 (2014), holding that since the state could implement a medical co-payment requiring inmates to pay the annual fee under TEX. GOV'T CODE § 501.063, no procedural due process claim existed with respect to funds in Petitioner's ITF account. (App. 38a–39a).

Because the magistrate concluded Petitioner did not have a protected property interest in the funds in his ITF account and there had been no violation of 38 U.S.C. § 5301, and therefore no deprivation of an actual constitutional or statutory right, his conspiracy claim under 42 U.S.C. § 1983 also failed. (App. 39a–40a).

Finally, the magistrate addressed Respondents' argument that they were entitled to qualified immunity from suits filed under 42 U.S.C. § 1983. In this regard, the magistrate concluded that since Petitioner had failed to show a violation of his constitutional or statutory rights (38 U.S.C. § 5301 was not violated), Respondents would be entitled to qualified immunity and the second-prong consideration of whether a clearly established right had been violated was unnecessary. (App. 43a–44a, citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

The District Court adopted the magistrate's recommendation. (App. 50a–60a). It agreed with the magistrate's core reasoning that the funds deposited into Petitioner's ITF account were not exempt under 38 U.S.C. § 5301. (App. 54a).

Petitioner filed a timely appeal with the Fifth Circuit Court of Appeals. The Circuit Court noted that Respondents had not objected to the lower court's conclusion that Petitioner could sue for a violation of his civil rights under 42 U.S.C. § 1983 on the basis that 38 U.S.C. § 5301(a) had been violated. (App. 5a). Thus, the Circuit Court proceeded on the assumption that "Section 5301(a) may be privately enforced through Section 1983." *Id*.

Taking a broader approach to the question of whether 38 U.S.C. § 5301(a) could be violated by application of the state statutory co-payment provision, the Circuit Court considered "the status of the funds in [Petitioner's] account on…the day the medical co-payment was deducted. (App. 8a). The Circuit Court reasoned that because VA benefits had been commingled with private funds deposited into Petitioner's ITF account, and it was impossible to determine whether the co-payment was charged against the restricted funds, there could be no violation of 38 U.S.C. § 5301. *Id*. The Circuit Court affirmed the district court's summary judgment.

Petitioner seeks leave to appeal to this Court.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's interpretation of 38 U.S.C. § 5301(a) conflicts with at least two other Circuit Court decisions. In *Higgins v. Beyer*, 293 F.3d 683, 686, 690 (3d Cir. 2002), the Circuit Court held that a cause of action under 42 U.S.C. § 1983 could be brought for an alleged violation of 38 U.S.C. § 5301(a)'s prohibition against attachment, levy, or seizure where prison officials had deducted an amount from the inmate's veteran's disability benefits to pay into a state victim's compensation fund. The Third Circuit reasoned that 38 U.S.C. § 5301(a)(1) precluded anyone from using "any 'legal or equitable process' to attach, levy, or seize these benefits" and a violation of the statute created a federal right that was enforceable against the state officials under § 1983. *Id*. at 686, 690.

The Third Circuit's decision followed a similar ruling from the Ninth Circuit. *Nelson v. Heiss*, 271 F.3d 891, 893-896 (9th Cir. 2001), held that veterans' disability benefits were exempt from withholding under § 5301, and the inmate had a right of action under § 1983, even where the inmate consented to and the prison officials authorized a hold to cover purchases of medical-record copies and dental appliances when there were insufficient funds in the inmates account to cover deficits.

The instant case is virtually identical to *Nelson*. By statute, the state of Texas imposed an annual $100 co-payment for medical treatment. As noted by the Third Circuit in *Higgins*, *supra* at 690, this Court "has not yet construed § 5301(a) to determine whether prison officials can attach or seize funds in an inmate's

account derived from VA disability benefits." However, this Court has interpreted a nearly identical provision as prohibiting state prison officials from attaching social security benefits to pay for the costs of prison maintenance. *Bennett v. Arkansas*, 485 U.S. 395 (1988). There, as here, the inmate argued that the state's action was preempted by the Supremacy Clause because it was in conflict with 42 U.S.C. § 407(a) of the Social Security Act, which exempts social security benefits from legal process and, like § 5301(a), provides that "none of the moneys paid or payable…shall be subject to execution, levy, attachment, garnishment, or other legal process." The Supreme Court of Arkansas held there was no conflict between the state statute allowing for the taking of the inmate's benefits and the anti-assignment provision.

This Court disagreed, holding there was clear inconsistency between the state statute and 42 U.S.C. § 407(a), the latter of which, the Court interpreted "unambiguously rules out any attempt to attach Social Security benefits" and the former, which "just as unambiguously allow[ed] the state to attach those benefits." *Bennett*, *supra* at 397-398. The Court concluded that this amounted to an irreconcilable conflict under the Supremacy Clause – "a conflict that the State cannot win." *Id*. at 397.

Here, the Fifth Circuit has come to the opposite conclusion. It did not even cite or acknowledge *Higgins* or *Nelson*, and it completely ignored this Court's decision finding conflict preemption in the *Bennett* case from 1988, which, again, interpreted the nearly identical provision in the Social Security Act.

This Court should resolve the conflict and hold, consistent with *Bennett*, that the state statute here irreconcilably conflicts with § 5301 and Petitioner has a right of action for a violation of that statute under 42 U.S.C. § 1983.

2. The Circuit Court also misapplied federal preemption law and misinterpreted § 5301 on many levels. First, its reasoning that § 5301 did not apply because Petitioner's VA disability benefits were commingled with other funds is contrary to the plain language of the statute and actually irrelevant to its purpose, which is "liberally construed" to protect the benefits from any depletion or dilution whatever, and which considers these funds as "inviolate." *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (renumbered as 5301)). Indeed, this Court has historically broadly and liberally interpreted provisions protective of veterans' benefits. See, e.g., *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (federal statutes protecting servicemembers from discrimination by employers is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *United States v. Oregon*, 366 U.S. 643, 647 (1961) (stating "[t]he solicitude of Congress for veterans is of long standing.").

Indeed, the Court in *Porter* explicitly held that commingling of veterans' disability benefits with other monies did not remove them from the protective scope of § 5301. *Id*. at 160-161. The pertinent focus is whether the benefits "remain[] subject to demand and use as the needs of the veteran for support and maintenance require[]." *Id*. at 161. As here, the Court noted that the VA benefits were the only funds at the beneficiary's disposal, and the statute's purpose was "to protect funds granted by Congress for the maintenance and support of the beneficiaries" and that "deposits such as are involved here should *remain inviolate*." *Id*. at 162 (emphasis added). The Court concluded: "The Congress, we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose – provided the benefit funds, *regardless of the technicalities of title and other formalities*, are readily available as needed for support and maintenance, actually *retain the qualities of moneys*, and *have not been converted into permanent investments*." *Id*. (emphasis added).

Second, as the plain language of the statute provides, it does not matter *when* the funds are deposited because § 5301 very plainly and broadly protects the benefits that are "*due* or *to become due*" and "*before* or *after* receipt". 38 U.S.C. § 5301(a)(1) (emphasis added). That is, they are protected before they are paid to the veteran, i.e., while still in the possession of the federal government, and after they are received by the veteran.

Also, by its plain language § 5301 applies to more than just withholding, liens, attachments, or garnishments, which the Circuit Court seemed to limit it to here. It specifically applies to "*any* legal or equitable process *whatever*." 38 U.S.C. § 5301(a)(1) (emphasis added). See, e.g., *Wissner v. Wissner*, 338 U.S. 655, 659 (1950) (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary).

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

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

> [I]t ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[notwithstanding] any other

> law. . .of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy…. *Id.*

Third, the Fifth Circuit's decision completely ignores and therefore usurps the Supremacy Clause and the principle of federal preemption applicable to veterans' benefits legislation.

Despite this Court's uninterrupted jurisprudence holding federal law in this specific area preempts *all* state law that stands in its way, the Fifth Circuit here concluded that the state could impinge upon these funds and force veterans to pay them over to the state even where, as here, it acknowledged that Petitioner's only source of income are these benefits.

It is of no moment if the funds were commingled, or if the incident complained of happened only once – the statute prospectively protects the benefits due or to become due before or after receipt. The state must yield. *Ridgway*, *supra*, ruled that state courts were prohibited from exercising any legal or equitable process to create equitable run-arounds to a veteran's choice to designate a specific recipient of his or her benefits upon death. 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.

This is because 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). See also *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 subject, "[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*.

This Court has acknowledged Congress's powers in military affairs is "broad and sweeping. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in general matters of the common defense, 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).

Military or service-connected disability pay falls under these same 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.")).

Despite the absolute preemption of state law in this area and the plain and unambiguous language of the federal statute at issue, states have ignored the principle of absolute preemption and the statutory protections provided by the blanket and sweeping prohibition in the plain language of 38 U.S.C. § 5301 leaving states free to repurpose these federally appropriated benefits. The Fifth Circuit's conclusion in this case is no different.

3. The Circuit Court's decision will also do grave damage to veterans nationwide. The protection of veterans' disability pay and its disposition in state court proceedings is an issue of significant national interest at present because of the large and growing number of disabled veterans that depend on such pay. They need all protection that federal law already affords them.

The country is no longer only faced with a population of disabled veterans from the Vietnam and prior wars. The nation's military has been operationally deployed in one theater or another for the better part of three decades. Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4.[3]

Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, supra. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features.[4] As of March 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New.[5] The number was well above 4.5 million as of May 2019 and is increasing at a rate of 117 percent.[6]

Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent or higher, with approximately 900,000 in 2011. VA, Trends, supra at slide 6. That same year,

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[3] www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf
[4] www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html
[5] www.va.gov/vetdata/veteran_population.asp
[6] www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL_2018.PDF

1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id*.

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website:www.disabilitystatistics.org. Thus, according to this data set, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation also conducted a study and found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims.[7] Yet another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems.

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

[7] www.nvf.org/staggering-number-of-disabled-veterans/

in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113.

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

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and

divorces are common. 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 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.[8] The stressors faced by the disabled veteran and his or her family are only exacerbated when they are involved in state court proceedings involving whether or not and to what extent the state court may actually control the disposition of that 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, as in this case, his or her only means of subsistence. The consequences of these situations are inevitably magnified and extremely stressful upon all disabled veterans, and, one could reasonably argue, especially upon those who are incarcerated.

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

This is why this Court has stressed again and again that the judiciary does not have to pain itself with the consequence of an application of clearly expressed federal law in this area. *Mansell v. Mansell*, 490 U.S. 581, 588-592 (1989). It does not have to inquire into the policies of Congress when the law is clear. This is precisely why the unfortunate consequences of military service have historically been recognized and attended to under exclusive and preemptive federal law.

Congress has exercised exclusive legislative authority in these premises since the earliest days of the Republic. See, e.g., *Hayburn's Case*, 2 U.S. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L. Rev. 1081, 1084 (2010). For an excellent discussion of the nature of these benefits and the importance of protecting them see *United States v Hall*, 98 US 343, 349-355 (1878).

Federal law exclusively, comprehensively and completely addresses the disposition of veterans' benefits. Yet, states continue to ignore these restrictions and believe they 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 blind adherence to the notion that veterans' benefits are not absolutely protected by the principles of federal supremacy.

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 that absolute federal preemption over state law 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 Congress does give the state jurisdiction and authority over these benefits, its grant does so in precise and limited ways. *Id*.

A state court lacks authority to invade the federal benefits because they originate from Congress's enumerated powers over military affairs. U.S. Const. Art. I, § 8, cls. 11 – 14. See *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) (*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."). If the state could invade the benefits designated by Congress for the express purpose of support and maintenance of the

armed forces, the function of government would cease. See *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).

As to all veterans' benefits that are *not* explicitly allowed by *Congress* to be diverted, 38 U.S.C. § 5301(a)(1) prohibits a state court from using "any legal or equitable process whatever" to divert these funds through any type of court order, whether *before* (that is in the hands of the government) or *after* receipt.

In the instant case, the Fifth Circuit and District Court ignored the principles of federal preemption and concluded that the state statute could be interpreted to give the state Respondents absolute authority and jurisdiction to include a veteran's disability benefits for purposes of satisfying the medical co-payment. As this Court said in *Bennett* of the identical language in the Social Security Act, the state statute allows what the federal statute prohibits. *Bennett*, 485 U.S. at 397. This, as the Court noted, "is a conflict that the State cannot win." *Id.*

4. The Fifth Circuit's decision allows the state to exercise unauthorized subject matter jurisdiction over veterans' benefits. The State, whether acting by statute or judicial fiat, has no jurisdiction over veterans' benefits, period. Nowhere has Congress given the states the "precise and limited" authority to

exercise jurisdiction and control over veterans disability benefits protected by 38 U.S.C. § 5301. In fact, as this Court most recently confirmed in *Howell*, 137 S. Ct. at 1405, this provision clearly and unambiguously excludes such benefits from state jurisdiction or control. "State courts cannot 'vest' that which (under governing federal law) they *lack the authority to give*. Cf. 38 U.S.C. § 5301(a)(1)..." (emphasis added).

Despite a continuous line of cases from this Court declaring federal laws passed pursuant to Congress's enumerated Article I Military Powers providing benefits for our nation's veterans preempt all state laws that stand in their way, see, e.g., *McCarty v. McCarty*, 453 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); and *Howell*, *supra*, inter alia, the Fifth Circuit ignored the sweep of § 5301 and its clear application.

"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).

In 1988, in furtherance of this jurisdictional exclusivity, 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,[9] 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 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 and it also protects subsequent attempts *by any authority* other than the VA to divert or otherwise dispose of these benefits in a manner that is inconsistent with federal law.

In keeping with this removal of state court subject-matter 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 or federal courts from making any initial or subsequent disposition of veteran's disability benefits, which are considered off-limits by existing federal statutes, particularly, 38 U.S.C. § 5301. Any other court or entity making a decision that disturbs

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

the calculated benefits determination and payments would be an usurpation of the Secretary's exclusive authority and an extra-jurisdictional act.

Petitioner's benefits are jurisdictionally protected from *any legal process* whatever by 38 U.S.C. § 5301.

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. "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, 616-617 (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. *Henderson v Shinseki*, 562 U.S. 428, 441 (2011).

There is a conflict among the Circuit Courts concerning whether veterans have a viable cause of action under 42 U.S.C. § 1983 for a violation of their rights under 38 U.S.C. § 5301. Time and again, this Court has ruled to protect veterans under the federal legislation providing them with rights and benefits, not only because the Constitution requires it, but

because veterans hold a special place in the protective fabric of this nation's laws.

Finally, this Court has held that a civil rights claim is valid where a valid constitutional right secured by statute is infringed upon by the unlawful acts of government officials. *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980). See also *Baker v. McCollan*, 443 U.S. 137, 146-147 (1979) (causes of action under 42 U.S.C. § 1983 must be tethered to the alleged deprivation of an established constitutional right). This Court has previously recognized that federal benefits are a protected property interest and thus a violation of federal law that would deprive an individual of those benefits would be cognizable under 42 U.S.C. § 1983. See, e.g., *Mathews v Eldrdige*, 424 U.S. 319, 334-335 (1976) and *Golden State Transit Corp v Los Angeles*, 493 US 103, 106-109 (1989).

Moreover, Respondents waived any argument that a 42 U.S.C. § 1983 claim could not be established if 38 U.S.C. § 5301 is violated by the state's co-payment requirement. The Fifth Circuit accepted the lower court's conclusion that a viable cause of action exists under 42 U.S.C. § 1983 for a violation by the state of 38 U.S.C. § 5301 and proceeded to analyze only the latter question. Although it erred in that regard, this Court's jurisprudence and the precise constitutional and statutory rights at issue require a ruling that Petitioner's claim should have been allowed to proceed because the state's co-payment statute clearly violates § 5301.

Finally, it cannot be understated that Petitioner's *legitimate* claim may never have come to this Court's

attention had Petitioner not taken it upon himself to challenge the state's action because he was concerned enough about the multitude of other incarcerated disabled veterans who are faced with these unlawful charges against their only source of income. These benefits are critical to incarcerated veterans to allow them access to clothing, medical and dental care, hygiene products, supplemental nutrition and hobbies and crafts – things they need in the correctional environment, and in many cases, critical to their mental and physical well-being. This problem will continue unless this Court addresses the injustice once and for all.

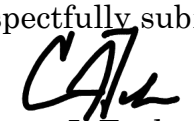
Undersigned counsel is also a veteran and it is only because he provides pro bono and discounted services to veterans nationwide that he became aware of this extremely important case and the erroneous ruling of the Fifth Circuit. Due to the COVID19 pandemic and the fact that communication with prisoners is already difficult, undersigned did not get in touch with Petitioner to discuss filing this petition until Friday, December 4, 2020.

This case is important for all veterans. No matter what their circumstances, disabled veterans need and deserve affirmative protections and one of the critical ways of doing this is recognizing legitimate claims that their constitutional rights are being violated by the government through the affirmative prosecution of civil rights actions under 42 U.S.C. § 1983 and the ability of attorneys who represent them to recover reasonable attorneys' fees in pursuing the vindication of those rights under 42 U.S.C. § 1988.

RELIEF REQUESTED

For all the reasons stated above, Petitioner respectfully requests the Court grant his petition or summarily reverse the Fifth Circuit Court of Appeals decision and allow Petitioner to pursue his constitutional claims for a violation of his rights under 42 U.S.C. § 1983 and 38 U.S.C. § 5301.

Respectfully submitted,



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