No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY N. MILLER,

Petitioner,

v.

CASI A. MILLER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

The state of Tennessee requires a litigant to notify the state attorney general when a challenge to state law is made on grounds that it is unconstitutional or preempted by federal law. See Tenn. Code Ann. § 29-14-107 and Tenn. R. Civ. P. 24.04.

Where a litigant has argued that a state court has no jurisdiction and authority to issue a decision that is contrary to that of a federal agency which is, by law, given exclusive jurisdiction over all claims for federal veterans' disability benefits, and which has denied a claim for those benefits, can the state preclude the litigant from arguing that federal law preempts state law on appeal because the litigant failed to notify the state's attorney general of this argument during the trial court proceedings, even though the appellate court provided notice to the Attorney General and gave it an opportunity to file a brief on the questions of federal law that had been raised in the trial court?

II.

38 U.S.C. § 511(a) provides the Veterans Administration (VA) with exclusive authority and jurisdiction to decide "all questions of law and fact" on a claim that a veteran's disability benefits be apportioned by the VA to pay support payments in a state court divorce proceeding. The statute further deems all such decisions as "final and conclusive" and beyond review "by any court, whether by an action in the nature of mandamus or otherwise."

Where the VA has denied such a claim, can a state trial court issue a ruling providing for a different disposition of these benefits in contravention of 38 U.S.C. § 511 and 38 U.S.C. § 5301?

PARTIES TO THE PROCEEDING

Petitioner, Jeremy N. Miller, was the Plaintiff in the trial court and Appellant-Petitioner in the Tennessee Court of Appeals and Tennessee Supreme Court, respectively.

Respondent, Casi A. Miller, was the Defendant in the trial court and Appellee-Respondent in the Tennessee Court of Appeals and Tennessee Supreme Court, respectively.

RULE 29.6 DISCLOSURE STATEMENT

There are no corporate parties in the proceedings.

RELATED PROCEEDINGS

No other case is directly related to the case in this Court within the meaning of Supreme Court Rule 14.1(b)(iii).

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OPINIONS BELOW

On May 13, 2022, the Chancery Court of Montgomery County, Tennessee, issued findings of fact, conclusions of law, and an order in an unreported decision. *Miller v. Miller*, No. MC-CH-CV-DI-11-121 (May 13, 2022) (App 10a-30a).

On August 21, 2024, the Tennessee Court of Appeals issued an unpublished opinion reported as *Miller v. Miller*, No. M2022-00759-COA-R3-CV, 2024 Tenn. App. LEXIS 365 (Ct. App. Aug. 21, 2024) (App. 1a-9a).

On January 24, 2025, the Tennessee Supreme Court denied Petitioner's application for leave to appeal. *Miller v. Miller*, No. M2022-00759-SC-R11-CV, 2025 Tenn. LEXIS 15 (Jan. 24, 2025) (App. 31a).

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction over petitions for writs of certiorari from final orders or judgments of the highest court of a state that dispose of all issues and parties, and in which any title, right, or privilege is claimed under the Constitution or laws of the United States.

Petitioner asserted that the trial court erred in interpretation and application of, *inter alia*, 38 U.S.C. § 511 and 38 U.S.C. § 5301, as those statutes applied to the disposition of Petitioner's veterans' disability benefits in divorce proceedings.

The Court of Appeals' opinion constituted a final disposition of the issues raised by Petitioner and the Tennessee Supreme Court's January 24, 2025, order denying Petitioner's application to appeal constituted a final disposition in the state's court of last resort. See, e.g., *Int'l Longshoremen's Asso. v. Davis*, 476 U.S. 380, 387 n.8 (1986) (where state court upholds a state statute as applied against a claim of federal preemption this Court has jurisdiction under 28 U.S.C. § 1257(2)).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article I, section 8, clauses 11 through 16

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;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress….

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. § 511. Decisions of the Secretary; finality

(a) The Secretary [of 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 or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to –

(1) matters subject to section 502 of this title [38 U.S.C. § 502];

(2) matters covered by sections 1975 and 1984 of this title [38 U.S.C. § 1975 and 38 U.S.C. § 1984];

(3) matters arising under chapter 37 of this title [38 U.S.C. § 3701, et seq.]; and

(4) matters covered by chapter 72 of this title [38 U.S.C. § 7251, et seq.].

38 U.S.C. § 5301. Nonassignability and exempt status of benefits

(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…..

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

(a) Notwithstanding any other provision of law (including section 207 of this Act [42 U.S.C. § 407] and section 5301 of title 38 [38 U.S.C. § 5301], 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 466 [42 U.S.C. § 666(a)(1), (b)] 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 [42 U.S.C. § 651, et seq.] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

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(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 –

(i) compensation payable for personal services of the individual, whether the compensation is denominated as wages, salary, commission, bonus, pay, allowances, or otherwise (including severance pay, sick pay, and incentive pay);

(ii) periodic benefits (including a periodic benefit as defined in section 228(h)(3) [42 U.S.C. § 428(h)(3)]) or other payments –

(I) under the insurance system established by title II [42 U.S.C. § 401, et seq.];

(II) under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual;

(III) as compensation for death under any Federal program;

(IV) under any Federal program established to provide "black lung" benefits; or

(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;

(iii) worker's compensation benefits paid or payable under Federal or State law;

(iv) benefits paid or payable under the Railroad Retirement System; and

(v) special benefits for certain World War II veterans payable under title VIII [42 U.S.C. § 1001, et seq.]; but

(B) do not include any payment –

(i) by way of reimbursement or otherwise, to defray expenses incurred by the individual in carrying out duties associated with the employment of the individual;

(ii) as allowances for members of the uniformed services payable pursuant to chapter 7 of title 37, United States Code [37 U.S.C. § 401, et seq.], as prescribed by the Secretaries concerned (defined by section 101(5) of such title) as necessary for the efficient performance of duty; or

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

Tenn. Code Ann. § 29-14-107. Parties to proceedings.

(a) When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.

(b) In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney general and reporter shall also be served with a copy of the proceeding and be entitled to be heard.

Tenn. R. App. P. 32. Notice to Attorney General When Validity of Statute, Rule or Regulation Is Questioned.

(a) Service; When Required. When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any appeal to which the state or an officer or agency is not a party, the party raising such question shall serve a copy of the party's brief on the Attorney General.

(b) Proof of Service. Proof that service has been made on the Attorney General shall be filed with the brief of the party raising such question.

(c) Right to Respond. The Attorney General is entitled, within the time allowed for the filing of a responsive

brief by a party, to file a brief. The Attorney General is also entitled to be heard orally, regardless of whether he or she files a brief.

(d) Consequence of Failure to Comply. Except by order of the court, in the absence of notice, the appellate court will not dispose of an appeal until notice has been given and the Attorney General has been given such opportunity to respond as shall be set by the court.

Tenn. R. Civ. P. 24.04. Notice to Attorney General When Statute, Rule or Regulation Is Questioned.

When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any action to which the state or an officer or agency is not a party, the court shall require that notice be given the attorney general, specifying the pertinent statute, rule or regulation.

STATEMENT OF THE CASE

A. Introduction

Petitioner is a permanently disabled veteran (App. 11a-12a). His disability benefits amount to $11,500 per year in non-taxable income. *Id*., 15a. At the time of the underlying proceedings, Petitioner contributed $450 per month in child support payments to Respondent (App. 25a, 48a).

This petition stems from an opinion and order issued by the trial court, which held that Petitioner's federal veterans' disability pay was to be considered "income" for purposes of payment to Respondent for child support, despite the fact that the VA, the federal agency with exclusive jurisdiction over all questions of law and fact over claims for such benefits had denied Respondent's previously filed claim for these benefits (App. 24a-27a; 47a-50a). See 38 U.S.C. § 511(a).

Section 511(a) provides: The VA "shall decide all questions of law and fact" concerning a dependent's claim for support payments to be paid from a veteran's disability benefits. 38 U.S.C. § 511(a); 38 U.S.C. § 5307. The VA's decision on such a claim is considered "final and conclusive" and may not be reviewed by "*any other court*…." *Id*.

The issue presented was left unresolved by this Court in *Rose v. Rose*, 481 U.S. 619 (1987), which held that state courts force a disabled veteran to use his disability benefits to satisfy a child support obligation in state court domestic relations proceedings. *Rose*, *supra* at 636.

Justice Scalia prefaced his concurrence with his view that the states did not have jurisdiction to issue a ruling that would contradict the federal agency's decision denying a dependent's claim for a disabled veteran's benefits. *Id.* at 641-642. As Justice Scalia reasoned, "had the (VA) granted or denied an application to apportion benefits, state-court action providing a contrary disposition would arguably conflict with the language of § 211 [now § 511, as amended] making his decisions 'final and conclusive' – and if so would…be pre-empted…." *Id.* Since there was no such decision by the VA, there was no need to address the question. *Id.* at 642.

In 2017, Respondent filed a claim with the VA under 38 U.S.C. § 5307 requesting that the VA "apportion" Petitioner's disability benefits to increase his support payments (App. 47a-50a). After reviewing the evidence, the VA denied Respondent's claim, concluding that the $450 per month that Petitioner was paying was a reasonable amount for child support. *Id.*

Respondent then returned to the state court and filed a motion for contempt to force Petitioner to pay increased child support from his disability benefits. (App. 24a-27a). While acknowledging the VA's denial of Respondent's claim, the trial court ruled that it was not bound by this decision. As a result, the trial court ruled that Petitioner's disability benefits were "income," and ordered him to increase his support payments and pay arrearages from those benefits.

On appeal, Petitioner argued, as he had in the trial court, that the VA's decision denying Respondent's

claim precluded the trial court from issuing a contrary ruling as to disposition of his disability benefits (App. 24a-25a). Citing 38 U.S.C. § 511(a), Petitioner argued that the VA's decision was a complete adjudication of Respondent's rights to his benefits and was final and conclusive and not subject to review by any other court (App. 24a-27a). Petitioner pointed out that his disability benefits were "excluded" from consideration as "income" for purposes of child support under federal law, citing 42 U.S.C. § 659(h)(1)(B)(iii) (App. 25a). Petitioner further argued that because these benefits are excluded, they were beyond the reach of the trial court's legal or equitable powers per 38 U.S.C. § 5301(a)(1). *Id*.

Respondent argued that Petitioner had failed to notify the Tennessee Attorney General of his federal preemption arguments and had therefore waived his preemption arguments. In reply, Petitioner argued that the state could never preclude a litigant from asserting these arguments and that the trial court had no jurisdiction or authority to contradict the VA's decision.[1]

On July 13, 2023, after oral argument, the Court of Appeals provided a notice to the parties, including the state's Attorney General, requesting a response to the argument that Petitioner had waived his federal preemption argument (App. 32a). The Attorney General replied, arguing that Petitioner had waived his federal rights under the state procedural rules requiring notice of preemption arguments (App. 33a-37a). However, the Attorney General also addressed

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[1] https://www.youtube.com/watch?v=6ZKP3msOOW4

the substantive issues, arguing that state law was not preempted (App. 34a-35a).

Over a year later, on August 21, 2024, the Court of Appeals issued a decision concluding that Petitioner had waived the substantive issue of federal preemption by failing to notify the Attorney General during trial of his federal preemption argument (App. 1a-9a). The court concluded Petitioner was required to notify the Attorney General when he first raised these issues in the trial court (App. 1a).

Petitioner raised the federal preemption and jurisdictional arguments in both the trial court and the Court of Appeals (see, respectively, App. 24a-27a; App. 3a-4a). The trial court had no authority and its ruling rejecting the VA's decision and ordering Petitioner to use his federal disability benefits to satisfy Respondent's claim for support payments was an extra-jurisdictional act and *ultra vires* of the trial court's authority per the plain and unambiguous language of 38 U.S.C. § 511(a).

The Court of Appeals' conclusion that Petitioner's failure to notify the state's Attorney General of his federal preemption and constitutional arguments constituted a waiver of his rights to assert them was error under the Supremacy Clause of the United States Constitution, federal preemptive law embodied in the controlling federal statutes, including, *inter alia*, 38 U.S.C. § 511(a), 42 U.S.C. § 659(h)(1)(B)(iii), and 38 U.S.C. § 5301, and this Court's jurisprudence.

B. Background

Petitioner and Respondent were divorced on September 2, 2011, and the parties entered into a Marital Dissolution Agreement (MDA) (App. 10a-11a). Petitioner was on active military duty at the time of the divorce. *Id*. The MDA provided for Respondent to receive 27% of Petitioner's "disposable retirement income in accordance with Title 10" of the United States Code. *Id*.

On February 27, 2017, Petitioner was medically discharged from the United States Army and determined to be 100-percent totally and permanently disabled (App. 11a, 14a). Petitioner receives no retirement benefits. *Id*. His only source of income is his veterans' disability pay. *Id*., 11a-12a, 14a.

After the parties' divorce, Respondent applied to the federal Defense Finance and Accounting Service (DFAS) for direct payment of a portion of Petitioner's military retirement benefits, as contemplated in the parties' MDA (App. 11a). DFAS responded that "[t]he entire amount of [Petitioner's] retired/retainer pay is based on disability," concluding that there were "no funds available under the USFSPA[, 10 U.S.C. § 1408]." *Id*., 11a-12a.

In 2017, Respondent submitted a claim under 38 U.S.C. § 5307 to the VA seeking an apportionment of Petitioner's veterans' disability benefits for additional support of the parties' three minor children (App. 48a). In support, Respondent submitted a statement, information regarding the minor children, the divorce

proceedings, and the parties' respective financial standing (App. 48a-49a).

On June 12, 2018, the VA denied Respondent's claim (App. 46a-50a). The VA explained that to receive an apportionment of a veteran's disability benefits, the claimant had to demonstrate, *inter alia*, a need for the benefits and that she was not already receiving a reasonable level of support from the disabled veteran (App. 47a-48a, citing 38 C.F.R. § 3.450 and § 3.451). The VA concluded that Petitioner was "providing $450 a month financial support ($450 child support)," which the VA determined to be reasonable. *Id.*, 48a.

The VA advised Respondent that she was entitled to a hearing and that she had 60 days to appeal the denial of her claim to the Board of Veterans Appeals. *Id.*, 49a-50a. Respondent did not request a hearing or file an appeal.

In June 2018, Respondent filed a motion for contempt against Petitioner in the state court divorce proceedings. Respondent challenged DFAS's decision that she was not entitled to any "disposable retirement benefits" under the MDA's "27 percent retirement pay provision" and the VA's decision that she was not entitled to child support payments from Petitioner's VA disability benefits.

Regarding the latter issue, Petitioner argued that his disability benefits could not be considered income for purposes of calculating dependency (child and spousal) support payments in state court proceedings. In this regard, Petitioner noted that 38 U.S.C. § 511(a) gave exclusive jurisdiction and authority to the VA

over all claims for child support to be paid from a veterans' disability benefits. Since the VA had denied Respondent's claim, the VA's decision, per the statute, was "final and conclusive" as to all other courts. See 38 U.S.C. § 511(a) (second sentence). Thus, Petitioner argued that under 42 U.S.C. § 659(h)(1)(B)(iii) these benefits were excluded from being considered income and under 38 U.S.C. § 5301(a)(1) the trial court had no equitable or legal power to further divide them.

On May 13, 2022, the trial court issued its decision (App.10a-30a). The court found that Petitioner was permanently and totally disabled as a result of his military service. *Id*., 11a-12a, 14a. The trial court also determined that Petitioner received no military retirement benefits and that his only source of income was his disability pay, which amounted to $11,500 per year in non-taxable income. *Id*., 11a-12a, 14a-15a, and 18a.

Concerning the property division in the MDA, the trial court held that Respondent was not entitled to any of Petitioner's veterans' disability benefits under the MDA's provision allotting 27 percent of Petitioner's disposable retired pay because Petitioner had no such pay, and his benefits were protected by the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 and 38 U.S.C. § 5301 (App. 18a-23a).

Concerning child support, the trial court ruled that despite the VA's prior denial of Respondent's claim, it could nonetheless consider Petitioner's disability benefits as income and order him to use these benefits

to pay child support and arrearages (App. 24a-27a). In this regard the trial court reasoned:

> The former husband argues that his former wife previously filed a claim for an apportionment of his disability benefits to be paid to her for child support. He states that the claim was denied by the Veteran's Administration. The letter advised that in order to be entitled for additional payments for child support the former non-military spouse must demonstrate a need for benefits and not receive a reasonable level of support from the primary beneficiary (the former military spouse). The letter additionally explained that the former husband was providing $450.00 per month in child support which was deemed a reasonable level of support. The Court is a little confused with this argument. Certainly, the VA provided the letter saying that the veteran is providing $450.00 a month in financial support and that it is deemed a reasonable level of support. The problem is that the $450.00 per month is not what the VA deemed is reasonable but what this court in its final decree/parenting plan dictated would be paid in support. That support was based on an agreement of the parties and a court order. Certainly, the Court has the ability to adjust that support to deem what is necessary. The Court cannot believe that the VA holds its own child support hearings or evaluates support amounts to determine what's reasonable but

> instead follow what courts say is reasonable for child support.
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> ***
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> Three factors point to the use of disability payment as income for child support. First, Tennessee's child support regulations include VA disability as income. Second, at least one other State Supreme Court finds that it doesn't violate federal statutes to include disability income for child support purposes. Third, *Howell* [*v. Howell*, 581 U.S. 214, 137 S. Ct. 1400 (2017))] doesn't specifically exclude disability payments from being used to calculate child support. This Court concludes that it is appropriate to include Mr. Miller's disability benefits for child support purposes. (App. 24a-27a).

Petitioner appealed. During oral argument, the Court of Appeals addressed Respondent's assertion that Petitioner had waived his jurisdictional and preemption arguments for a failure to notify the Tennessee Attorney General during the trial that such a challenge had been lodged (App. 1a-9a). See Tenn. Code Ann. § 29-14-107(b) (2012); Tenn. R. Civ. P. 24.04; and Tenn. R. App. P. 32.

After oral argument, the court *sua sponte* provided notice to the Tennessee Attorney General *and* provided all parties an opportunity to reply to the substantive federal issues (App. 32a). While the Attorney General argued that Petitioner's failure to notify it of his federal preemption constituted a waiver of his appellate rights, it nonetheless addressed the

substantive issue and argued that state law controlled and was not preempted (App. 33a-38a).

Over a year later, the Court of Appeals ruled that Petitioner had waived his federal preemption arguments (App. 4a-5a).

The court reasoned that Petitioner's challenge was to Tennessee's child support guidelines. *Id.* Although it acknowledged Petitioner's federal preemption and jurisdictional challenges, it did not address the substantive arguments that federal law preempted state law and that the trial court lacked authority *and* jurisdiction under the federal statute, 38 USC § 511, to even issue a ruling on a claim for benefits that had already been disposed of by the federal agency with exclusive jurisdiction and final adjudicative authority over such claims. *Id.*, 4a.

REASONS FOR GRANTING

A. The State Cannot Preclude by Waiver or Otherwise the Presentation and Disposition on the Merits of a Properly Raised Argument that Federal Law Preempts State Law

The Tennessee Court of Appeals ruled that Petitioner failed to notify the state Attorney General of its jurisdictional and federal constitutional preemption arguments, and therefore Petitioner waived his entire appeal of the trial court's ruling (App. 4a-5a). Citing *Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005), the Court of Appeals stated:

> The Attorney General must be given notice and an opportunity to be heard whenever the constitutional validity of a state statute or regulation is at issue. Tenn. Code Ann. § 29-14-107(b) (2012); TENN. R. CIV. P. 24.04. "Compliance with [the notice] statute and the related rules is mandatory." *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009) (J. Koch, concurring in part and dissenting in part). A litigant's failure to provide timely notice can be fatal on appeal. *See Buettner*, 183 S.W.3d at 358 (App. 4a-5a).

Notably, the statute cited by the Court explicitly applies only to "any proceeding which involves *the validity of a municipal ordinance or franchise*." Tenn. Code Ann. § 29-14-107(b) (emphasis added). Further, the statute states that the "municipality" involved shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney general and reporter shall also be served with a copy of the proceeding and be entitled to be heard." *Id*.

The rule of civil procedure cited states only that notice is to be given to the attorney general specifying the "pertinent statute" if its "validity is drawn in question in any action" to which the state is not a party. Tenn. R. Civ. P. 24.04.

In its response to the Court of Appeals' invitation to participate in the appeal, the Attorney General also cited Tenn. R. App. P. 32, which requires notice and service upon the Attorney General of a brief in any

case where the validity of a statute is challenged (App. 33a-34a). The rule further provides that the Attorney General is entitled to be heard orally regardless of whether he or she files a brief, and that "*in the absence of notice*," the appellate court will not dispose of the appeal "*until notice has been given and the Attorney General has been given such opportunity to respond as shall be set by the court.*" *Id*. (emphasis added).

Petitioner was not challenging the validity of a municipal ordinance or franchise, and thus, there was no "municipality" involved. Further, as to the rule of civil procedure and the rule of appellate procedure, Petitioner was not challenging the constitutionality of a state statute, as those two provisions clearly require as a condition for notice. Rather, his argument was that federal law *preempted* state law and *jurisdictionally* precluded the trial court's subsequent *review* of and contrary ruling as to the VA's decision denying Respondent's claim. See 38 U.S.C. § 511(a). Further, Petitioner challenged the trial court's authority to consider his disability benefits as income *notwithstanding* any state law because 42 U.S.C. § 659(h)(1)(B)(iii) specifically excludes them as "income." Therefore, as Petitioner further argued, the trial court had no "legal or equitable" powers "whatever, either before or after receipt" of his benefits to force him to use them for any reason. 38 U.S.C. § 5301(a)(1).

Further, as explained in Petitioner's response to the Attorney General's reply, the "notice" requirement was satisfied once the Court of Appeals provided the Attorney General with notice and the opportunity to file a brief (App. 41a-46a).

The Court ignored Petitioner's argument that the Supremacy Clause preempted state law, allowing these inapplicable procedural rules to suppress Petitioner's federal rights and interests, which are established pursuant to Congress' enumerated powers under the federal constitution. This, the state cannot do.

Under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, federal law overrides conflicting state laws and judicial decisions. A state court cannot refuse to consider a federal preemption argument simply on procedural grounds if doing so would result in an outcome that is not only prohibited, but, as in this case, jurisdictionally precluded.

In a nearly identical situation, this Court flatly rejected the notion that a failure to raise federal preemption constitutes a waiver of a litigant's rights to raise the federal interests involved. *Int'l Longshoremen's Asso. v. Davis*, 476 U.S. 380, 388, 106 S. Ct. 1904, 1910-11 (1986). There, the Court addressed a federal statute that, as here, gave primary and exclusive jurisdiction to a federal agency concerning the disposition of unfair labor practice claims and the claimant's failure to raise the issue of preemption as an affirmative defense. *Id*. at 386. The state court concluded that the claimant had waived federal preemption. *Id*.

This Court reversed, reasoning that "[i]t is clearly within Congress' powers to establish an exclusive

federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution." *Id*. at 387-88, citing *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940). The Court continued:

> [When] resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded…. In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) (citing *Herb* v. *Pitcairn,* [324 U.S. 117, 65 S. Ct. 459 (1945) at 126; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co*., 243 U.S. 157, 164 (1917). Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and

> conflicts likely to result from a variety of local procedures and attitudes…. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *Id.* at 388-89, quoting *Garner v. Teamsters*, 346 U.S. 485, 490-491 (1953) (internal quotation marks omitted).

Citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court went on to set out the now well-established scope the federal agency's pre-emption.

> Given the NLRA's complex and interrelated federal scheme of law, remedy, and administration, the Court held that due regard for the federal enactment requires that state jurisdiction must yield, when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of § 7 or § 8. The Court acknowledged that at times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. Even in such ambiguous situations, however, the Court concluded that courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the [agency]. Thus, the Court held that when an activity is arguably subject to § 7 or

> § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted. *Id*. at 389-90 (cleaned up).

While a state may impose procedural requirements regarding notice, it ultimately cannot ignore a valid federal preemption argument if the issue is properly before the court. As noted by this Court, this is especially true where, as here, Congress under its enumerated federal powers has provided a federal agency with jurisdictional and decisional exclusivity, an apparatus for claims handling, review, and decision-making, finality and conclusiveness as to such decisions vis-à-vis *all other courts*, and a means by which the claimant can appeal. 38 U.S.C. § 511(a)

These primary elements are present here. The VA determines disability benefit entitlements and establishes an integrated and comprehensive claims processing apparatus for dependents. With respect to claims for child support payments to be paid from the veteran's federal disability benefits, § 511(a) provides that the VA has exclusive jurisdiction and authority and "shall decide *all questions of law and fact*" with respect to claims for apportionment of such benefits. *Id*. (emphasis added). All such decisions are "*final* and *conclusive* and *may not be reviewed* by any other official or by any court whether by an action in the nature of mandamus or otherwise." *Id*. (emphasis added).

Thus, federal law already provides the exclusive means by which dependents may make a claim for a

portion of a veteran's disability benefits for support payments where they demonstrate a need through the process of apportionment. 38 U.S.C. § 5307; 38 C.F.R. § 3.450-3.458 (regulations governing apportionment). Jurisdiction over such claims lies exclusively with the VA, and all decisions on any benefit determination is final and conclusive as to *any and all other courts*. 38 U.S.C. § 511(a) (second sentence). Review of the VA's decision can only be sought in the administrative tribunals and Article I courts specifically established by Congress for this purpose. See 38 U.S.C. § 511(a), 38 U.S.C. § 7251, 38 U.S.C. § 7261.

Finally, while a consequence of Petitioner's argument, if correct, would be that federal law preempts state law in this area, the premise of that argument was based on a federal statute that jurisdictionally precludes a state court from making *any contrary decision* on a claim for the federal benefits. In other words, per federal law, the trial court had no jurisdiction to contradict the VA's decision.

B. A State Court Cannot Adjudicate, Contradict, or Otherwise Rule on a Matter that is by Federal Statute within the Primary and Exclusive Jurisdiction and Authority of a Federal Agency and Which Deems All Decisions by Such Agency as Final and Conclusive as to Any Other Court, Where Such Agency Has Decided a Claim Brought Under Said Statute

The substantive issue raised by Petitioner was whether a state court can make a decision that is contrary to that of a federal agency, which, by federal statute, has been given exclusive jurisdiction and final

adjudicative authority over all questions of law and fact concerning the disposition of a veteran's disability benefits to dependents upon a claim for support, and which has denied such a claim. Section 511(a) provides, in relevant part, as follows:

> The Secretary [of 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 or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

The VA denied Respondent's claim for child support payments from Petitioner's disability benefits (App. 47a-50a). The trial court, aware of this decision and the controlling federal statute, nonetheless ruled that Appellant's disability benefits could be considered income for this purpose (App. 24a-27a). Was the trial court correct?

This issue was left unresolved in *Rose v. Rose*, 481 U.S. 619, 640-43 (1987), which held that state courts could exercise jurisdiction over veterans' disability benefits for payment of child support, and could therefore force a disabled veteran to use these benefits to satisfy his obligation in state proceedings. *Id.* at 636. Concluding that the state had jurisdiction, the Court held that 38 U.S.C. § 3101 (now § 5301) did not bar a state court from ordering a disabled veteran

to pay child support, even if the veteran's only income was VA disability benefits. *Cf.*, *Bennett v. Arkansas*, 485 U.S. 395, 398, 108 S. Ct. 1204 (1988) (holding that the state could not appropriate federal funds (social security benefits) because 42 U.S.C. § 407(a), a provision nearly identical to § 5301, prohibited the state from using any legal or equitable process to do so).

In this case, the VA denied Respondent's claim that Petitioner use his disability benefits for support of the minor children (App. 47a-50a). Upon the filing of her claim, the VA assumed exclusive jurisdiction to decide "all questions of law and fact necessary to a decision…under a law that affects the provision of benefits…to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a) (first sentence). The VA issued a final decision denying Respondent's claim (App. 47a-50a), and per the second sentence of § 511 (a), that decision was "*final and conclusive*" and could not be "*reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise*." (emphasis added).

Thus, when Respondent filed her contempt action in state court requesting a distribution of Petitioner's disability benefits, the trial court had no authority to issue a ruling contradicting the VA's decision and *no jurisdiction* to review, or otherwise decide that a different disposition of those benefits should result. The trial court's "decision" was one that affected Petitioner's benefits because it ruled that he had to use them to satisfy Respondent's request to increase child support payments (App. 24a-25a). The trial

court directly responded to Petitioner's argument that it had no jurisdiction or authority to do so, stating:

> Certainly, the Court has the ability *to adjust that support to deem what is necessary*. The Court *cannot believe that the VA holds its own child support hearings or evaluates support amounts to determine what's reasonable but instead follow what courts say is reasonable for child support* (App. 25a) (emphasis added).

Yet, this is exactly what the VA did. It stated that Respondent had to demonstrate a need for the benefits per 38 C.F.R. § 3.451 *and* that Petitioner's existing payments of $450 per month was deemed to be a reasonable level of support (App. 47a). As one court has put it, any decision affecting a veteran's disability pay is a decision affecting his benefits, and such an "adjudication would necessitate a consideration of issues of law and fact involving the decision to reduce the veterans' entitlement." Such review is "explicitly precluded by 38 USC § 511(a)." *Veterans for Common Sense v. Shinseki*, 678 F. 3d 1013, 1023 (9th Cir. 2011), *cert den'd* at 568 U.S. 1086, 133 S. Ct. 840 (2013).

The language of the statute interpreted in *Rose*, 38 U.S.C. § 211 (now § 511), was ambiguous on the issue of state-court jurisdiction. *Id*. at 641. In his concurrence, Justice Scalia quoted the then-applicable language of § 211: "decisions of the Administrator on any question of law or fact under any law administered by the [VA] providing benefits for veterans and their dependents…shall be final and conclusive and no other…*court of the United States*

shall have power or jurisdiction to review…such decision." (emphasis added). Scalia noted that the majority found this provision "inapplicable because *it does not explicitly exclude state-court jurisdiction*, as it does federal") (emphasis added).

However, just after *Rose*, Congress changed this language when it enacted the Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), codified in various sections of Title 38. *Shinseki*, 678 F.3d at 1021 ("to dissuade the judiciary from ignoring the explicit language that Congress used in isolating decisions of the Administrator from judicial scrutiny, Congress overhauled both the internal review mechanism and § 211 in the VJRA." The VJRA made three fundamental changes affecting judicial review of VA decisions.

First, the VJRA placed responsibility for reviewing decisions made by the VA and Board of Veterans' Appeals in a new Article I court. *Id*. at 1021, citing 38 U.S.C. § 7251 and 38 U.S.C. § 7261. Authority was extended to "*all* questions involving benefits under laws administered by the VA. This would include factual, legal, and constitutional questions." *Id*. (original emphasis).

Second, only the Federal Circuit can review decisions of the Veterans Court, and its jurisdiction extends to "all relevant questions of law, including interpreting constitutional and statutory provisions." *Id*. at 1022., citing 38 U.S.C. § 7292(a), (c), (d)(1). The Federal Circuit's decisions are considered final and subject only to review by this Court upon certiorari. *Id*., citing 38 U.S.C. § 7292(c).

Third, by amending § 511 (formerly § 211), Congress significantly expanded the VA's powers of review and clarified the scope of its jurisdiction. This change, ensured that review of the VA's decision on an apportionment claim was subject to review only through a singular, linear process commencing with the federal Board of Veterans Appeals.

As the *Shinseki* decision explained, under § 511(a), 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." *Id.* Whereas the prior language prohibited review of "decisions…under any law…providing benefits for veterans," it now prohibits review of "all questions of law and fact necessary to a decision…that *affects the provision of benefits*." *Id.* (emphasis added). "With this change, Congress intended to broaden the scope of § 511 and limit outside court intervention…." *Id.*

This change directly responded to Justice Scalia's observation that the prior language appeared only to protect the VA's decisions from review by *federal courts*. *Rose*, *supra* at 641-43. The modification in the language of § 511 excluded "*any* court" from reviewing an apportionment decision. The provision now states that the VA's decision "as to any such question shall be final and conclusive and may not be reviewed by *any other official or by any court, whether by an action in the nature of mandamus or otherwise*." 38 U.S.C. § 511(a) (second sentence) (emphasis added). If Congress had agreed with *Rose*, it would have left this language alone in tacit agreement with the Court's

interpretation that the statute did not exclude state court jurisdiction over a dependent's claim for support from a veteran's disability benefits.

Congress also strengthened the scope of the VA's reviewing authority by editing the first sentence to say that the VA "*shall decide all questions of law and fact*" with respect to any claim for these benefits. 38 U.S.C. § 511(a) (first sentence). Accord, *Shinseki*, *supra* (interpreting and applying § 511 as such).

With these changes, Congress addressed any ostensible ambiguity concerning the scope of VA authority and jurisdiction over a dependent's claims for benefits. With the overhaul of § 511 and passage of the VJRA, *post-Rose*, state courts have no jurisdiction or authority over veterans' disability benefits and cannot make a ruling that would be contrary to the VA's decision on a claim by a dependent for a portion of these benefits to satisfy any type of dependency support obligation.

Here, the VA denied Respondent's claim for apportionment (App. 47a-50a). The VA advised her of her appellate rights, but she declined to pursue them. The trial court had no authority or jurisdiction to *review*, much less, contradict, the VA's determination that Respondent was not entitled to additional support payments from Petitioner's benefits. Its decision was preempted.

Pursuant to its enumerated "military powers" under Article I, section 8 of the Constitution, Congress has "broad and sweeping" power "to raise and support armies." *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S.

580, 585 (2022). "[I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *McCarty v. McCarty*, 453 U.S. 210, 236 (1981), citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). "It has long exercised that power to encourage military service in a variety of ways." *Johnson v. Robison*, 415 U. S. 361, 376 (1974) (education benefits); *McCarty*, *supra* at 232-35 (retirement benefits); *Howell v. Howell*, 581 U.S. 214, 222 (2017) (disability benefits).

Congress has passed a comprehensive adjudicative and review process respecting claims by dependents for apportionment of a veteran's disability pay. 38 U.S.C. § 5307. The distribution of these appropriated funds must be left to the discretion of the VA because it is under the enumerated powers of Congress that veterans, and their dependents, are entitled to the benefits that result from federal service.

Just as state courts cannot order a reduction in retirement and disability benefits in contravention of federal law, see *McCarty*, *supra*; *Howell*, *supra* respectively, allowing the states to direct the division and distribution of federal disability benefits which are *not authorized by federal law* to be so considered discourages military service and works against national interests. This is why Congress retains absolute power over this particular subject.

As this Court noted in *Int'l Longshoremen*, *supra* at 347-48:

> Congress did not merely lay down a substantive rule of law to be enforced by any

> tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *Id.* at 388-89 (internal quotations and cites omitted).

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

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or

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

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Justice Marshall spoke of the exercise by Congress of its enumerated powers, stating: "[T]hat the government of the Union, though limited in its powers, is supreme within its sphere of action" is a "proposition" that "command[s]…universal assent" *Id*. at 406.

There is no debate on this point because "the people, have, in express terms, decided it, by saying," under the Supremacy Clause that "'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,'" and "by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it." *Id*. Marshall finished the point by citing to the last sentence of the Supremacy Clause:

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

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

Under the Supremacy Clause the judges of every state are bound by the jurisdictional and procedural limitations imposed by federal laws passed by Congress under its exclusive enumerated powers. Here, § 511 deprived the state of jurisdiction and authority over the federal benefits concerned and preempts the state court's ruling.

Respondent was bound by the VA's decision. When the VA denied Respondent's claim, its decision was "final and conclusive" as to any and all other courts. With the exception of following the *federal appellate process* contained within the relevant federal statutes, see, 38 U.S.C. § 511; 38 U.S.C. § 5307; 38 U.S.C. § 7104 (all questions subject to a decision by the

Secretary under § 511 are subject to appeal to the Secretary and final decisions shall be made by a Board of Veterans' Appeals); 38 U.S.C. § 7251 (Congress established "under Article I of the Constitution" a court of record to be known as "the United States Court of Appeals for Veterans Claims" (CAVC); 38 U.S.C. § 7252; and 38 U.S.C. § 7261 (that court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and has authority to consider "all relevant questions of law"); and 38 U.S.C. § 7292 (appeals can only be made to the Federal Circuit Court of Appeals), that decision was "final and conclusive and "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise," including state trial and appellate courts.

C. A State Cannot Order the Disposition of Federal Benefits Where Such Disposition is, by Federal Statute, Prohibited by Any Action at Law or in Equity, Where No Federal Statute Grants the State Such Authority, and Where a Federal Statute Actually Excludes Such Benefits from Being Considered Income for Purposes of Calculating State Domestic Support Obligations

In *Rose*, the Court also addressed whether 38 U.S.C. § 3101 (now § 5301) would prohibit the state from exercising any legal or equitable authority over veterans' disability benefits. While the Court ruled that "state family law" overrode the language of § 5301, this was a short-lived anomaly. Indeed, in his dissent in *Rose*, Justice White pointed out the absolute contradiction in the majority's reasoning, stating:

> As the Court apparently recognizes…the order that appellant pay over a portion of his veterans' disability benefits on pain of contempt constitutes a "seizure." The plain language of § 3101(a) prohibits *any* seizure of veterans' benefits, but the Court ignores that prohibition and creates an exception out of whole cloth…. *Id.* at 644-645 (cleaned up).

Justice White further pointed that the Court's decision was also inconsistent with its holding in *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981). There, the state court attempted to limit the reach of an anti-attachment statute nearly identical to § 5301 concerning veterans' life insurance benefits on the theory that the purpose of the provision was to protect the policy proceeds from the claims of creditors, and that the provision had no application to minor children asserting equitable interests. *Id.* at 60-61. This Court held, however, that this contention "failed to give effect to the unqualified sweep of the federal statute." *Id.*, at 61. See *Rose*, *supra* at 645-46.

As further noted by Justice White, Congress has also prohibited state courts from garnishing federal social security benefits and has similarly restricted their legal and equitable authority to do so by other means with the passage of 42 U.S.C. § 407 (similar in pertinent respects to 38 U.S.C. § 5301). And in *Bennett*, 485 U.S. at 398, this Court applied the language of § 407 to prohibit the state from exercising legal and equitable powers over such benefits. Finally, in *Hillman v. Maretta*, 569 U.S. 483, 491, 133 S. Ct. 1943, 1950 (2013), this Court dispensed with

the justification cited in *Rose* to ignore § 5301, and noted that state family law could not override the clear intent of federal statutes providing benefits vis-à-vis attempts by non-beneficiaries to challenge the disposition dictated by federal law. Citing *Ridgway*, *supra*, the Court noted that "state laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments." *Id*.

Finally, in 2017, this Court ruled that § 5301 prohibits the state from exercising control over federal benefits where no such authority is provided by federal law. *Howell v. Howell*, 137 S. Ct. 1400, 1404-1406 (2017). While *Howell* only addressed property division using federal veterans' disability benefits in state domestic relations proceedings, it ruled that federal law has always preempted state law in this particular area, and that § 5301 removes all authority from the state over these benefits unless federal law explicitly allows the state to consider them. *Id*. at 1405.

While acknowledging *Rose*, the Court made clear that unless federal law *allows the state* authority over the particular benefits at issue, the default position is (1) federal law preempts all state law, and (2) state courts have *no authority* "legal or equitable" by virtue of 38 U.S.C. § 5301, to vest disability benefits in anyone other than the beneficiary. *Id*. at 1405.

"The relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway*, *supra* at 55 (emphasis added), citing *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 continued: "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id*., citing *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). "That principle is but the necessary consequence of the Supremacy Clause of the National Constitution." *Id*.

In *McCarty*, *supra*, 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).

Moreover, § 5301, by its plain language, applies to more than just "attachments" or "garnishments," as some have argued. It applies to "any legal or equitable process *whatever*, either before or after receipt." (emphasis added). *Wissner v. Wissner*, 338 U.S. 655, 659, 70 S. Ct. 398 (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 veterans' life insurance benefits).

The contrary argument "fails to give effect to the unqualified sweep of the federal statute." *Ridgway*, *supra* at 60-61. The statute "prohibits, in the broadest

of terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" *Id*. at 61. Relating the statute back to the Supremacy Clause, the Court concluded that it:

> 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*. (cleaned up).

In keeping with this principle, *unless* federal law allows otherwise, the state cannot consider veterans' disability benefits as disposable assets, i.e., income, for purposes of child support. Thus, 42 U.S.C. § 659(h)(1)(A)(ii)(V) of the Child Support Enforcement Act (CSEA), *allows* the state to garnish *disability pension benefits* – that is, benefits received where a retiree has waived retirement pay to receive an in-kind portion in (partial) disability pension – federal law considers this to be *remuneration for past employment*, i.e., income, and allows the state to consider it for child support. However, where a veteran is not receiving a disability retirement pension, but is 100 percent totally and permanently service-connected disabled, as Petitioner is here, 42 U.S.C. § 659(h)(1)(B)(iii) explicitly *excludes* these benefits from being considered income subject to state garnishment orders.

These are pure VA disability benefits. Such benefits are not among the federal benefits that are considered income under the CSEA. Therefore, neither DFAS nor the VA will honor a state court order to directly pay these monies to the dependents.

Since such disability pay is *excluded* from being considered income, see 42 U.S.C. § 659(h)(1)(B)(iii), it is protected by 38 U.S.C. § 5301(a)(1) from all legal and equitable state court process. See also *Howell*, 137 S. Ct. at 1405. The only legal process available to dependents seeking a portion of these benefits as "support" would be the federal apportionment process detailed in 38 U.S.C. § 5307. Respondent submitted such a claim. The VA denied it. (App. 47a-50a). At that point, per § 511(a) and § 5301, the trial court had no jurisdiction or authority to conclude that Petitioner's disability benefits could be used to increase his existing support payments.

As there is no express grant of authority to states over federal veterans' benefits, they are exempt from state control and protected by the sweeping prohibition in 38 U.S.C. § 5301, which applies to all federal veterans' benefits due "*under any law administered by the Secretary of Veterans' Affairs*." 38 U.S.C. § 5301(a)(1). These benefits "shall not be assignable *except* to the extent specifically authorized by law, and such payments made to, or on the account of, a beneficiary…*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…." *Id.*, § 5301(a)(1).

CONCLUSION

It would be the summum of absurdity if the state could simply nullify federal rights by claiming that questionably applicable procedural rules requiring notice of the federal arguments were not followed, even though those arguments were raised at every stage of the state proceeding. In such a case, any judgment or court order that is preempted by federal law *and* jurisdictionally precluded would nonetheless be allowed to stand.

This is especially true where, as here, the preemptive federal statute provides a federal agency with exclusive jurisdiction over all questions of law and fact concerning the federal claim and that its decision on such claims is final and conclusive as to all other courts.

If a state court could ignore the exclusive jurisdiction retained by federal agencies to make decisions concerning funds appropriated by Congress, and further ignore a federal statute which prohibits them from entering "any legal or equitable" orders dispossessing veterans of these benefits, then the state could "subvert the very foundation of all written constitutions" and "declare that an act, which according to the principles and the theory of our government, *is entirely void*; is yet, in practice, completely obligatory." *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (emphasis added).

"The *nullity of any act*, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law." *Gibbons*, *supra* at

210-11 (emphasis added). There, the Court expounded upon Congress' enumerated powers:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. [T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects. Full power to regulate a particular subject, implies the whole power, and leaves no residuum. *Id*. at 196-97 (cleaned up).

For decades, disabled veterans have suffered immeasurably under this Court's *wholly judicial* creation in *Rose* of an exception to the explicit protections afforded them by Congress' military powers. Self-interested lawyers and state interests have collaborated to raise a clamor in opposition to the self-evident consequences of federal supremacy. But the swell of defiance does not nullify the effects of federal supremacy. Nor can procedural rules insulate the state from those seeking to regain and restore their constitutional entitlements.

The passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed by the Constitution.

> Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding

> wrong and failing those in the right. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

The federal statutes and regulations passed pursuant to Congress' enumerated military powers contain no allowance to the state to sequester veterans' disability benefits and force them to be paid over to any other individual. Rather, these benefits are (and always have been) explicitly excluded from state control, *before*, 42 U.S.C. § 659(h)(1)(B)(iii), and *after*, 38 U.S.C. § 5301(a)(1), receipt. These funds are "inviolate." *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162 (1962).

Logically, the only allowance for support of dependents lies within the primary and exclusive jurisdiction of the VA, to which Congress has given primary authority and exclusive jurisdiction to make all decisions affecting benefits for veterans and their dependents. Congress also provided for an "apportionment" of these benefits for the dependents of veterans *if* the Secretary determines that the veteran will not suffer undue hardship and the dependent demonstrates a need for them.

The state cannot avoid Petitioner's assertion of his federal interests. The trial court had no jurisdiction to contradict the VA's decision denying Respondent's claim. Thus, its decision in this regard was preempted by federal law and *void ab initio*. Further, the trial court could not issue an equitable order concluding that Petitioner's disability pay was "income" and forcing him to use these benefits to satisfy a support obligation that the VA had already decided was being satisfied and was reasonable according to Petitioner's

current level of support and his and Respondent's financial standing and circumstances.

This Court is the only authority that can correct the state courts that have ignored federal law to thwart the will of Congress.

REQUESTED RELIEF

Petitioner respectfully requests that the Court grant his petition.

Respectfully submitted,

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Dated: June 23, 2025

APPENDIX

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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

July 11, 2023 Session

JEREMY N. MILLER v. CASI A. MILLER

Appeal from the Chancery Court for Montgomery Count
No. MC CH CV DI 11-121
Ted A. Crozier, Judge

No. M2022-00759-COA-R3-CV

A divorced father retired from the military. Afterward, he received only disability pay due to service-related injuries. The mother sought to hold him in contempt, claiming she was denied a percentage of his military retirement benefits. The father denied her allegations and petitioned to modify child support. He argued that his disability pay could not be counted as income for child support purposes because federal law preempted the provision of the Tennessee Child Support Guidelines governing military disability benefits. The trial court concluded that the father's disability pay counted as income for child support. On appeal, the father reiterates his preemption argument. Because he failed to provide timely notice of his constitutional challenge to the Tennessee Attorney General and Reporter, we consider the preemption issue waived.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Deborah S. Evans, Clarksville, Tennessee, and Carson J. Tucker, Troy, Michigan, for the appellant, Jeremy N. Miller.

Donald N. Capparella and Jacob Andrew Vanzin, Nashville, Tennessee, for the appellee, Casi A. Miller.

Jonathan Skrmetti, Attorney General and Reporter, Andrée Sophia Blumstein, Solicitor

General, Amber L. Barker, Senior Assistant Attorney General, and Carrie A. Perras, Assistant Attorney General, for the State of Tennessee.

OPINION

I.

Jeremy Miller ("Father") and Casi Miller ("Mother") divorced in 2011. As part of the divorce decree, the Montgomery County Chancery Court adopted and incorporated their agreed permanent parenting plan. The parenting plan provided for equal parenting time and named Mother primary residential parent. It also required Father, an active member of the United States Army, to pay $450.00 per month in child support.

Several years after the divorce, Mother petitioned to modify the custody provisions of the parenting plan. Father responded in kind. He later amended his

counter-petition to include a request for a retroactive modification of child support. And Mother sought to hold Father in contempt for failure to comply with the property settlement provisions in the marital dissolution agreement. By agreed order, the court eventually dismissed the custody and visitation issues. Father's request for modification of child support and Mother's contempt petition remained pending.

Father alleged in his amended counter-petition that both parents' incomes had changed significantly since the divorce. Father had retired from military service in 2017. At that time, the Department of Veterans Affairs ("VA") determined Father was 100% disabled due to service-connected injuries. Father only received disability pay. He argued that federal law precluded the state court from considering his disability pay as income for child support purposes.

The trial court rejected Father's preemption argument. It reasoned that the Tennessee Child Support Guidelines included disability benefits received from the VA in the determination of gross income for child support purposes. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1)(xiv) (2021). And nothing in federal law specifically prohibited the court from applying the guidelines. The VA had denied Mother's claim to apportion Father's veterans' disability benefits on behalf of the children. *See* 38 U.S.C. § 5307(c). But, in the court's view, that decision did not preclude the court from modifying child support when necessary. So federal law did not prohibit it from counting disability benefits as "income" for the purpose of calculating child support.

Finding a significant variance in income, the trial court determined that a modification of child support was appropriate. The court increased Father's child support obligation from $450 to $649 retroactive to the date he began receiving disability benefits. The court declined to award attorney's fees to either party.

Father contends that the trial court erred in including his military disability benefits in the determination of his gross income as directed in the child support guidelines. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1)(xiv). Citing federal preemption principles, he argues that "the state cannot consider veterans' disability benefits as disposable assets, i.e., income, for purposes of property or child support," especially when, as here, a federal agency has made a final decision denying an apportionment claim on behalf of the veteran's dependents. *See* 38 U.S.C. § 511(a) (making the decision of the Secretary of Veterans Affairs "final and conclusive" and not subject to "review[] by any other official or by any court, whether by an action in the nature of mandamus or otherwise").

Mother asserts that Father waived his preemption argument by failing to notify the Tennessee Attorney General and Reporter of his challenge to the validity of a provision of the child support guidelines. *See Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005). "[T]he doctrine of preemption is rooted in the Supremacy Clause of the United States Constitution." *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 748 (Tenn. 2015); U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, federal law "may preempt an otherwise valid state law, rendering it

without effect." *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47, 55 (Tenn. 2013); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) ("Because the state Act's provisions conflict with . . . the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause."). The Attorney General must be given notice and an opportunity to be heard whenever the constitutional validity of a state statute or regulation is at issue. Tenn. Code Ann. § 29-14-107(b) (2012); TENN. R. CIV. P. 24.04. "Compliance with [the notice] statute and the related rules is mandatory." *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009) (J. Koch, concurring in part and dissenting in part). A litigant's failure to provide timely notice can be fatal on appeal. *See Buettner*, 183 S.W.3d at 358.

Father's counsel conceded at oral argument that the Attorney General had not been notified in this case. By rule, we may "not dispose of an appeal until notice has been given and the Attorney General has been given such opportunity to respond." TENN. R. APP. P. 32(d). So we ordered Father to serve a copy of the appellate briefs on the Attorney General's office. *See id.* 32(a). And we ordered the Attorney General to notify this Court whether it wished to participate in the appeal and, if so, what relief was appropriate considering Father's failure to comply with the statutory mandate and related rules.

The Attorney General responded that it would defend the validity of the guidelines. *See* Tenn. Code Ann. § 8-6-109(b)(9)(2016). But, given Father's non-compliance with the statute and related rules, the

Attorney General argued that we should consider Father's preemption argument waived.

Federal preemption arguments can be waived in some circumstances. *See Roberts v. Roberts*, No. M2017-0479-COA-R3-CV, 2018 WL 1792017, at *9 (Tenn. Ct. App. Apr. 16, 2018) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008)); *Dajani v. New S. Fed. Sav. Bank*, No. M2007-02444-COA-R3-CV, 2008 WL 5206275, at *4 (Tenn. Ct. App. Dec. 12, 2008); *Wells v. Tenn. Homesafe Inspections, LLC*, No. M2008-00224-COA-R3-CV, 2008 WL 5234724, at *3 (Tenn. Ct. App. Dec. 15, 2008). For instance, a litigant's failure to provide the requisite notice of a constitutional challenge to the Attorney General has resulted in waiver of the constitutional issue on appeal. *See Tennison Bros., Inc. v. Thomas*, 556 S.W.3d 697, 731 (Tenn. Ct. App. 2017); *Buettner*, 183 S.W.3d at 358. In *Buettner v. Buettner*, a father raised a constitutional challenge to the child support guidelines during a post-divorce modification proceeding. 183 S.W.3d at 357. Yet he "failed to provide the Attorney General with notice of the challenge to the constitutionality of the guidelines while this matter was before the trial court." *Id.* at 358. The appellate court deemed his constitutional challenge waived. *Id.* As we explained, "the failure to provide notice of a constitutional challenge to the Attorney General . . . is fatal 'except to the extent the challenged statutes are so clearly or blatantly unconstitutional as to obviate the necessity for any discussion.'" *Id.* (quoting *In re Adoption of E.N.R.*, 42 S.W.3d 26, 34 (Tenn. 2001)).[1] And "[t]he child support

[1] Although In re Adoption of E.N.R. also involved a failure to

guidelines are not clearly or blatantly unconstitutional." *Id.*

Father insists waiver is inappropriate here because he raised his preemption argument in the trial court. And he gave belated notice to the Attorney General after oral argument in this Court to "cure" his previous noncompliance. But Father overlooks the importance of timely notice in protecting the public's interest. *See Cummings v. Shipp*, 3 S.W.2d 1062, 1063 (Tenn. 1928). Notice "enables the Office of the Attorney General to discharge its responsibility to defend the constitutionality of state statutes." *Waters*, 291 S.W.3d at 918 (J. Koch, concurring in part and dissenting in part). And it assures a vigorous defense. *Id.*; *see also Cummings*, 3 S.W.2d at 1063 (recognizing that the purpose of the notice mandate "is to protect the public should the parties be indifferent to the result, as it might affect the public welfare"). Here, the Attorney General had no notice or opportunity to be heard when the preemption issue was before the trial court.

Under these circumstances, we deem Father's preemption issue waived. *But see Daniels v. Trotter*,

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notify the Attorney General, the fatal failure in that case was a constitutional "issue improperly raised before the trial court at the last minute" during closing argument. 42 S.W.3d 26, 30, 32 (Tenn. 2001). The Tennessee Supreme Court never held, as this Court did in Buettner, that failure to notify the Attorney General of a constitutional challenge results in the waiver of that challenge. Compare Buettner, 183 S.W.3d at 358 with In re Adoption of E.N.R., 42 S.W.3d 26, 31-34 (Tenn. 2001). But, as a published decision, Buettner is controlling. See TENN. R. SUP. CT. 4(G)(2).

No. E2020-01452-COA-R3-CV, 2022 WL 2826848, at *7 (Tenn. Ct. App. July 20, 2022) (concluding the circumstances of that case warranted vacating a judgment and remanding with instructions for the litigant to notify the Attorney General of the constitutional challenge to a state statute). Father did not notify the Attorney General of his constitutional challenge to the child support guidelines until after the trial court had made its decision and for over a year after this appeal was filed. The important public interest objectives served by the notice requirement were not met.

B.

Mother asserts that, as the prevailing party with respect to the child support issue, she is entitled to an award of attorney's fees incurred on appeal.[2] *See* Tenn. Code Ann. § 36-5-103(c) (2021). Tennessee Code Annotated § 36-5-103(c) provides this Court with the discretion to award attorney's fees incurred on appeal. *Strickland v. Strickland*, 644 S.W.3d 620, 635-36 (Tenn. Ct. App. 2021).

We grant Mother's request for an award of reasonable attorney's fees incurred on appeal. Mother prevailed by successfully defending the trial court's modification of child support. This Court has recognized that "[t]he allowance of attorney's fees for [an appeal] is for the

[2] Father also asks, based on the prevailing party statute, for reversal of the trial court's judgment and a remand with instructions to reconsider the denial of his request for attorney's fees. But because Father did not prevail, he is not entitled to an award of attorney's fees. *See* Tenn. Code Ann. § 36-5-103(c) (2021).

benefit of the child, and the custodial spouse should not have to bear the expense incurred on the child's behalf." *Ragan v. Ragan*, 858 S.W.2d 332, 334 (Tenn. Ct. App. 1993). We also note that Father's income is more than double Mother's income.

III.

Because Father failed to provide timely notice of his constitutional challenge to the Attorney General, we deem his federal preemption issue waived. Thus, we affirm the trial court's judgment. We remand this matter to the trial court for a determination of reasonable attorney's fees to Mother on appeal and for further proceedings consistent with this opinion.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE

IN THE CHANCERY COURT FOR THE 19™ JUDICIAL DISTRICT OF MONTGOMERY COUNTY, TENNESSEE AT CLARKSVILLE

JEREMY N. MILLER	§
Plaintiff	§
	§
vs	§ Docket No. MC-CH-CV-
	§ DI-11-121
CASI A. MILLER	§ Judge Ted A. Crozier, Jr.
Defendant	§

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the Defendant, CASI A. MILLER's Petition for Modification of the Parenting Plan, filed on August 16, 2016; the Defendant's Petition for Civil and Criminal Contempt, filed on June 23, 2017; testimony of the parties and arguments of their respective counsel of record; and the entire Court record herein, from all of which the Court finds as follows. The Plaintiff shall hereinafter be referred to as "former Husband", and the Defendant shall hereinafter be referred to as "former Wife":

FINDINGS OF FACT

1. That these parties were divorced by the entry of a Final Decree of Absolute Divorce in the Chancery Court for Montgomery County, on September 2, 2011. The parties entered into a Marital Dissolution

Agreement and Agreed Shared Parenting Plan which provided for the parties to have equal time with the minor children.

2. That at the time of the parties' divorce, the former Husband was active duty military. Pursuant to the terms of said Final Decree, the former Wife was awarded twenty-seven (27%) of the former Husband's disposable retirement income in accordance with Title 10 of the U.S. Code. Also pursuant to the terms of the Final Decree, the former Wife was to receive her portion of the former Husband's retirement benefits directly from DF AS (Defense Finance and Accounting Service). The former husband was awarded one half of the wife's retirement and he received $5,000.00 from her retirement account.

3. That on or about February 27, 2017, the former Husband was discharged from the United States Army and released from assignment and duty by the Department of the Army because of physical disabilities resulting from injuries former Husband suffered during his military service. The former Husband was determined by the Department of Veterans Affairs to be 100% disabled due to his service connected injuries, and was placed on the TDRL (Temporary Disability Retired List) on February 28, 2017, in connection with the injuries sustained by him while serving in the U.S. Army. Former Husband has not received and does not receive any retirement benefits.

4. That subsequent to submitting her application for payment of a portion of the retired/retainer pay of the former Husband from DFAS, the former Wife received

a letter from Tammy Tompkins, Paralegal Specialist with DFAS, dated March 10, 2017 (This letter informed the former Wife that her application could not be approved because, "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available under the USFSPA." USFSPA is the Uniformed Services Former Spouses' Protection Act.

5. The former Wife filed a Petition for Civil and Criminal Contempt against the former Husband on June 23, 2017. The former Wife filed a Motion to Compel Allotment for Child Support and Retirement Benefits, on February 21, 2018. When that Motion was denied, the former Wife filed a Motion for Immediate Payment of Arrearages, Retirement Funds to the former Wife and for Attorney's Fees on June I, 2018, which was denied. The former Husband's attorney filed two Motions to Dismiss the former Wife's Petitions and Motions, reiterating that the former Husband's pay was based upon disability and not longevity. The former Husband's Motions to Dismiss were denied.

6. That prior to the former Wife filing a Petition for Civil and Criminal Contempt against the former Husband, the former Wife filed a Petition for Ex Parte Restraining Order and Modification of Permanent Parenting Plan on August 16, 2016. An Order was entered on September 7, 2016 as it regarded the Restraining Order. The Restraining Order was dissolved as it pertained to the parties' two youngest children, Jacob B. Miller and Caitlyn B. Miller, but remained in effect as it pertained to the eldest child, Justin B. Miller.

7. That in an attempt to resolve the issue of a modification of the parenting plan, the parties attended a Rule 31 mediation conference. On October 4, 2018, the parties entered an Agreed Order dismissing the Petition for Modification of the Parenting Plan, with the exception that the issue of a modification of child support would be addressed at the final hearing of this cause.

8. That per the Permanent Parenting Plan Order entered along with the Final Decree of Absolute Divorce on the 2nd day of September, 2011, the former Husband was to claim the minor child, Justin Blake Miller, on his tax return during odd years. The former Husband later learned that the former Wife had claimed Justin on her 2017 Federal Income Tax return. On November 28, 2018, the former Husband filed a Petition for Civil Contempt against the former Wife for claiming Justin on her tax return, which was heard at the final hearing of August 12, 2019. The Court declined to hold the former Wife in contempt for this issue.

9. That on February 6, 2019, the former Wife filed a Motion to Correct Order and/or Alter the Final Decree, which was to be heard at the final hearing of August 12, 2019. The former Wife's Motion to Correct Order and/or Alter the Fina] Decree was not timely filed pursuant to Rule 60 of the Tennessee Rules of Civil Procedure, which states that an order may be corrected for clerical mistakes, inadvertence, surprise or excusable neglect, fraud, misrepresentation, misconduct and the like, and none of these conditions applied. Further, Rule 60.02 requires that a motion filed pursuant to this Rule shall not be made more

than one year after the order was entered. The former Wife's Motion was filed over seven (7) years following the entry of the Final Decree of Absolute Divorce on September 2, 2011. Therefore, the former Wife's Motion to Correct Order and/or Alter the Final Decree was denied.

10. The former Husband was provided correspondence from L. Bodenmiller, Training Specialist (Retired and Annuitant Pay), with the DFAS, which clearly indicates the former Husband receives only disability pay and that there is no entitlement for the former Wife under USFSPA. This correspondence stated, *inter alia,* that the former Husband was receiving Chapter 60 Disability Pay and that the former Husband had $0.00 available as disposable income. The correspondence further stated that the former Husband's disposable income of $0.00 multiplied by the former Wife's awarded percentage of 27.0000% equaled $0.00 of the former Wife's entitlement.

11. That at the final hearing, the Court found that the former Husband is 100% disabled.

12. That at the time of the final hearing on August 12, 2019, the former Husband had been placed on the TDRL (Temporary Disability Retired List) on February 28, 2017, in connection with the injuries sustained by him while serving in the U.S. Army. The Court indicated that it may hold its decision in abeyance until a decision was made concerning a finding of permanent disability. On October 18, 2019, the former Husband was placed on the PDRL (Permanent Disability Retired List), by ORDER D291-38 from the Secretary of the Army. The former

Husband submitted proof of this placement by providing a copy of the letter he received from the Department of the Army, U.S. Army Physical Disability Agency. This letter stated that the former Husband was now considered permanently disabled with a percentage of disability at 90%.

13. The Marital Dissolution Agreement was drafted by the attorney for the husband. Both parties were represented by attorneys during the preparation of the Marital Dissolution Agreement.

14. The court finds that Mr. Miller's income from all sources is $11,250.00 per month. All of Mr. Miller's income is non-taxable.

15. The court finds that Ms. Miller's income from her work at Dr. Brannen's dental office is $5,015.00 per month.

16. Under paragraph 12 of the hand-written mediation agreement, it states "wife gets 27% of husband's military retirement. This is the husband's gross military retirement (W3-20 years)." Further wording of " gross to include disability pay" has been scratched out from the mediation document."

17. Paragraph II. SPOUSAL SUPPORT / RETIREMENT of the MDA states "The parties agree that the WIFE shall be awarded twenty-seven percent (27%) of Husbands disposable retirement income in accordance to Title 10. The WIFE's percentage shall be taken from the disposable amount of the Husband's retirement after authorized deductions. The Wife shall receive said monthly payment directly from the

Defense Finance and Accounting Service (DFAS) and HUSBAND agrees to cooperate in doing all things necessary to ensure that the WIFE receives said benefits via military allotment."

CONCLUSIONS OF LAW

THE EFFECT OF THE MARITAL DISSOLUTION AGREEMENT

The former wife argues that the Marital Dissolution Agreement does not conform with the intent of the parties. She states that the wording in the MDA is not the same wording in the parties hand-written mediated agreement and that the insertion of certain words prevents her from receiving her portion of the ex-husband's military retirement. As stated in the Findings of Fact, the mediated agreement says "wife gets 27% of husband's military retirement. This is the husband's gross military retirement." The MDA says "the parties agree that the wife shall be awarded twenty-seven percent (27%) of the husband's disposable retirement income in accordance with Title 10. The wife's percentage shall be taken from the disposable amount of the husband's retirement after authorized deductions." The wife argues that the mediated agreement allows her retirement percentage to be calculated from the gross income of Mr. Miller, not taking into account any payments for Mr. Miller's disability pay. The former wife argues that what was in the Marital Dissolution Agreement was not what was intended during mediation and written in the mediated agreement. She believes the wording in the MDA is the husband's attempt to prevent her from getting her share of his retirement.

The Court finds that evidence of the writings and discussions proceeding and surrounding the signing of the 2011 MDA, and what the parties did or did not intend or understand from its language is inadmissible as extraneous, contemporary, and/or parole evidence and therefore, insufficient and unreliable to contradict the plain terms of the agreement itself. Based on the testimony of the parties, both parties were represented by counsel during this divorce and specifically during the signing of the MDA. There was no evidence presented of any fraud, undue influence or incapacity which may negate the Marital Dissolution Agreement. This court recognizes the MDA and the provision that talks about the husband's disposable retirement as controlling. The court also notices that the specific term "gross to include disability pay" was scratched out of the mediated agreement. It is clear from the MDA that the wife's award was from the husband's disposable retirement income in accordance with Title 10. That's the interpretation from the military and VA and it is also determined in case law and specifically *Howell v. Howell* which will be discussed later. *Howell v. Howell* supports that a spouse cannot receive any portion of a veterans' disability benefits as a property division. The Court finds that the defendant / counter-plaintiff, Casi Miller signed a valid and enforceable contract in the 2011 MDA that provided that she is only entitled to 27% of the respondent, Jeremy Miller's "disposable retired pay." The Defense Finance and Accounting Service instructed Ms. Miller that there were no "disposable benefits to distribute per this agreement because Mr. Miller's retirement pay was based on his service connected disability."

DISPOSABLE *INCOME/HOWELL*

Ms. Miller argues that *Vlach v. Vlach, 556* S.W.3d 219(Tenn. App. 2017) propounds that a court can interpret its own orders, modify them and ensure they are followed including when parties make arrangements of division of military retirement. While that may be the case, the court cannot go against federal statutes as well as Tennessee and federal case law. The Court would like to rule for the former wife because the court believes Ms. Miller is at a tremendous disadvantage by not getting what she potentially bargained for, which was a portion of Mr. Miller's retirement which no longer exists. Under federal law the only monies that a veteran can be required to pay to his or her former spouse, in a property division based on divorce, is what is defined as "disposable retired pay" received by the veteran from the federal government as a result of the veteran's service. In this case, Mr. Miller was medically retired under Chapter 61, Title 10 U.S.C.A. §1201, et seq., on 12 January 2017. He was designated as 100 percent disabled upon his forced medical retirement from the military. He never received any non-disposable monies and there never was any "disposable retired pay" from which Mrs. Miller would receive her 27%.

One hundred percent of the veterans' benefits received by Respondent Jeremy Miller are and always have been what the USFSPA defines as non-disposable, and therefore non-divisible benefits. Therefore, there is no "disposable retired pay" for this Court to order a division of if it were to enforce the language of the MDA. Both parties' site to different

cases but the Court believes it needs to go no further than the Supreme Court's decision in *Howell v. Howell.* The U.S. Supreme Court held that 38 U.S.C. 530l(a)l prohibits state courts from entering any order that contradicts or otherwise exceeds the property disposition allowed by federal law. *Howell v. Howell,* 137 S.Ct.1400, 1405 (2017). *Howell* addressed whether state courts could order a veteran to pay to his or her former spouse monies in a property settlement agreement where there were no disposable benefits as a result of the veterans receipt of non-disposable benefits. "State courts cannot "vest" that which (under governing federal law) they lack the authority to give)". *Id*.

Mrs. Miller seems to argue there must be a waiver of retired pay by the service member to receive disability benefits. She argues that traditionally under federal law a service member's retirement, (if he/she had a disability rating) would be reduced by the amount of the disability itself. Thus, the spouse of the service member could not count the disability pay as part of the retirement from which his or her percentages would be calculated. Ms. Miller argues that there must be a specific waiver whereby VA disability reduces the amount of retirement pay and that reduced amount is paid by the VA. While that has been the process in the past, recently the military has established Concurrent Receipt Pay (CRDP) and Combat Related Special Compensation (CRSC) to compensate military retires with disabilities at a greater rate. Ms. Miller argues that this case is distinguishable from *Howell.* In *Howell* and *Mansell* v. *Mansell,* 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2D 675, the service members were receiving their full

retirement benefits which were then "actually reduced" by the disability benefits that the former service member received from the VA. In this case, the former wife argues that there is not a VA waiver nor any reduction in retirement pay. There is no VA waiver because Congress has instituted CRDP, which more fully compensates a retiree with disabilities.

Even though there's a deduction from CRDP of disability pay, the retiree doesn't have to execute a waiver as under a waiver that was required under the prior military pay system. The point here is that these are disability benefits which the Court believes that Congress was trying to protect for former soldiers. The Court believes that the designation of the money as retirement or disability outweighs the terminology of waiver or non-waiver.

Howell went a step further stating that not only can't the state court divide disability pay, but the state court cannot indemnify a former spouse, as that would be a roundabout means of paying that spouse the service member's disability pay. The court rejected the argument that the former spouses right to the veteran's benefits had vested, noting that the state courts cannot vest 'that which they cannot give' (non-disposable retired pay).

This Court believes even if the parties entered into an agreement without the nondisposable terminology and the Court signed the agreement, based on *Howell* the Court would not have the authority to divide that pay which is for disability.

Under prevailing and preemptive federal law, the only monies that a veteran can be required to pay over to a former spouse in a property division consequent to divorce is what is defined as "disposable retired pay" received by the veteran from the federal government as a result of the veteran's service. In the instant case, Mr. Miller was medically retired under Chapter 61, Title 10 U.S.C.A. *§* 1201, et seq., on 12 January 2017. He was designated as 100 percent disabled upon his forced medical retirement from the military. The only benefits Mr. Miller ever received are considered non-disposable within the meaning of federal law. Therefore, there is and never was any "disposable retired pay" to partition under the parties' contractual agreement, the Marital Dissolution Agreement (MDA).

One hundred percent of the veterans' benefits received by Respondent Jeremy Miller are and always have been what the USFSPA defines as non□disposable, and therefore non-divisible benefits. Therefore, there is no "disposable retired pay" for this Court to order a division of if it were to enforce the language of the MDA.

Mr. Miller was retired under Chapter 61, Title 10 U.S.C.A. § 1202. His disability rating was 90 percent. Section 1202 provides that "retired pay" under this section is to be computed under 10 U.S.C. *§* 1401. The latter section calculates "disability retirement" pay by multiplying the retirement pay to which the service member *would be entitled* by the disability percentage. In this case, this percentage was 100. Thus, the "disability retirement pay" to which he was entitled on 12 January 2017 per 10 U.S.C. §

1408(a)(4)(A)(iii), which is to be subtracted from the amount of retired pay to which he would be entitled if he were not disabled, was determined to be 100 percent. Therefore, Respondent receives *no disposable retired pay;* his only income is percent VA disability pay.

The "concurrent retired disability pay" (CRDP) classification, in this particular instance, is a pure disability-based classification. Respondent's qualification upon his discharge as a 100-percent permanently and totally disabled veteran who was involuntarily removed from active duty service due to his combat-related injuries resulted in this disability classification pursuant to Chapter 61, 10 U.S.C. *§* 1201, et seq. As he only received benefits pursuant to Chapter 61, and such benefits are statutorily excluded from consideration as disposable retired pay under 10 U.S.C. § 1408(a)(4)(A)(iii) of the USFSPA, state courts may not order or approve of a division of any of these funds. Even Petitioner's own consultant agrees: "When the pay is based on *percentage of disability,* no portion of it may be divided by the court." 10 U.S.C. § 1408(a)(4).

The Court finds that in March of 2017, the Defense Finance and Accounting Service (DFAS), which would ordinarily directly pay any disposable benefit to former spouses under the USFSPA contemplated in an agreement between the parties and pursuant to a court order, see 10 U.S-C.A. § 1408(d), sent Petitioner Casi Miller a letter rejecting Petitioner's claim for a share of Respondent's disposable retired pay explaining that there was no

disposable retired pay to divide with her or to distribute to her.

During the course of these proceedings, Respondent Jeremy Miller was designated as 100 percent disabled as the result of injuries incurred in combat. In March 2017, Respondent Jeremy Miller was entitled to CRSC. *Id.* His total combat-related disability was established at 100 Percent. *Id.,* p. 2. It should be noted that in addition to being non-disposable, CRSC benefits, which were established by Congress *after* passage of the USFSPA in 1982, are specifically excluded from being considered as divisible or disposable retired pay within the meaning of the USFSPA. See 10 U.S.C.A. § 1413a(g). The CRSC award is retroactive to March 2017 (the same date Plaintiff Jeremy Miller began receiving his veteran's disability entitlement).

In the instant case, there is no legal basis upon which this Court could require Plaintiff, Jeremy Miller to pay anything over to Petitioner Casi Miller in the form of "disposable retired pay" under the parties' MDA, either in the past, present, or in the future, because Jeremy Miller never received and will never receive "'disposable retired pay." All of Mr. Miller's pay is and has always been defined as "non-disposable" disability pay within the meaning of the USFSPA.

While a hard consequence to Ms. Miller, the court finds that Mr. Miller receives no disposable income from which to pay Ms. Miller and that *Howell* prevents the court from ordering or restructuring the

MD A/Final Decree in order for Ms. Miller to draw from Mr. Miller's disability
pay.

CHILD SUPPORT AND CHILD SUPPORT ARREARAGES

Mr. Miller argues that the court cannot consider Mr. Miller's disability pay as income for the purpose of calculating child support. This court disagrees. The Tennessee Child Support Guidelines Chapter 1240-02--04-.04(3)(a)l.(xiv) states that the determination of gross income includes "disability or retirement benefits that are received from the Social Security administration pursuant to title II of the Social Security act or from the Veteran Affairs Department, whether paid to the parent or to the child based on the parents account."

Thus, Tennessee's child support guidelines contemplate VA payments to be included in child support income calculations. The father argues that "where a veteran receives only disability pay and has never received or waived retirement pay, the federal government does not consider such pay as income for purposes of garnishment or attachment for satisfaction of child support ob1igations. It's obvious from the letter presented from the VA that they won't garnish child support from Mr. Miller's VA benefits. Garnishing child support from disability benefits is much different than using those benefits to calculate a child support amount. The former husband argues that his former wife previously filed a claim for an apportionment of his disability benefits to be paid to her for child support. He states that the claim was

denied by the Veteran's Administration. The letter advised that in order to be entitled for additional payments for child support the former non-military spouse must demonstrate a need for benefits and not receive a reasonable level of support from the primary beneficiary (the former military spouse). The letter additionally explained that the former husband was providing $450.00 per month in child support which was deemed a reasonable level of support. The Court is a little confused with this argument. Certainly, the VA provided the letter saying that the veteran is providing $450.00 a month in financial support and that it is deemed a reasonable level of support. The problem is that the $450.00 per month is not what the VA deemed is reasonable but what this court in its final decree/parenting plan dictated would be paid in support. That support was based on an agreement of the parties and a court order. Certainly, the Court has the ability to adjust that support to deem what is necessary. The Court cannot believe that the VA holds its own child support hearings or evaluates support amounts to determine what's reasonable but instead follow what courts say is reasonable for child support.

The former husband additionally argues that *Howell* holds that state courts are prohibited from vesting entitlement in these benefits to anyone other than the beneficiary. He further states that as these benefits cannot be directly or indirectly subjected to legal process, they cannot be "counted" or otherwise used in calculating spousal support or child support in any proceeding in which the state seeks to have them included. This Court disagrees. The Court believes that *Howell* pertains to property division and not child support. The Supreme Court specifically said that a

court could not divide disability payments made to the service member for a property division. Nothing in *Howell* talks about child support. The Supreme Court of New Hampshire *in the Matter of Braunstein,* 173 N.H. 38 (2020) found otherwise. Mr. Braunstein asserted that his federal veteran's disability benefits did not qualify for inclusion in income for child support purposes pursuant to federal law. He argued that the federal preemption based on *Howel* prevented his disability benefits from being considered. The trial court disagreed. In New Hampshire, the legislative body included in the statutory definition of gross income (for child support purposes) veterans' benefits. The New Hampshire Supreme Court held "the broad statutory definition of gross income" for child support purposes, which includes veterans benefits and disability benefits, is consistent with federal law, moreover, neither the intent of the New Hampshire legislature nor the New Hampshire Department of Health and Human Services is relevant to the federal question of pre-emption thus for all the reasons stated above, we hold that federal law did not preclude the trial court from including husband's federal veteran's disability benefits as income for child support purposes." *In the Matter of Braunstein,* l 73 N.H. 38, 877, 236A.3d 870 (2020).

Three factors point to the use of disability payment as income for child support. First, Tennessee's child support regulations include VA disability as income. Second, at least one other State Supreme Court finds that it doesn't violate federal statutes to include disability income for child support purposes. Third, *Howell* doesn't specifically exclude

disability payments from being used to calculate child support. This Court concludes that it is appropriate to include Mr. Miller's disability benefits for child support purposes.

The Court finds that based on the agreed number of days between the parties (182.5 and 182.5), credit to two other children for Mr. Miller, and based on the Findings of Fact that Mr. Miller's total income through Social Security and Veteran's Disability benefits equals $11,250 and Ms. Miller's income equals $5,015; that the child support payments Mr. Miller should make to Ms. Miller equate to $649.00 per month. The Court accepts the child support worksheet provided by Ms. Miller. The Court finds that the child support should be retroactive to March of 2017, when Mr. Miller began receiving his Veteran's Disability entitlement and that the prior order of $450 a month was still in effect until March of 2017. Mr. Miller's arrearages equate to $199.00 a month back to March of 2017. The arrearages will be paid off at a rate of $200.00 a month in addition to his current child support until the arrearages are paid off.

CONTEMPTS

The Court finds that neither party is in contempt. The issues presented at trial and in the briefs are complicated and, in many ways, difficult to understand. It is understandable that each side would take a contrary position as to both the reading of the Marital Dissolution Agreement and whether disability payments were part of a property division or not. Additionally, both sides take a different position on whether Mr. Miller's disability benefits should be

included or not in child support calculations. Both these issues are nebulous at best and therefore, the Court does not find that either party was in willful violation of the law or a court order.

ATTORNEY FEES

Both parties argue that they should receive attorney fees either because the other party was in contempt or because the Tennessee Code favors them receiving benefits. Mr. Miller sites to TCA§36•5-103(c). This code section states

> "a prevailing party may recover reasonable attorney fees, which may be fixed and allowed in the courts discretion, from the non-prevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing in at any subsequent hearing."

The Court finds that both parties have prevailed and failed. Mr. Miller has prevailed in his argument that his disability payments cannot be used to pay Ms. Miller's retirement benefits as set out in the MDA. Ms. Miller has prevailed in that the child support calculation should be adjusted because Mr. Miller's income from disability benefits is included in his overall income. Because both parties have prevailed, the Court denies attorney fees to either one.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Defendant/former Wife, **CASI A. MILLER's** Petition for Civil and Criminal Contempt and Motion to Correct Order and/or Alter the Final Decree are dismissed.

2. That there is and never has been any "disposable retired pay" for the parties to divide under the property disposition in the 2011 Marital Dissolution Agreement (MDA). Therefore, the Court concludes under prevailing federal law, and particularly, the Uniformed Services Former Spouses Protection Act (USFSPA), Title 10 U.S.C.A. § 1408, Plaintiff/former Husband **JEREMY MILLER** does not owe any monies to Defendant/former Wife, **CASI A. MILLER,** under the MDA's provision wherein Plaintiff/former Husband, **JEREMY MILLER,** agreed to pay twenty seven percent (27%) of his disposable retired pay in accordance with Title 10.

3. The Court finds that the former wife, is not in willful and deliberate contempt of this Court's Order, and therefore, dismisses the former husband's Petition for contempt against the former wife.

4. The Court finds that the current child support should be in the amount of $649.00 per month and orders child support arrearages back to March 2017. The arrearages are $199. 00 a month and will be paid off at $200.00 per month until arrearages are caught up. The Court incorporates Ms. Miller's child support worksheet.

ENTERED, this the 13th day of May, 2022.

_____
TED A. CROZIER, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by United States Postal Service first c1ass mail, postage prepaid to Deborah S. Evans, 136 Franklin Street, Suite 300, Clarksville, TN 37040, Carson Tucker, 117 N. First Street, Suite 111, Ann Arbor, MI 48104 and Sheri Philips, 105 South Third Street, Clarksville, TN 37040 on this the 13th day of May, 2022.

_____
Michael W. Dale
Clerk and Master

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JEREMY N. MILLER v. CASI A. MILLER

Montgomery County Chancery Court
MC CH CV DI 11-121

No. M2022-00759-SC-Rl l-CV

Date Printed: 01/24/2025
Notice/Filed Date: 01/24/2025

NOTICE – Case Disposition Decision – TRAP 11
Denied

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

JEREMY N. MILLER v. CASI A. MILLER
Montgomery County Chancery Court
MC CH CV DI 11-121
No. M2022-00759-COA-R3-CV

Date Printed: 07/13/2023 Notice Filed: 07/13/2023

NOTICE – Order – Answer/Response Requested by Court

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

IN THE COURT OF AP PEALS OF TENNESSEE
AT NASHVILLE

JEREMY N. MILLER,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. M2022-00759-COA-3-
v.	)	CV
	)	Montgomery Chancery
CASI A. MILLER	)	No. MC CH CV DI 11-121
	)	
Defendant-Appellee.	)	

STATE OF TENNESSEE'S NOTICE OF INTENT TO FILE A BRIEF

In accordance with this Court's order of July 13, 2023, the State of Tennessee respectfully gives notice of its intent to file a brief in this case under Tenn. R. App. P. 32(c) – unless this Court determines that Plaintiff-Appellant, Jeremy Miller, has waived his challenge to the constitutionality of Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1). And the State submits that this issue *has* been waived, for the reasons discussed below.

Plaintiff has argued on appeal that the Rule – which requires veteran disability benefits to be considered as gross income for the purpose of calculating child support – is preempted by federal aw. (Br. Appellant, 6-14.) This Court noted in its July 13 order that while Plaintiff raised this issue in the trial court, he did not provide notice to the Attorney General, as required by Tenn. R. Civ. P. 24.04 and

Tenn. Code Ann. § 29-14-107; nor had Plaintiff provided notice on appeal, as required by Tenn. R. App. P. 32. The Court ordered Plaintiff to provide copies of the parties' briefs to the Attorney General; those briefs were served on the Attorney General on July 25, 2023. The Court ordered the Attorney General to "notify this Court if it wishes to be heard in this appeal" and "if so, what relief is appropriate in light of the lack of compliance with Tennessee Code Annotated § 29-14-07, Tennessee Rule of Civil Procedure 24.04, and Tennessee Rule of Appellate Procedure 32." (Order, 1-2.)

The State intends to participate in this appeal for the limited purpose of defending the constitutionality of Rule 1240-02-04-.04(3)(a)(1). However, given Plaintiff's failure to provide the requisite notice to the Attorney General in the trial court, Plaintiff's constitutional challenge should be deemed waived.

The purpose of providing notice to the Attorney General is to allow the State "to protect the public's interest in the result of the suit." Tenn. R. Civ. P. 24.04, *Advisory Comm'n Comment* (citing *Cummings v. Shipp*, 3 S.W.2d 1062 (1928)). Here, the State has an interest in ensuring that children in Tennessee are financially supported by their parents through the setting and enforcement of child support. *See State ex rel. Johnson v. Mayfield*, No. W2005-02709-COA-R3-JV, 2006 WL 3041865, at *6 (Tenn. Ct. App. Oct. 26, 2006) (noting the State's interest "in ensuring that biological and adoptive parents support their children" and "in safeguarding public funds by making certain that biological parents fulfill their duties to support their children") (no perm. app. filed).

The Tennessee Department of Human Services administers the child-support program operated pursuant to Title IV-D of the Social Security Act. *See* Tenn. Code Ann. § 71-1- 32. And the Department promulgates the child support guidelines, one of which is the subject of Plaintiff's constitutional challenge. *See* 42 U.S.C. § 667(a) ("Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State."); Tenn. Code Ann. § 71-1-132 (providing rulemaking authority); Tenn. Comp. R. & Regs. 1240-02-04 (child support guidelines).

"Before [this Court] can consider an attack on the constitutionality of a statute, the record must reflect compliance" with the laws requiring that the Attorney General be provided notice of the challenge. *Tennison Bros., Inc. v. Thomas*, 556 S.W.3d 697, 731 (Tenn. Ct. App. 2017). Failure to provide such notice results in waiver of the issue. *See id.* at 731. "The Tennessee Supreme Court has noted that the failure to provide notice of a constitutional challenge to the Attorney General . . . is fatal 'except to the extent the challenged statutes are so clearly or blatantly unconstitutional as to obviate the necessity for any discussion.'" *Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005) (quoting *In re Adoption of E.N.R.*, 42 S.W.3d 26, 28 (Tenn.2001)). And "[t]he child support guidelines are not clearly or blatantly unconstitutional." *Id.*; *see also id.* (finding the constitutional challenge waived).

It matters not that Plaintiff bases his constitutional challenge on federal preemption principles. "Statutory preemption arguments are not

treated differently than other arguments with regard to waiver." *Roberts v. Roberts*, No. M2017-00479-COA-R3-CV, 2018 WL 1792017, at *9 (Tenn. Ct. App. Apr. 16, 2018) (no perm. app. filed). "[T]he United States Supreme Court has held that courts have discretion to rule that preemption arguments were waived by failure to timely raise and properly support arguments to that effect." *Id.* (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008)). And this Court has found federal preemption issues waived when the circumstances warranted such a finding. *See Roberts*, 2018 WL 1792017, at *8-9; *Dajani v. New S. Fed. Sav. Bank*, No. M2007-02444-COA-R3-CV, 2008 WL 5206275, at *4 (Tenn. Ct. App. Dec. 12, 2008); *Wells v. Tenn. Homesafe Inspections, LLC*, No. M2008-00224 COA-R3-CV, 2008 WL 5234724, at *3 (Tenn. Ct. App. Dec. 15, 2008).

The circumstances here warrant a finding that Plaintiff's preemption challenge is waived. If the Court should determine otherwise, however, the State respectfully requests that it be afforded 30 days from the date of the Court's ruling to obtain and review the appellate record and to file a brief in support of the constitutionality of Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(1).

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

/s/ *Amber L. Barker*
AMBER L. BARKER,
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Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appearance has been forwarded by this Court's electronic filing system and/or first class U.S. Mail, postage paid to:

Deborah S. Evans
136 Franklin St. Ste 300
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dsevans@bellsouth.net

Donald Capparella
Jacob A. Vanzin
1310 6th Ave. N.
Nashville, TN 37208
capparella@dodsonparker.com
jacob@dodsonparker.com

on this the 7th day of August 2023.

/s/ *Amber L. Barker*
AMBER L. BARKER
Senior Assistant
Attorney General

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

JEREMY N. MILLER,	§	
	§	
Plaintiff / Appellant,	§	
	§	
vs.	§	Appeal No. M2022-00759
COA-R3-CV	§	COA-R3-CV
	§	
CASI A. MILLER,	§	Montgomery County
	§	Chancery Court
Defendant / Appellee	§	MC CH CV DI 11-121

APPELLANT'S RESPONSE TO ATTORNEY GENERAL AND APPELLEE'S REPLY

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Amber L. Barker
Tennessee Attorney General
Senior Assistant Attorney General
Human Services Division
P.O. Box 20207

Nashville, TN 37202

TABLE OF AUTHORITIES

Statutes

Cases

APPELLANT'S RESPONSE TO ATTORNEY GENERAL'S NOTICE OF INTENT TO PARTICIPATE AND APPELLEE'S REPLY

Appellant provides this combined response to the Attorney General's notice of intent to participate filed August 7, 2023, and the Appellee's response thereto, filed August 11, 2023.

The case before the Court squarely presents an issue never before addressed by any state or federal court in its current posture. A federal agency with primary *and* exclusive jurisdiction and control over claims for veterans' disability benefits denied such a claim by Appellee for support of the minor children before Appellee's state law action to receive those benefits for supplemental support payments. See 38 U.S.C. § 511(a) (first sentence). That decision occurred *prior to* Appellee's state contempt action was filed seeking the restricted disability benefits to supplement the Appellant's current support payments.

Contrary to that decision, and in direct contravention thereof under the controlling federal statute, which *precludes review by any other court*, see 38 U.S.C. § 511(a) (second sentence), the trial court then ruled that it could ignore the agency's decision and order Appellant to use his restricted disability

benefits to pay Appellee's claim for additional child support. The trial court did this despite the fact that the statute clearly provides that any decision by the agency is final and conclusive, and "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. § 511(a) (second sentence).

The State argues that statutory preemption arguments can be waived, citing *Roberts v. Roberts*, No. M2017-00479-COA-R3-CV, 2018 Tenn. App. LEXIS 195, at *26 (Ct. App. Apr. 16, 2018) and *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487; 128 S. Ct. 2605, 2618; 171 L. Ed. 2d 570 (2008)), for the proposition.

However, those cases are distinguishable because there the appellants completely failed to raise the issue of preemption in the trial court and on appeal. *Roberts*, *supra* at *23; *Exxon*, *supra* at 487-88. Indeed, in the latter case, the federal statute relied on by Exxon was not even in existence during the lower court proceedings. It was raised by Exxon during the appeal because it was a new statute that Exxon tried to bootstrap into a generalized argument challenging the constitutionality of the challenged regulation regarding fines imposed against it for water pollution under the Clean Water Act. *Id*. at 488.

Here, not only did Appellant squarely present the issue in the trial court and on appeal concerning the federal agency's primary and exclusive jurisdiction over claims for disability benefits for support of dependents, but Appellant *and Appellee* already had, in hand, the agency's final adjudication denying

Appellee's claim (an adjudication that occurred prior to Appellee even filing the state contempt action seeking payment from Appellant). (App. 20-21 (June 12, 2018 Denial of Apportionment Claim for Child Support Benefits, also found in 2022-759 Technical Record, vol. IV, also stamped as Bates ID 000530-000531); (App. 24, 50-62, Appellant's Trial Brief, also found in 2022-759 Technical Record, vol. IV, also stamped as Bates ID 000464-000504); Appellant's Brief, pp. 1-40.

With the exception of following the *federal appellate process* contained within the relevant federal statutes, see, 38 U.S.C. § 511; 38 U.S.C. § 5307; 38 U.S.C. 7104 (all questions subject to a decision by the Secretary under § 511 are subject to appeal to the Secretary and final decisions shall be made by a Board of Veterans' Appeals); 38 U.S.C. § 7251 (Congress established "under Article I of the Constitution" a court of record to be known as "the United States Court of Appeals for Veterans Claims" (CAVC); 38 U.S.C. § 7252; and 38 U.S.C. § 7261 (that court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and has authority to consider "all relevant questions of law"); and 38 U.S.C. § 7292 (appeals can only be made to the Federal Circuit Court of Appeals), that decision was "final and conclusive and "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise," including state appellate courts.

The Supreme Court in *Hillman v. Maretta*, 569 U.S. 483, 490-491 (2013) ruled that state family and domestic law yields where federal preemption applies

and Congress occupies the entire field, and that "state laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments." Citing *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981). The Court was unequivocal in its reasoning that state law must yield to federal statutes governing the provision of federal benefits. Here, the case is even stronger because there is a specific federal statute divesting the state of jurisdiction and control, providing that a federal agency has full, exclusive jurisdiction and authority over these benefits, and making its decisions on claims therefor final and conclusive as to *all other courts*. See 38 U.S.C. § 511(a).

Appellant would therefore respectfully argue, as it did below, that not only has he not waived the relevant issue, but because the federal statute at issue provides the federal agency with primary and exclusive jurisdiction over claims for the contested funds, and because an adjudication on such a claim predated the Appellee's contempt action, the state court (as any other court) was jurisdictionally precluded from issuing a decision that contradicts the agency's denial of Appellee's claim. See *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 n.5, 104 S. Ct. 1936, 1939 (1984).

Arguably, the issue raised by the State is not one of waiver, but rather a failure to follow the rule regarding notice to the State of a constitutional challenge, and the extent to which a failure to comply with that provision constitutes a fatal error by an Appellant. Appellant would respectfully suggest that while the State should receive notice, and should

participate in contributing to this Court's consideration of this issue of first impression involving a conflict between state and federal law (and Appellant acknowledged a failure to do that during oral argument), Appellant has cured the defect by complying with this Court's order to notify the State.

As Appellee's response relies largely on the State's waiver argument, Appellant respectfully offers the above-arguments as to why he did not in fact waive the relevant federal preemption arguments, and has now complied with the Court's order to notify the State. Thus, because Appellant has not waived the arguments, and because it has now complied with the rule regarding notice to the Attorney General, Appellee's additional request for attorney fees should be denied.

CONCLUSION

Appellant respectfully argues that it has not *waived* the federal preemption argument, having presented the issue and the facts to the trial court and to this Court. Appellant would further respectfully suggest that the State has now been given the opportunity to fully participate in this case, and should do so to provide the most robust appellate record possible.

Respectfully submitted,

Deborah S. Evans,
BPR No. 017072
Attorney for Plaintiff / Appellant
136 Franklin Street, Suite 300

Clarksville, TN 37040
(931) 552-7111

Dated: August 16, 2023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon counsel of record for the State Attorney General, Senior Assistant Attorney General, Amber L. Barker, at Human Services Division, P.O. Box 20207, Nashville, TN 37202, and counsel of record for Appellee Donald N. Capparella, Esq., and Jacob A. Vanzin at 1310 6th Ave. North, Nashville, TN 37208, by sending same via first class mail and via electronically filing same in the Court of Appeals TrueFiling electronic filing system on August 16, 2023.

/s/ Deborah S. Evans

Deborah S. Evans

DPEARTMENT OF VETERANS AFFAIRS

FILED August 19, 2019
Michael W. Dale, Clerk
& Master

_____
Deputy Clerk
8 :57 A.M.

June 12, 2018

CASIE ANNE MILLER
CUSTODIAN OF
JUSTIN MILLER
JACOB MILLER
CAITLYNN MILLER
[REDACTED]
[REDACTED]

In reply, refer to
[redacted]
File Number:
[redacted]
MILLER, J N

Dear Ms. Miller,

We have carefully considered the claim for an apportionment of Jeremy Millers VA benefit to support his dependents, Justin, Jacob, and Caitlynn Miller.

What Did We Decide
We have denied your claim for an apportionment of the Veteran's benefits.

How Did We Make Our Decision
In order for a claimant to receive an apportionment of the Veterans benefits, the claimant must live apart from the primary beneficiary and demonstrate a need for the benefits, per the requirements of 38 CFR 3.451

and not receive a reasonable level of support from the primary beneficiary, as stated in 38 CFR 3.450.

The Veteran is providing $450 a month financial support ($450 child support) this is deemed a reasonable level of support.

What Evidence Did We Use

We used the following evidence to make our decision:

- VA Form 21-4318 Statement in Support of Claim, received on December 5, 2017
- Divorce Decree received July 11, 2017
- Letter from Casi, received July 11, 2017
- Court Document received July 11, 2017
- VA Form 21-0788 Information Regarding Apportionment of Beneficiary Award received July 11, 2017
- VA Form 21-4138 Statement in Support of Claim received July 11, 2017 (Casi)
- Social Security Cards for Justin. Jacob. and Caitlynn
- Apportionment Letter to Casi, dated August 30, 2017
- Due Process Notification Letter, dated August 30, 2017
- VA Form 2-4138 Statement in Support of Claim, received September 25, 2017 (Casi)
- Court Documents, received September 25, 2017

- VA Form 21-0820 Report of General Information, received on December 4, 2017
- Divorce Decree, received on December 5. 2017
- Court Documents, received December 5, 2017
- Court Documents, received December 14, 2017

Representation
You may be represented. without charge, by an accredited representative of a veteran's organization or other service organization recognized by the Secretary of the Department of Veterans Affairs. An agent or an attorney, for example, an attorney in private practice or a legal aid attorney, may only charge you for services performed on or after the date of a final decision by the Board of Veterans Appeals.

If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. Tbc VA will furnish the hearing room and provide hearing officials. The VA cannot pay any other expenses of the hearing since a personal hearing is held only on your request.

You may appeal this decision to the Board of Veterans Appeals at any time within 60 days from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of

Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits you are appealing.

If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, you must complete and return to us the enclosed VA Form 21-0958, *Notice of Disagreement*, in order to initiate your appeal. You have *sixty days* from the date of this letter to appeal the decision. The enclosed VA Form 4107c, *"Your Rights to Appeal Our Decision contested claims,"* explains your right to appeal.