No. 20-267

In the Supreme Court of the United States

SEAN BRAUNSTEIN,
Petitioner,

v.

JERICKA BRAUNSTEIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT FOR THE
SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR REHEARING

> I disagree with the Court's construction of 38 U.S.C. § 211(a), which provides that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents...shall be final and conclusive and no other official or any court of the United States *shall have power or jurisdiction to review any such decision.*" The Court finds this inapplicable because it does not *explicitly exclude state-court jurisdiction, as it does federal...* and because its underlying purpose of "achiev[ing] uniformity in the administration of veterans' benefits and protect[ing] the Administrator from expensive and time-consuming litigation...would not be impaired.

Rose v Rose, 481 US 619, 641-642; 107 S Ct 2029; 95 L Ed 2d 599 (1987). (emphasis added) (SCALIA, J., concurring).

There, Justice Scalia opined on the applicability of 38 USC § 211 (now § 511) to a state court order forcing a disabled veteran to dispossess himself of his veterans' disability pay to satisfy a child support obligation. Congress responded and changed 38 USC § 211 just after *Rose* to do exactly what Justice Scalia referred to, i.e., *explicitly exclude state court jurisdiction*, altogether. See 38 USC § 511(a) (in direct response to *Rose*, reference in § 211(a) to courts "of the United States" was replaced with a separate sentence that excludes review of benefits determinations as to "*any other official or by any court*").

Moreover, the first sentence was changed to make it clear that the Secretary primarily "*shall decide* all questions of law and fact", as opposed to the prior language which merely provided that the "decisions of the Administrator" would be deemed final and conclusive as to courts of the United States.

These were fundamental changes in the statute that removed *any doubt* about the Veterans Administration's (VA) primary and exclusive jurisdiction over all claims for veterans' benefits by both veterans *and* their dependents. Prior to 1988, the law did not give the Secretary initial (and therefore

primary) jurisdiction to "decide all questions of law or fact" regarding veterans' benefits. It also arguably *limited* the jurisdiction of the VA over claims to such benefits to *federal* courts – "court[s] of the *United States*". See 38 USC § 211(a) (1970) (emphasis added).

Placing the primary and initial decision over *all* questions of *law and fact* concerning the division of benefits to veterans *and* dependents under the exclusive jurisdiction of the executive agency created for that purpose and creating an internal and wholly "federal" court system for appellate review of that decision, with a linear appellate track straight to the Supreme Court, was a substantive change to remove any doubts regarding concurrent jurisdictional decision-making authority by state and federal courts. It removed from *any other court* the diverse considerations necessary when considering a disabled veteran's needs for his or her own benefits and, consequently, any potential needs of his or her dependents. *Henderson v Shinseki*, 562 US 428, 441; 131 S Ct 1197; 179 L Ed 2d 159 (2011). As explained by one court, "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 [Veterans Judicial Review Act] VJRA. Pub. L. No. 100-687, 102 Stat. 4105." *Veterans for Common Sense v Shinseki*, 678 F 3d 1013, 1021 (9th Cir 2012), cert denied 568 US 1086 (2013).

Congress explicitly excluded *all other* courts, including, of course, state courts from second guessing the VA's individual benefits determinations and its subsequent adjudications – these types of decisions are deemed by Congress to be within the exclusive jurisdiction and final adjudicative authority of the VA. *Veterans for Common Sense, supra.* Section 511 dictates that the Board of Veterans' Appeals and the VA makes the ultimate decision on claims for benefits and provides one, and only one, reviewing body. *Moore v Peake*, 2008 US App Vet Claims LEXIS 1640 (2008).

Not only did Congress remove any notion that state courts could intervene in a manner contrary to a decision by the VA, but it also created an Article I Court (the United States Court of Appeals for Veterans Claims) to exclusively review such decisions. 38 USC §§ 7251 and 7261, respectively. See Public Law 100-687, November 18, 1988, 38 USC § 7251

("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.").

Finally, since *Rose*, *supra*, this Court has confirmed what Justice Scalia and Justice White surmised in their separate statements in that case, to wit, 38 USC § 5301 does, in fact, jurisdictionally prohibit *all* state court orders (equitable or legal) that would force a veteran to use disability benefits to satisfy a support obligation, even one, as here, that would make the veteran pay a sum of money that simply implicates the restricted benefits. *Rose*, 481 US at 642-644 (SCALIA, J., concurring), 644-647 (WHITE, J., dissenting). In *Howell v Howell*, 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017), the Court addressed this concern directly and held that all such orders are preempted and that under 38 USC § 5301 state courts have *no authority* to vest these benefits in anyone other than the beneficiary. "Regardless of their form, such reimbursement and indemnification orders *displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.*" *Id.* at 1406

(emphasis added). The Court reiterated that under preexisting federal law, only Congress could lift the absolute preemption and give the state permission to count a veteran's disability as disposable income. *Id.* at 1404. Congress has never done so for the benefits at issue in this case.

Indeed, while *Howell* acknowledged that if disability pay is received in lieu of waived retired pay the state may allow division for purposes of support of dependents, see 137 S Ct at 1406 (citing *Rose*) and 42 USC § 659(a), (h)(1)(A)(ii)(V) (authorizing the federal government to honor state court orders when there is "income" being paid in the form of military disability retired pay (a portion of retired pay owed to the veteran is replaced with "partial" disability pay), that is not the case here. That is because 42 USC § 659(h)(1)(B)(iii) actually excludes from this federal allowance *all regular disability pay* paid to veterans with service-connected disabilities exceeding the retirement allowance and/or with service-connected disabilities incurred prior to eligibility for retirement. State courts may exercise jurisdiction and authority over veteran's disability pay to satisfy a child support or spousal support award, *but only up to the*

amount of his or her waived retired pay. 42 USC § 659(a), (h)(1)(A)(ii)(V), (B)(iii); 5 CFR § 581.103 (2018). See also *In re Marriage of Cassinelli (On Remand)*, 20 Cal App 5th 1267, 1277; 229 Cal Rptr 3d 801 (2018) (on remand from the United States Supreme Court for consideration of *Howell*).

Howell reaffirmed that all other disability benefits are protected *unless* Congress has made an exception. *Id.* at 1404-1406. Here, there is no exception. Thus, Petitioner's benefits are protected by the affirmative and sweeping jurisdictional protection from "*any* legal or equitable process *whatever*, either before or after receipt" provided by 38 USC § 5301(a)(1).

No such federal permission exists in this case because Petitioner is a permanently and totally disabled veteran who never attained time in service sufficient to even be eligible for disability retirement benefits that *might* be available as a disposable asset subject to state court support orders under 42 USC § 659(h)(1)(A)(ii)(V).

This Court has recently confirmed the overarching principles in *Howell*. State courts have always been preempted in this subject

matter *unless* federal law allows exercise of jurisdiction and authority over the federal benefits at issue. Moreover, the Court applied 38 USC § 5301, recognizing that it jurisdictionally prohibited the veteran from dispossessing himself of the benefits at issue and it also prohibited state courts from entering orders that would force the veteran to use these benefits to pay orders in contravention of federal law.

Petitioner has presented the Court with the facts demonstrating that there is a fundamental jurisdictional defect in the exercise by the state over the disposition of his federal veterans' disability benefits. As this Court has recognized where an agency has been given primary (and in this case exclusive *federal*) jurisdiction over a claim or issue, other courts lack subject matter jurisdiction to enter any rulings that would contravene the disposition of that claim by the agency which retains such jurisdiction. *Henderson,* 562 US at 432-433.

State courts are precluded "from inquiring into and adjudicating" claims and issues that reside solely and exclusively within the federal agency designated for that purpose. As this Court has recognized, the doctrine of

primary jurisdiction applies to federal agencies that have been tasked with exercising the full scope of Congress's enumerated powers under the Constitution. *Id.*

As jurisdictional defects may be raised at any time, even collaterally or after the time for appeal has passed, and a court must always, sua sponte, question its own authority and jurisdiction over a particular matter, Petitioner respectfully submits that here, as the New Hampshire Supreme Court's opinion contravened the primary and exclusive jurisdiction of a federal agency designated by Congress as the sole arbiter of claims for veterans' benefits, rehearing is warranted.

Jurisdiction, in its fullest sense, is not restricted to the subject-matter and the parties. If the court *lacks jurisdiction to render*, or *exceeds its jurisdiction in rendering*, the *particular judgment in the particular case*, such judgment is subject to collateral attack, *even though the court had jurisdiction of the parties and of the subject-matter*. This Court has so ruled in *Windsor v McVeigh*, 93 US 274; *Ex Parte Rowland*, 104 US 604; *Ex Parte Lange*, 18 Wall (85 US) 163. A state court that "transcend[s] the limits of its authority" in

rendering a judgment issues a void decree." *Windsor*, *supra* at 282. See also Cooley, Constitutional Limitations (7th Ed) (1903), pp 575-576, stating:

> If [the court] assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and the *rights of property cannot be divested by means of them.... [C]onsent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law.*"
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> ***
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> [W]here a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and *refuse to be bound by them, notwithstanding he may once have consented to its action*, either by voluntarily commencing the proceeding as plaintiff, or as

> defendant by appearing and pleading to the merits, *or by any other formal or informal action.* This right he may avail himself of *at any stage of the case*; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, *but a total want of power to act at all....* [T]here can be no waiver of rights by laches in a case where consent would be altogether nugatory. (emphasis added).

There is no question that the state has exceeded its jurisdiction and authority in this case. See 38 USC § 511(a). Not one jot or tittle of state sovereignty remains to divert or otherwise decide the use of Petitioner's benefits.

They are also protected by affirmative and positive federal legislation. 38 USC § 5301(a)(1). *United States v Hall*, 98 US 343, 349-355; 25 L Ed 180 (1878). The Court, in 1878, stated of canvassing the anti-attachment provisions in veterans' benefit legislation that "[t]hese diverse selections

from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted *the exclusive use and benefit of the money appropriated and paid for that purpose.*" *Id.* at 352 (emphasis added).

All of the legislative authority concerning the provision of veterans' benefits and their disposition are a direct exercise by Congress of its enumerated powers over military affairs. *Id.* at 346-356. See also *Hines v Lowrey*, 305 US 85, 90-91; 59 S Ct 31; 83 L Ed 56 (1938); *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1949); *United States v Oregon*, 366 US 643, 648-649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Free v Bland*, 369 US 663, 666; 82 S Ct 1089; 8 L Ed 2d 180 (1962); *McCarty v McCarty*, 453 US 210, 220-223; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981); *Mansell v Mansell*, 490 US 581, 587; 109 S Ct 2023; 104 L Ed 2d 675 (1989); *Howell v Howell*, 137 S Ct 1400, 1404; 197 L Ed 2d 781 (2017). As this Court has most recently acknowledged in *Howell, supra*, federal law preempts state law

control over military benefits absent congressional authority. Federal preemption goes to the subject matter jurisdiction of the state courts because where federal preemption applies, the federal government has retained its sovereign authority over the issue. The state court has no authority to exceed its constitutional jurisdiction in such matters. The delegated powers of the federal government have not been surrendered to the states.

The states may only exercise jurisdiction and authority over those matters that have been granted to it by Congress. If the rule were otherwise, then 50 states could have 50 different rules (or even one consistent but erroneous rule) than that which is established as the Supreme Law under the Constitution. Justice Story described this as a situation that would be "truly deplorable". *Martin v Hunter's Lessee*, 14 US 304, 348; 4 L Ed 97 (1816).

Against this backdrop the conclusion is quite simple. Not only has Congress been delegated absolute preemptive authority over these matters, but in 1988, after the *Rose* decision that the state court relied on here to assert authority over the federal benefits,

Congress amended 38 USC § 211 (now 38 USC § 511) to remove any of the reservations concerning potential concurrent state jurisdiction over claims by dependents for veterans' benefits. *Rose v Rose*, 481 US at 628.

A decision by a state court that forces a disabled veteran to use his or her restricted benefits to pay for support of dependents, is a decision that necessarily interferes with and ostensibly supersedes (albeit erroneously) the primary and exclusive jurisdiction of the VA. Any decision by the Secretary under its authority as provided in § 511(a) to provide benefits is prima facie insulated from any subsequent state court authority with respect to those benefits. The statute provides that "[t]he Secretary *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." (emphasis added). The second sentence of that provision continues: "[T]he 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*." (emphasis added).

Jurisdiction is exclusively vested in the Secretary as to "any court". Federal law nowhere allows for the benefits at issue to be without the jurisdictional protections afforded by federal law and Congress's assurance that only the Secretary can make the *initial* benefits determination and, necessarily, any subsequent request to apportion them in a manner that differs from the original disposition.

Any claim or decision that relates to or involves the disposition of a veterans' federal disability benefits necessarily affects a decision that has *already been made* by the VA Secretary concerning a claim for those benefits by the veteran or by his or her dependents. 38 USC § 511(a). The VA's decision as to how much of those benefits should be paid to the veteran and the reasons those payments are made cannot be interfered with or disrupted by a contrary ruling by any other person or court. *Id.* Such decision would disrupt the federal appropriation, the congressional scheme for military compensation, and most importantly the delegated and exclusive powers of Congress over military affairs. To be clear, any decision by a state court that would cause a diversion of these protected funds away from the

federally designated beneficiary (usually the veteran) to any other person or entity would be an extra-jurisdictional act and in direct conflict with the provisions of 38 USC § 511, the VJRA and the anti-attachment provision, 38 USC § 5301. So, to conclude that a state court is without *authority*, is to say that it has no jurisdiction, and here, that is constitutional jurisdiction, to issue a contrary ruling. See *Howell*, 137 S Ct at 1405-1406.

RELIEF REQUESTED

For the reasons stated above, Petitioner requests the Court to recognize the primary and exclusive jurisdiction of the Secretary of Veterans Affairs over his benefits, summarily reverse the decision of the Supreme Court of New Hampshire, which allowed the state court to assert unauthorized control and authority over those benefits, or, alternatively to grant a rehearing on his petition for a writ of certiorari to the Supreme Court of New Hampshire.

Respectfully submitted,

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v.

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RULE 44 CERTIFICATE

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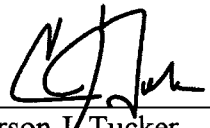
RULE 44 CERTIFICATE

Pursuant to Supreme Court Rule 44.1 undersigned counsel for Petitioner certified that:

1. The within Petition for Rehearing is being presented to the Court in good faith and not for purposes of delay. The underlying decision of the state courts has not been delayed or suspended pending the disposition of Petitioner's petition before this Court.

2. The grounds of this Petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Respectfully submitted,



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Dated: January 14, 2021