No. __-____

In the Supreme Court of the United States

YANN IANNUCCI,

Petitioner,

v.

MACOMB COUNTY FRIEND OF THE COURT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CARSON J. TUCKER, JD, MSEL, *Counsel of Record*
LEX FORI, PLLC
DPT #3020
1250 W. 14 Mile Rd.
Troy, MI 48083-1030
Phone: +17348879261
Fax: +17348879255
cjtucker@lexfori.org

QUESTIONS PRESENTED

1. In *Rose v. Rose*, 481 U.S. 619, 641-642 (1987), Justice Scalia stated in his concurring opinion:

> "I am not persuaded that if the Administrator [now Secretary of Veterans Affairs] makes an apportionment ruling, a state court may enter a conflicting child support order. *It would be extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants can be overridden by a state official.*
>
> ***
>
> I also 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. I would

> find it inapplicable for a much simpler reason.
>
> *Had the Administrator granted or denied an application to apportion benefits*, state-court action providing a contrary disposition *would arguably conflict with the language of § 211 making his decisions "final and conclusive"* – and if so *would in my view be pre-empted*, regardless of the Court's perception that it does not conflict with the "purposes" of § 211. But there is absolutely no need to pronounce upon that issue here.
>
> Because the Administrator can make an apportionment only upon receipt of a claim…and because no claim for apportionment of the benefits at issue here has ever been filed, the Administrator has made no "decision" to which finality and conclusiveness can attach. *Rose*, 481 U.S. at 641-42 (emphasis added).

Where the Secretary of the VA has denied a claim for apportionment of veterans' disability benefits pursuant to 38 U.S.C. § 5307, may the state count these benefits as available income for purposes of a state court support order?

2. Where, after *Rose*, *supra*, Congress gave the Secretary of Veterans Affairs exclusive jurisdiction to "decide *all questions of law and fact* necessary to a decision" affecting "the provision of benefits…to veterans *or the dependents* or survivors of veterans," see 38 U.S.C. § 511 (emphasis added); and, "as to any

such question" made such decisions "final and conclusive" and unreviewable "by any other official *or by any court*," *id*. (emphasis added); and created an Article I Court in the Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, for exclusive appellate review of such decisions, does a state court have jurisdiction or authority to directly or indirectly order a disposition of these benefits in a manner contrary to the initial benefit determination?

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

PARTIES TO THE PROCEEDING

Petitioner, Yann Iannucci, was the Plaintiff-Appellant below. Respondent, Macomb County Friend of the Court was the Appellee below. Defendant, Julie Michelle Jones was a defendant in the original case, but is not a party to the proceedings.

There are no other parties involved in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The December 19, 2019 opinion of the Michigan Court of Appeals is attached as App. 1a – 8a.[1] The Supreme Court of Michigan denied an Application for Leave to Appeal on September 8, 2020 in Case Number 160891, 947 N.W.2d 789 (2020), attached as App. 8a. On November 24, 2020, the Michigan Supreme Court denied Petitioner's Motion for Reconsideration. (App. 9a).

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Congress shall have power…

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

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

To provide and maintain a navy;

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

U.S. Constitution, Article VI, clause 2

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

38 U.S.C. § 5301

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

38 U.S.C. § 511

(a) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b) [not relevant here], the decision of the

Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

42 U.S.C. § 659

(a) Consent to support enforcement. Notwithstanding any other provision of law (including…section 5301 of title 38, United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law…and regulations of the Secretary under such subsections, and to any other legal process brought by a State agency administering a program under a State plan approved under this part…to enforce the legal obligation of the individual to provide child support or alimony.

***

(h) Moneys subject to process.

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

(A) consist of…

(ii) periodic benefits…or other payments…

(V) by the Secretary of Veterans Affairs as compensation for a service connected disability paid…to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation….
(B) do not include any payment…

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

STATEMENT OF THE CASE

1. Factual Background

Petitioner is a veteran of the United States Army Airborne Corps. He served as a chemical operations specialist for two years and 5 months before being injured and honorably discharged in 1993. As a result of his service-connected injuries, Petitioner is totally and permanently disabled and unemployed. *Id.*

Petitioner has not received compensation or income since at least 2005. (App. 51a). He receives no "disposable retired pay" under the Uniformed Servicemembers Former Spouses Protection Act (USFSPA), 10 USC 1408. *Id.* Therefore, Petitioner receives no income within the meaning of the Child Support Enforcement Act, 42 U.S.C. § 659(h)(1)(A)(ii)(V). *Id.* Petitioner's veteran's disability benefits are explicitly excluded from being considered available income for state-court child support or alimony. 42 U.S.C. § 659(h)(1)(B)(iii).

In 2011, Petitioner divorced his former spouse. (App. 1a). Petitioner had joint custody of the parties' children and agreed to pay $250 per month in child support. *Id.* The former spouse absconded with the children and Petitioner never saw them again.

Six months after the divorce, Respondent increased the amount of child support to $812 per month and Petitioner began to fall behind in his payments because his only income was his veterans' disability compensation. *Id.*

2. Procedural History

On August 22, 2012, a request was made to the Secretary of Veterans Affairs (VA) for an apportionment of Petitioner's disability benefits under 38 U.S.C. § 5307 and 38 U.S.C. § 511. (App. 10a). On September 24, 2013, the VA issued a decision denying the dependents' claim for an apportionment, concluding that "an apportionment would cause [Petitioner] undue financial hardship (38 C.F.R. § 3.451)." *Id.* The VA noted that it was "restoring" the "benefits previously withheld" under 42 U.S.C. § 659. *Id.* The VA further stated that the claimants had "a period of 60 days to file an appeal." The claimant did not appeal.

In an effort to get around this decision, Respondent intentionally and fraudulently characterized Petitioner's VA disability compensation as "income" and alleged that he was an "employee" of the VA. (App. 6a-7a). In 2014, a state court convicted Petitioner of contempt. He was imprisoned, but continued to contest the state's actions.

Petitioner maintained that his VA disability benefits were not income under federal law, were not available for purposes of Respondent's support calculations, and, because the VA had made a jurisdictionally final and conclusive determination that the dependents were not entitled to apportionment, the state courts had no jurisdiction or authority to force him to pay these monies to satisfy any past, present or future support obligations. (App. 2a).

In 2018 the state court again held Petitioner in contempt. (App. 2a). A new contempt order was entered and Petitioner appealed. Petitioner argued that 42 USC 659(a); (h)(1)(A)(ii)(V) and (h)(1)(B)(iii) excluded his specific benefits from state court orders for child support. (App. 4a-5a). Petitioner explained he was not eligible for retirement pay and thus he never waived such pay to receive his service-connected disability benefits. *Id*. He further argued that his disability benefits were not based on earnings and could not be considered income. *Id*.

Petitioner further argued that Congress responded to *Rose v. Rose*, 481 U.S. 619 (1987) by passing the VJRA, Pub. L. 100-527, which granted the VA exclusive (rather than concurrent) jurisdiction over all claims for benefits by veterans and their dependents. (App. 4a-6a). Petitioner pointed out that 38 U.S.C. § 211 (now § 511) was also amended to exclude state courts from considering claims for benefits by dependents. *Id*. Petitioner presented the fact that the VA had denied the claim for division of his VA benefits due to hardship and undue prejudice. (App. 6a). Petitioner also argued that 38 USC 5301 protected the specific disability benefits he receives. *Id*. at 5a-6a).

The Court of Appeals affirmed. (App. 4a). It reasoned that *Rose* still applied and VA disability pay was income. The Court framed the question as "whether a state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, where the veteran's only means of satisfying this obligation is to utilize benefits received from the Veterans' Administration." (App. 4a).

The court further reasoned that 42 U.S.C. § 659(h)(1)(B)(iii) did not preclude the state from counting a veteran's disability pay as income. (App 4a-6a). The court concluded there was no indication that this language eliminated authority of the state to calculate income based on a veteran's disability compensation. (App. 5a).

With respect to Petitioner's argument that 38 U.S.C. § 5301 applied to preclude the use of his disability benefits, the Court of Appeals again relied on *Rose* in ruling that this provision did not apply to a state court's ability to hold a veteran in contempt for failing to pay child support. *Id*.

Finally, the Court rejected Petitioner's arguments concerning the post-*Rose* amendments to 38 U.S.C. § 511 and passage of the Veterans Judicial Review Act, stating that despite the fact that the VA had denied the dependent's apportionment request, the state court could still proceed against Petitioner once the funds were delivered to him. (App. 6a).

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

REASONS FOR GRANTING THE PETITION

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

There is more than just a waning number of disabled veterans from the post-Vietnam era and prior. In addition to being wholly abrogated by Congress, *Rose v. Rose*, 481 U.S. 619 (1987), the case relied on by the state court in this and many other cases across the nation to deprive veterans of their entitlements, was a 1987 case addressing an entirely different population. Since that decision gratuitously allowing states to unilaterally exercise authority and control over veterans' benefits which are (and always have been) explicitly protected by federal law, the nation has been at war for the better part of three decades. VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4.[2]

Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number with service-connected disabilities above 3.3 million as of 2011. *Id.* By 2014, the number was 3.8 million. U.S.

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

Census Bureau, Facts for Features.[3] As of March 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New.[4] The number was above 4.5 million as of May 2019 with an annual increase of 117 percent.[5]

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

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

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

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

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

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

This progress comes with a price. Physical injuries received in combat are horrific. *Id*. See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries due to the suddenness and arbitrariness of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family Perceptions of Post-Deployment Healthcare Needs of Iraq/Afghanistan Military Personnel, 7(3) Mental Health in Family Medicine 135-143 (2010).

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

everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by combat environments make the veteran's reintegration with his or her family even more challenging. See Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

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

2. These concerns illustrate why the Court has emphasized that the judiciary must not frustrate clearly expressed federal law in this subject matter. *Mansell v. Mansell*, 490 U.S. 581, 588-592 (1989). It does not have to inquire into policies of Congress when the law is expressly authorized by the Constitution. When Congress makes a law, the Supreme Court should not question it – to inquire into the degree of its necessity is to pass the line which circumscribes the judicial department and to tread on legislative ground. As this Court has stated: "[W]hen the law (enacted by Congress) is not prohibited and is really

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

calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court (it was said) disclaims all pretensions to such a power." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 539 (1870).

This is why states may not "decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States – 'the supreme law of the land.'" *Martin v. Hunter's Lessee*, 14 U.S. 304, 340-341) (emphasis added). Thus, while there is a presumption against preemption of state law governing domestic relations, "family law is not entirely insulated from conflict pre-emption principles" and thus, the Supreme Court has held that "state laws 'governing the economic aspects of domestic relations…must give way to clearly conflicting federal enactments.'" *Hillman v. Maretta*, 569 U.S. 483, 491 (2013), quoting *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981). Where state law conflicts with federal law and compliance with state law is not possible in light of the federal restrictions, state law must yield. *Ridgway*, *supra.*

This is precisely why legislation governing military affairs are considered exclusive and preemptive federal law. Congress has exercised exclusive authority in these premises since the earliest days of the Republic. See, e.g., *Hayburn's Case*, 2 U.S. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev.

227, 228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L. Rev. 1081, 1084 (2010). For an excellent discussion by the Court concerning the nature of these benefits and the importance of protecting them see *United States v Hall*, 98 U.S. 343, 349-355 (1878).

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

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

Congress's powers in military affairs are "broad and sweeping. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in these matters unless Congress itself cedes such

authority or exceeds its constitutional limitations in exercising it. *Rumsfeld v. Forum for Adad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Congress has been given no "greater deference than in the conduct and control of military affairs." *McCarty*, *supra* at 236, citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

This Court recently reaffirmed the principle that military compensation and disability benefits fall exclusively under Congress's enumerated military powers and federal law absolutely preempts state law. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017) (*McCarty* with its rule of federal preemption, still applies" and "the basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay (describing the federal interests in attracting and retaining military personnel.")).

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

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

In *Howell*, *supra*, the Court reiterated that state courts have no authority to assert control over veterans' benefits to the extent that governing federal law says otherwise. *Id*. at 1404, citing *Mansell*, 490 U.S. at 588. The Court reaffirmed the pre-*Rose* case law that held absolute federal preemption over state domestic law issues is the rule, *unless* Congress says otherwise. "*McCarty* with its rule of federal preemption, *still applies*." *Id*. (emphasis added). The Court also reconfirmed what it had said in *Mansell*, that when Congress does give the state jurisdiction and authority over these benefits, the grant is precise and limited. *Id*.

The state lacks authority because these federal benefits originate from Congress's enumerated military powers, U.S. Const. Art. I, § 8, cls. 11 – 14. *United States v. Oregon*, 366 U.S. 643, 648-649 (1961); *McCarty v. McCarty*, 453 U.S. 210, 232 (1981); *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017). If the state could invade the benefits appropriated by Congress for the express purpose of support and maintenance of the military and veterans, the function of government would cease. *McCarty*, *supra* at 229, n. 23, citing *Buchanan v. Alexander*, 45 U.S. 20, 20 (1846) ("The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be *diverted and defeated by state process or otherwise*, the functions of the government may be suspended.") (emphasis added).

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

Consistent with the absolute preemption of state law over *all* military benefits, excluded from the amounts which Congress has given states jurisdiction

over, are benefits paid to retirees who have become totally disabled (the retiree is no longer among the rolls of the serviceable military retirees) and those disabled veterans who never attained time in service to quality for retirement. 42 U.S.C. § 659(h)(1)(B)(iii). As to all veterans' benefits that are *not* specifically allowed by *Congress* to be subjected to state process, 38 U.S.C. § 5301(a)(1) prohibits state courts from using "any legal or equitable process whatever" to divert them through any type of court order, whether *before* (that is, while in the hands of the government) or *after* receipt by the beneficiary.

4. Despite solid constitutional grounding in the Supremacy Clause and the plain and unambiguous language of the federal statutes, the Court in *Rose* ignored the principle of absolute preemption, ignored the statutory exclusion of veterans' disability benefits from consideration as an available asset, ignored the blanket and sweeping prohibition in 38 U.S.C. § 5301 that protects benefits "due or to become due" from "*any legal or equitable process whatever*, either *before* or *after* their receipt", and ruled that because veterans have a general obligation to support dependents, 100 percent of their benefits could be counted as income, leaving the state free to unilaterally repurpose these federal appropriations.

The Court thereby gave the state carte blanche to assert dominion and control over these benefits. *Rose*, 481 U.S. at 630-631, rejecting application of 38 U.S.C. § 5301. The Court also rejected the argument, made by both the United States[8] and the disabled veteran,

[8] The Solicitor General filed a brief supporting the veteran,

that the Veterans Administration had exclusive jurisdiction under 38 U.S.C. § 211 (now 38 U.S.C. § 511) over veterans' benefits and determinations of how such benefits should be distributed.

As pointed out by Petitioner, just after *Rose*, Congress passed the VJRA and amended 38 U.S.C. § 211. See *Larrabee v. Derwinski*, 968 F.2d 1497, 1498-1502 (2d Cir. 1992). In 1988, Congress overhauled both the internal review mechanism and § 211 in the Veterans Judicial Review Act (VJRA). Pub. L. No. 100-687, 102 Stat. 4105. See also *Veterans for Common Sense v. Shinseki*, 678 F. 3d 1013, 1021 (9th Cir. 2012). In doing this, Congress "made three fundamental changes to the procedures and statutes affecting review of VA decisions." *Id.*

First, the VJRA created an Article I Court, the United States Court of Appeals for Veterans Claims, to review decisions of the VA Regional Offices and the Board of Veterans' Appeals. 38 U.S.C. §§ 7251, 7261. *Veterans for Common Sense*, *supra*. Congress "intended to provide a more independent review by a body…which has as its sole function deciding claims in accordance with the Constitution and laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808. Congress also noted the Veterans Court's authority extended to "*all* questions involving benefits under laws administered by the VA.

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

H.R. Rep. No. 100-963, at 5, 1988, U.S.C.C.A.N. at 5786." *Id.* (emphasis in original). Congress thereby conferred the Veterans Court with "*exclusive* jurisdiction" and "the authority to decide any question of law *relevant to benefits proceedings*." 38 U.S.C. § 7252(a); 38 U.S.C. § 7261(a)(1), respectively (emphasis added).

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

Third, Congress *expanded* the provision precluding judicial review in former § 211. Under the new provision, eventually codified at 38 U.S.C. § 511,[9] the VA "shall decide *all questions of law and fact* necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a) (emphasis added). Whereas § 211(a) prohibited review of "decisions on any question of law or fact…under any law…providing benefits to veterans," 38 U.S.C. § 211(a) (1970), § 511(a) prohibits review of the Secretary's decision on "*all questions of law and fact necessary to a decision*…that affects the provision of benefits," 38 U.S.C. § 511(a) (2006). This change places primary and exclusive authority over the initial

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

benefits determination in the VA Secretary.

In keeping with this removal of state court jurisdiction over decisions affecting veterans' benefits, whereas § 211 precluded any other "official or court *of the United States*" from reviewing a decision, § 511 now precludes review "by *any court*…." (emphasis added). This of course, would apply to preclude state courts from making *any* disposition of veteran's disability benefits considered off-limits by existing federal statutes, particularly, 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301. Any other court or entity making a decision that disturbs the calculated benefits determination would be an usurpation of the Secretary's exclusive authority and an extra-jurisdictional act.

Moreover, as Petitioner pointed out in his arguments below, there is an exclusive process for the VA to pay disability benefits to dependents in need. 38 U.S.C. § 5307. Consistent with 38 U.S.C. § 511 and the VJRA, the process for a dependent to seek these benefits is through the apportionment procedures outlined in 38 U.S.C. § 5307 and as described in the memorandum. *Id.* In this case, the VA *denied* the claimant's apportionment. (App. 10a).

Here, the state court ignored these significant developments, and, like many other states, ruled that this Court's decision in *Rose* allows the state to include a veteran's disability benefits as income for purposes of his child support obligations. Nowhere has Congress given the states the "precise and limited" authority required to exercise jurisdiction and control over these benefits. See *Howell*, 137 S. Ct. at 1404;

Mansell, 490 U.S. at 588. In fact, by way of 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1), Congress has excluded such benefits from state court jurisdiction and control.

Despite a continuous line of cases from this Court declaring that federal law preempts all state law governing the economic and domestic relations of the parties, see, e.g., *McCarty*, *supra*; *Ridgway*, *supra*; *Mansell*, *supra*, and *Howell*, *supra*, states continue to ignore the requirement that Congress must give it explicit authority to dispossess the veteran of these benefits.

5. Moreover, the states continue to ignore the sweeping language of 38 U.S.C. § 5301. *Ridgway* addressed a provision identical to § 5301 and ruled that it prohibited the state from using any legal or equitable process to frustrate the veteran's designated beneficiary from receiving military benefits (life insurance). Citing that part of *Gibbons v. Ogden*, 22. U.S. 1, 210-211 (1824), in which this Court declared the absolute nullity of any state action contrary to an enactment passed pursuant to Congress's delegated powers and *Free v. Bland*, 369 U.S. 663, 666 (1962), the Court said: "[the] relative importance to the State of its own law is *not material* when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway*, *supra* at 55 (emphasis added). The Court continued: "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.*, citing *McCarty*, *supra*. "That principle is but the necessary consequence of the

Supremacy Clause of the National Constitution." *Id*. In *McCarty* the Court quite plainly said that the "funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *McCarty*, 453 U.S. at 229, n. 23 (emphasis added), quoting *Buchanan v Alexander*, 45 U.S. 20 (1846).

As with all federal statutes addressing veterans, 38 U.S.C. § 5301 is liberally construed in favor of protecting the beneficiary and the funds received as compensation for service-connected disabilities. *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (now § 5301) and stating the provision was to be "liberally construed to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof" and that the funds "should remain inviolate."). See also *Henderson v Shinseki*, 562 U.S. 428, 441 (2011) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("legislation…liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (laws protecting servicemembers from discrimination "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *United States v. Oregon*, 366 U.S. 643, 647 (1961) ("[t]he solicitude of Congress for veterans is of long standing.").

Moreover, contrary to the state court's reasoning (App. 5a-6a), 38 U.S.C. § 5301, by its plain language, applies to more than just "attachments" or "garnishments". It specifically applies to "any legal or equitable process whatever, either before or after receipt." See *Wissner v. Wissner*, 338 U.S. 655, 659 (1950) (state court judgment ordering a "diversion of future payments as soon as they are paid by the Government" was a seizure in "flat conflict" with the identical provision protecting military life insurance benefits paid to the veteran's designated beneficiary). This Court in *Ridgway*, in countering this oft-repeated contention, stated that it "fails to give effect to the unqualified sweep of the federal statute." 454 U.S. at 60-61. The statute "prohibits, in the broadest of terms, any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" *Id.* at 61.

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

> [E]nsures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[notwithstanding] any other law. . .of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy…. *Id*. Accord *McCarty*, 453 U.S. at 229, n. 23.

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

The Court of Appeals ignored Petitioner's argument that 38 U.S.C. § 5301 independently protected his benefits from any legal process. (App. 6a). As noted, § 5301 applies to *all state court process* (equitable or legal) and *jurisdictionally prohibits* state courts from considering funds both before and after receipt, *unless otherwise authorized by federal (not state) law*. 38 U.S.C. § 5301(a)(1), accord *Howell*, *supra* at 1405. There is no ambiguity in this provision. It *wholly* voids attempts by the state to exercise control over these restricted benefits. *United States v. Hall*, 98 U.S. 343, 346-57 (1878) (canvassing legislation applicable to military benefits). This Court construes this provision liberally in favor of the veteran and regards these funds as "inviolate" and inaccessible to all state court process. *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162 (1962).

Thus, not only has Congress *not included* Petitioner's benefits as available for direct garnishment in state court proceedings, Congress *has indeed indicated* that Appellant's veterans disability benefits are not income and may not be subject to calculations for child support awards in state domestic relations proceedings. *Howell* held that with respect to such disability benefits, 38 U.S.C. § 5301 erects a jurisdictional bar to a state court's authority.

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

Stripped of its veneer, the *only* remaining rationale provided by *Rose* as justification to ignore express federal law is based on congressional testimony and the notion that state law is primary in the area of domestic relations. Both of these reasons have been rejected. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *McCarty*, 453 U.S. at 220; *Ridgway*, 454 U.S. at 55; *Mansell*, 490 U.S. at 592-596; *Hillman v. Maretta*, 569 U.S. 483, 490-91 (2013); and *Howell*, 137 S. Ct. at 1401-1407 (2017).

Federal law exclusively, comprehensively and completely addresses this issue. Yet, state courts continue to blindly cite *Rose* for the proposition that

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

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

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

While the Court in *Howell* cited *Rose*, *supra*, it merely confirmed what federal law allows, i.e., "some military *retirement pay* might be waived" and partial disability paid in lieu may be used to calculate spousal support. *Id*. at 1406. This is consistent with 42 U.S.C. § 659(h)(1)(A)(ii)(V), which recognizes the availability of a limited portion of waived disposable *disability retired pay* consistent with 10 U.S.C. § 1408(e)(4). But, federal law *excludes* veteran's disability pay from this definition. 42 U.S.C. § 659(h)(1)(B)(iii). Such benefits are those which Congress appropriated for disabled veterans under its enumerated powers without any grant of authority to the states to consider them as an available asset in state court proceedings. The state does not have *any* concurrent authority to sequester these funds and put them to a use different from their intended purpose. This Court's reiteration in *Howell* that federal law preempts all state law in this particular subject *unless* Congress says otherwise remains intact. There is no *implied* exception to absolute federal preemption in this area. *Bennett v. Arkansas*, 485 U.S. 395, 398 (1988).

Although the Court in the latter case distinguished *Rose*, Congress quickly acted to remove any speculation that authority had been ceded to state courts over these veteran's benefits. *Rose*, 481 U.S. at 630 (citing congressional testimony that veterans' disability benefits are "intended to 'provide reasonable and adequate compensation for disabled veterans and *their families*.'") (emphasis in original). Whereas 38 U.S.C. § 211 (the provision interpreted and applied in *Rose*) gave state courts ostensible concurrent jurisdiction over claims for veterans'

benefits by dependents absent an apportionment), 38 U.S.C. § 511 (§ 211 amended as part of the Veterans Judicial Review Act (VJRA) in 1988) gives exclusive jurisdiction to the Secretary of the VA over "all questions of law and fact necessary to a decision" as to claims for benefits by dependents and made such decisions final and conclusive and unreviewable "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) (emphasis added). Thus, Congress changed 38 U.S.C. § 211, which had been interpreted in *Rose* as giving *both* state and federal courts authority (concurrent jurisdiction) to make decisions respecting a veteran's benefits, to accord with Justice Scalia's concurring opinion that such joint authority would frustrate the purpose of the federal provisions respecting veterans' benefits. Therefore, Congress explicitly excluded state court jurisdiction. See *Rose*, *supra* at 641 (SCALIA, J., concurring) (where he pointed out that § 211 did not then explicitly exclude state court jurisdiction because the language of the provision only excluded "federal official[s] or federal court[s]" from reviewing or otherwise making decisions respecting veterans' benefits and stating "it would be extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants can be overridden by a state official."). As noted, § 211 (now § 511) was amended to in fact explicitly exclude this state court authority and jurisdiction because Congress removed the reference to federal courts only and applied the limitation on review and disposition to *all* courts. 38 U.S.C. § 511(a) ("The 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…. [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)).

After *Rose*, Congress went even further than removing concurrent jurisdiction from state courts and passed the Veterans Judicial Review Act (VJRA) of 1988, creating an Article I Court and a closed-circuit appellate review process for all dependents' claims for veterans' benefits. See 38 U.S.C. §§ 7251, 7252 (H.R. Rep. No. 100-963, at 20-21, 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5802-03, 5809-10). Thus, to dissuade both state and federal courts 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 [renumbered to § 511] in the VJRA." See Pub. L. No. 100-687, 102 Stat. 4105. See also *Veterans v Common Sense v Shinseki*, 678 F. 3d 1013, 1021 (2012).

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

made at the request of the dependent or the guardian. 38 U.S.C. § 511; 38 U.S.C. § 5307.

Thus, Congress directly responded to this Court's approval in *Rose* of the state's implied "concurrent" jurisdiction and authority to control disposition of these benefits without any federal statutory authority to do so. The states have ignored these developments in the law and have instead relied on *Rose* despite the explicit statutory changes that exclude most veterans' benefits from consideration and affirmatively protect them from all legal and equitable process *whatever*. 42 U.S.C. § 659(h)(1)(B)(iii) (veterans' disability benefits are not considered remuneration for employment and therefore are not available to be garnished (while in the hands of the government) for satisfaction of state child support obligations); 38 U.S.C. § 5301(a)(1) (veterans' disability benefits are not subject to "any legal or equitable process *whatever*, either *before* or *after* receipt" by the beneficiary, that is, either while still in the hands of the government or in the hands of the veteran beneficiary) (emphasis added).

Finally, despite the Court's analysis of legislative history in *Rose* to conclude that veterans had an obligation to support their dependents and its extrapolation of that history to mean that 100 percent of a veteran's disability benefits may be considered by a state court considering the veteran's support obligations to his or her dependents, federal law already provides the exclusive means by which dependents may seek a portion of these disability benefits for support where they demonstrate a need through the process of apportionment. 38 U.S.C. §

5307; 38 C.F.R. § 3.450 – 3.458 (regulations governing apportionment). Jurisdiction to do this also lies primarily and exclusively with the Secretary of Veterans Affairs, and all decisions on any benefit determination (whether an initial determination or on a request for apportionment) is final and conclusive as to *all other courts*. 38 U.S.C. § 511(a). Review can only be sought in the Article I court established by Congress after *Rose*. See 38 U.S.C. §§ 511(a), 7251, 7261.

7. Even without the amendments to 38 U.S.C. § 211, Petitioner's case is the one alluded to by Justice Scalia in *Rose*. The Secretary made a decision denying an apportionment of Petitioner's benefits. (App. 10a). The state court ignored this decision, even though under 38 U.S.C. § 511 it is an exclusive, conclusive and final determination of a claim for benefits by a dependent, and even though such a decision cannot be controverted "by *any other official or by any court*, whether by an action in the nature of mandamus or otherwise."

Petitioner is among the large number of permanently disabled veterans who never attained sufficient time in service to retire and who is receiving only service-connected veteran's disability pay. He has *no income* despite the state's fraudulent characterization of Petitioner as an "employee" of the VA. (App. 51a). Congress has never authorized states to count these monies as income for the benefit of others. However, this is what states do on a routine basis. This is contrary to preemptive federal law and a violation of the Supremacy Clause.

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

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

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court spoke to the exercise by Congress of its enumerated powers. Justice Marshall said: "[T]hat

the government of the Union, though limited in its powers, is supreme within its sphere of action" is a "proposition" that "command[s] … universal assent…." *Id*. at 406. There is no debate on this point because "the people, have, in express terms, decided it, by saying," under the Supremacy Clause that "'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,'" and "by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it." *Id*. Marshall finished the point by citing to the last sentence of the Supremacy Clause:

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

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

For decades, disabled veterans have suffered immeasurably under this Court's *wholly judicial* (and immediately abrogated) creation in *Rose* of an exception to the explicit protections afforded them by Congress's exercise of its enumerated powers. Self-interested lawyers and state machinations have collaborated to raise a clamor to prevent the self-evident and explicit preemptive law from taking effect. But the swell of defiance does not make these parties any more correct, nor can it insulate state courts from those who seek to regain and restore to themselves their constitutional entitlements. The passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed. This Court has recently expressed this sentiment in overturning more than a century of reliance on erroneous legal principles. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). There, Justice Gorsuch, writing for the majority stated:

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

The federal statutes and regulations passed pursuant to Congress's enumerated military powers contain no allowance to the states to sequester the veterans' disability benefits at issue in this case and force them to be paid over to any other individual, including children, for state-imposed support obligations. Rather, these benefits are (and always have been)

explicitly excluded from state jurisdiction and control, *before*, 42 U.S.C. § 659(h)(1)(B)(iii), and *after*, 38 U.S.C. § 5301(a)(1), their receipt.

Logically, the only allowance for support of dependents lies within the primary and exclusive jurisdiction of the Secretary of Veterans Affairs to whom Congress has given primary authority and exclusive jurisdiction to make all decisions affecting claims for benefits by veterans and by their dependents. 38 U.S.C. § 511(a). Congress also provided for an "apportionment" of disability benefits for the dependents of veterans *if* the Secretary determines that the veteran will not suffer undue hardship and the dependent is in need of a portion of these otherwise restricted benefits. 38 U.S.C. § 5307.

This process occurred here. The VA denied the apportionment request and the claimant did not appeal that decision. (App. 10a). Thus, *Rose* would not even apply to this case.

Moreover, Congress fundamentally abrogated *Rose* just after the decision came out, and clearly removed any semblance of concurrent jurisdiction the state may have had from that anomalous case and restored the preexisting absolute federal preemption in this particular subject matter. In 2017, this Court unanimously reiterated that absolute federal preemption was the rule and that unless Congress says VA benefits of any kind are available to the state for purposes of dividing them in state court domestic relations proceedings, 38 U.S.C. § 5301 applied and the state had no authority or jurisdiction to issue any legal or equitable process whatever. This, of course,

would include a unilateral state court order forcing the veteran to use his or her disability benefits to satisfy a state mandated support order. Naturally, this includes any "calculation" that would count such benefits as income or consider them an available asset or resource for purposes of calculating the veteran's support obligation.

In addition to this case, state courts have rejected the absolute preemption of federal law in this area and the primary and exclusive jurisdiction of the VA over all decisions respecting the division of VA disability benefits. See, *inter alia*, *Russ v. Russ*, 2021 N.M. LEXIS 12 (Apr. 1, 2021); *Carpenter v. Carpenter*, 2020 Mich. App. LEXIS 780 (Mich. Ct. App., Jan. 30, 2020), lv. den., 506 Mich. 892; 947 N.W.2d 806 (September 8, 2020), rec. den., 950 N.W.2d 734 (November 24, 2020), pet. for cert. filed April 22, 2021; *Matter of Braunstein*, 173 N.H. 38, 236 A.3d 870, 876 (N.H. 2020) (same) cert. den., ___ S. Ct. ___; 208 L. Ed. 2d 399 (Nov. 9, 2020); *Alwan v. Alwan*, 70 Va. App. 599, 604-607; 830 S.E.2d 45, 49 (2019); *Lesh v. Lesh*, 257 N.C. App. 471, 809 S.E.2d 890, 899 (N.C. Ct. App. 2018); *Phillips v. Phillips*, 347 Ga. App. 524, 820 S.E.2d 158 (Ga. Ct. App. 2018); *Nieves v. Iacono*, 162 A.D.3d 669; 77 N.Y.S.3d 493 (2018).

It is time for the Court to reign in the state's brazen disregard of the Supremacy Clause. Congress has full, plenary and exclusive authority over the disposition of military disability pay. *Tarble's Case*, 80 U.S. 397, 408 (1871). This Court has recognized this absolute preemption still applies. *Howell*, 137 S. Ct. at 1404, 1406. The Court has also recognized that Congress *may* give states authority over military

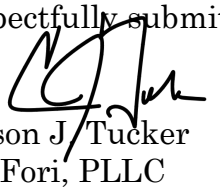
benefits, but when it does, the grant is "precise and limited." *Id*. at 1404. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

Instead of honoring the federal authority, the state of Michigan engaged in a decades long campaign to defraud Petitioner by claiming his disability benefits were income and ordering him under threat of contempt and imprisonment to pay them to the state, all the while ignoring the VA's exclusive decision refusing to apportion them.

CONCLUSION

Petitioner respectfully requests the Court grant his petition.

Respectfully submitted,



Carson J. Tucker
Lex Fori, PLLC
Attorney for Petitioner
(734) 887-9261

Dated: April 23, 2021