No. __-____

In the Supreme Court of the United States

SEAN BRAUNSTEIN,
Petitioner,

v.

JERICKA BRAUNSTEIN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress's enumerated military powers preempt all state law concerning disposition of military benefits, and Congress has not affirmatively granted the state the power to treat veterans' disability benefits received by a non-retired, disabled service member as "income" for purposes of support obligations to dependents, and in fact, explicitly, excludes such benefits from state court control 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 to the contrary, a legitimate basis for the state of New Hampshire 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?

2. Where, after *Rose*, *supra*, Congress created an Article I Court in the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511 and gave the Secretary of Veterans Affairs "exclusive jurisdiction over all questions of law and fact necessary to a determination of benefits by veterans and dependents," and made such decisions *final* and *conclusive* as to *all other courts*, does a state court have jurisdiction or authority to make a disposition of these benefits to another party in a manner that is contrary to the initial benefit determination?

PARTIES TO THE PROCEEDING

Petitioner, Sean Braunstein, was the Plaintiff-Appellant below. Respondent, Jericka Braunstein, was the Defendant-Appellee.

A court-appointed attorney, Deborah Mulcrone, Esq., serves as guardian ad litem (GAL) for the minor child of the marriage born on December 12, 2012.

There are no other parties involved in these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Regulations

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sean Braunstein, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire.

OPINIONS BELOW

The February 13, 2020 opinion of the New Hampshire Supreme Court, *In the Matter of Sean Braunstein and Jericka Braunstein* (App. Vol. I, Tab A, 1a-8a), Case Number 2019-0065, 2020 N.H. LEXIS 71.[1]

An order denying Petitioner's Motion for Reconsideration was issued on March 31, 2020 (App. Vol. I, Tab B, 9a).

The 6th Circuit Court (Family Division), Hooksett, issued a final decree on November 19, 2018. (App., Tab C, 10a – 37a).

These comprise the substantive rulings Petitioner seeks to appeal.

JURISDICTION

The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257. The New Hampshire Supreme Court's opinion issued on February 13, 2020 (App. 1a – 8a). Petitioner's motion for reconsideration was denied on March 31, 2020 (App. 9a).

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[1] The appendix is presented in three tabbed volumes with documents from the record numbered in seriatum at the bottom right hand corner, 1a, etc.

On March 19, 2020, this Court issued a Miscellaneous Order automatically increasing the time to file Petitions for Certiorari from 90 days to 150 days from the date of the lower court judgment or order denying rehearing or reconsideration.

This Petition for Certiorari is being filed on or before Friday, August 28, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Congress shall have power…

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

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

To provide and maintain a navy;

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

U.S. Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

38 U.S.C. § 5301

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

38 U.S.C. § 211 (1970)

(a) [T]he 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 or survivors 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 by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511 (2006)

(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 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.

***

(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 by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation….

(B) do not include any payment…

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

New Hampshire Revised Statutes 458-C:2, IV

"Gross income" means all income from any source, whether earned or unearned, including but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town),

including, but not limited to…veterans benefits…and disability benefits….

STATEMENT OF THE CASE

1. Introduction

In 1987, this Court held that state courts could count veterans' disability benefits as "income" for purposes of calculating a disabled veteran's child support obligations. *Rose v. Rose*, 481 U.S. 619 (1987). That decision, being contrary to the Supremacy Clause and in direct conflict with express federal law, was erroneous then, and it is even more erroneous today.

Congress's authority over all military benefits originates from its enumerated "military powers" under Article I, § 8, clauses 11 through 14 of the Constitution. Congress has *never* given the states authority over the specific veterans' benefits at issue in this case. In fact, these benefits are explicitly excluded from consideration as income in state court divorce proceedings. See 10 U.S.C. § 1408(a)(4); 42 U.S.C. § 659(h)(1)(B)(iii); 5 C.F.R.§ 581.103(c)(7).

When Congress *has* given the states authority to divide veteran's benefits, it has done so in in precise and limited circumstances not applicable here. 10 U.S.C. § 1408(a)(4) (defining disposable retired pay as marital property) and 42 U.S.C. § 659(h)(1)(A)(ii)(V) (defining partial disability pay that replaces military retirement pay as "remuneration for employment", i.e., income, for child support and spousal support).

Moreover, Congress has universally protected these benefits from all legal and equitable process either before or after their receipt. 38 U.S.C. §

5301(a)(1). There is no ambiguity in this provision. It *wholly* voids any attempts by state courts to exercise control over these restricted funds with its sweeping prohibition. *United States v. Hall*, 98 U.S. 343, 346-357 (1878) (canvassing anti-assignment legislation applicable to military benefits); *Ridgway v. Ridgway*, 454 U.S. 46, 61 (1981). This Court has construed these provisions liberally in favor of the veteran and regarded these funds as "inviolate". *Porter v. Aetna Cas. & Surety Co.*, 370 U.S. 159, 162 (1962).

This Court recently reconfirmed that federal law preempts all state law concerning the disposition of veterans' disability benefits in state court proceedings. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017). In doing so, the Court reiterated Congress must affirmatively grant the state authority over such benefits, and when it does, that grant is precise and limited. *Id.* at 1404. The Court also stated that without this express statutory grant, 38 U.S.C. § 5301(a)(1), affirmatively prohibits state courts from exercising control over disability benefits. *Id.*, at 1405.

While the Court in *Howell* cited *Rose*, *supra*, it only confirmed what federal law currently 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 retired pay consistent with 10 U.S.C. § 1408(e)(4). Veteran's disability pay is still excluded from available income. 42 U.S.C. § 659(h)(1)(B)(iii). See also 5 C.F.R. § 581.103(c)(7). This Court's reiteration in *Howell* that federal law preempts all state law in

this particular subject *unless* Congress says otherwise remains. There is no *implied* exception to absolute federal preemption in this area. See *Bennett v. Arkansas*, 485 U.S. 395, 398 (1988).

Although *Bennett*, *supra*, distinguished *Rose*, Congress quickly acted to remove any speculation that it had ceded jurisdiction to state courts over these historically restricted 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).

In direct response to the Court's conclusion that states have authority and jurisdiction over these disability benefits despite the lack of a federal grant and affirmative federal protection, see 481 U.S. at 629, Congress amended 38 U.S.C. § 211 and enacted the Veterans Judicial Review Act (VJRA) leaving no doubt that primary jurisdiction lies exclusively with the Secretary of Veterans Affairs who "*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). Whereas § 211 only provided that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration" would be "final and conclusive", § 511 provides that it is the Secretary that shall first decide any such question. Second, Congress went a step further and created an Article I Court (the United States Court of Appeals for Veterans Claims) to exclusively review such decisions. 38 U.S.C. §§ 7251,

and 7261, respectively. Congress also removed the limitation from § 211 suggested in *Rose* that only federal courts not state courts, were excluded from concurrently reviewing veterans' benefits decisions by replacing the phrase "any court of the United States" with the broader reference to "any court". See *Henderson v. Shinseki*, 562 U.S. 428, 440-441 (2011) (discussing the VJRA's singular and comprehensive review scheme for veterans' benefits determinations and Congress's longstanding solicitude for veterans and this Court's established "canon" of liberal construction of statutes providing *and* protecting these benefits).

These post-*Rose* analyses, along with the plenary statutory and regulatory scheme 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 of a dependent. See 38 U.S.C. § 511; 38 U.S.C. § 5307.

Congress directly responded to this Court's remarkable and anomalous approval in *Rose* of a state court's implied jurisdiction and authority to control disposition of these benefits without any federal statutory authority to do so, and indeed, in the face of explicit federal provisions that exclude them from such consideration and 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) and 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, federal law provides the exclusive means by which dependents may seek a portion of these disability benefits for support, if they demonstrate 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.

Petitioner is among the large number of permanently disabled veterans who never attained sufficient time in service to retire and who is receiving only veteran's disability pay for injuries received serving the nation. Congress has never authorized states to count these monies as income for the benefit of others, but that is what states do on a routine and daily basis across the country. It is time for this Court to reconsider *Rose*.

In *Howell*, this Court was addressing state attempts to encroach on military benefits for a third time in as many decades. *McCarty v. McCarty*, 453 U.S. 210 (1981) and *Mansell v. Mansell*, 490 U.S. 581, 588-592 (1989) clearly expressed the absolute federal preemption of state law in this subject. The travesty lies in the fact that disabled veterans, who have limited resources and capacity, must consistently seek recourse in *this* Court because 50 different states have seemingly devised as many ways of defining out or getting around the limitations imposed upon them by the Supremacy Clause.

But, the Constitution "has 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 inevitable tergiversations, Justice Story there 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, writing for the majority, 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* creation in *Rose* of an exception to the explicit protections afforded them by Congress's exercise of its enumerated military 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 a majority of this Court 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 by the beneficiary.

Logically, the only allowance for support of dependents lies within the primary and exclusive jurisdiction of the Department of Veterans Affairs, where Congress provides the Secretary of Veterans Affairs with the primary authority and exclusive jurisdiction to make decisions affecting the provision of all benefits to veterans and their dependents, 38 U.S.C. § 511(a), and also allows 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 any portion of these otherwise restricted benefits. 38 U.S.C. § 5307.

2. Background

Petitioner served in the United States Army as a medic / chemical specialist from 2004 to 2007. (App.

Vol. III, Tab G, 128a). He received an honorable discharge in 2007. *Id*.

In 2012, the Secretary of Veterans Affairs determined that Petitioner was disabled due to service-connected injuries and provided a disability rating of 70 percent, retroactive to his last date of service, and a rating of 100 percent on the date of its decision. *Id*. As of February 2012, Petitioner was 100-percent permanently and totally disabled. *Id*.

Petitioner and Respondent were married on January 26, 2010. On May 26, 2017, Petitioner filed for divorce. (App. Vol III, Tab H, 129a – 137a). The litigation was fairly contentious and involved the issue of custody and care of the minor child, disposition of real property, and child support. In December of 2017, Petitioner's lawyer withdrew and he has continued to represent himself. (App. 131a).

Concerning child support, Petitioner argued that his veteran's disability benefits were not "income" or "remuneration for employment" and could not be considered in the calculation of his child support obligation. (App. Vol. II, Tab G, 122a-127a)

Petitioner argued that as of February 2012 he was totally and permanently disabled and that none of his disability pay was "disposable" retired pay or income that could be considered for child support. (App. 122a, citing 10 U.S.C. § 1408(a)(4)(A)(ii). He also argued, consistent with 42 U.S.C. § 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) he was not a retiree, and did not therefore waive any military retirement pay to receive disability compensation. *Id*.

Petitioner also argued that after this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987), Congress passed the Veterans' Judicial Review Act (VJRA), granting exclusive jurisdiction over disability benefits claims and over the apportionment of such benefits to dependents. (App. 122a – 123a, citing 38 U.S.C. § 511). Finally, Petitioner argued that 38 U.S.C. § 5301(a) clearly applied to prohibit state courts from forcing him to give up his disability pay. (App. 125a – 126a).

The trial court issued a final decree on November 18, 2019. (App. Vol I, Tab C, 10a), disagreeing with Petitioner's argument that his veteran's disability pay was prohibited by federal law from being considered as "income". (App. 11a), citing N.H.R.S. (R.S.A.) 458-C:2, IV (2018). The trial court concluded that the state statute's reference to gross income included veterans' and disability benefits. (App. 11a).

On January 30, 2019, Petitioner appealed to the New Hampshire Supreme Court. (App. Vol. II, Tab D, Notice of Appeal and Statement of Issues, 38a – 41a). In his statement of issues and brief on appeal, Petitioner once again argued that federal law preempts state law as applied to his veterans' disability pay, and that state law and the state court were prohibited by this law from counting these benefits as income for child support purposes. (App. 75a – 100a).

Without oral argument, the Court issued its opinion on February 13, 2020. (App. Vol I, Tab A, 1a – 8a). The Court affirmed the trial court's decision,

holding that this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987) controlled and thus, the state court had authority under existing state law to include Petitioner's total and permanent veterans' disability benefits as "income" for purposes of calculating his child support obligations. (App. 3a – 8a).

Petitioner filed a motion for reconsideration on March 10, 2020 (Vol. III, Tab I, App. 128a – 171a). In this motion Petitioner made additional arguments and attached documents and information concerning the status of his veterans' disability pay and his efforts to have the state of New Hampshire submit an apportionment request to the Secretary of Veterans Affairs pursuant to 38 U.S.C. § 5307. *Id.*

The Court denied the motion on March 31, 2020. (App. Vol. I, Tab A, 9a; App. Vol. III, Tab J, Supreme Court Docket Entries, 172a – 174a).

Petitioner seeks leave to appeal to this Court.

REASONS FOR GRANTING THE PETITION

The protection of veterans' disability pay and its disposition in state court proceedings is an issue of significant national interest at present because of the large number of disabled veterans that depend on such pay. There is a large and growing population of disabled veterans, many of whom have had their careers cut short and who are 100 percent disabled, like the veteran in the instant case. They need every protection that federal law already affords them.

The country is no longer only faced with the

waning population of disabled veterans from the post-Vietnam era and prior. *Rose* was a 1987 case, and it necessarily addressed an entirely different population of aging and disabled veterans. Since that decision in which the Court gratuitously allowed state courts to exercise authority and control over these funds that are (and always have been) explicitly protected by federal law, the nation has been at war in one theater or another for the better part of three decades. Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4.[2]

Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, supra. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features.[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 well above 4.5 million as of May 2019 and the percentage is increasing by 117 percent.[5]

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

Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent or higher, with approximately 900,000 in 2011. VA, Trends, supra at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id.*

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

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

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military

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

operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113.

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

Such conditions are exacerbated when returning veterans must face stress in their families caused by

their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. See DeBaun, The Effects of Combat Exposure on the Military Divorce Rate, Naval Postgraduate School, California (2012). Families, already stretched by the extraordinary burdens and sacrifices of national service, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. See Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Finally, it cannot go without mention that an estimated 17 to 22 veterans commit suicide every day and the number may actually be much higher.[7] The stressors faced by the disabled veteran and his or her family are only exacerbated when they are involved in a state court proceeding involving whether or not and to what extent the state court may actually control the disposition of that veteran's benefits, which are supposed to be used to compensate that veteran for his or her service-connected disabilities and which are all too often his or her only means of subsistence. While the subset of the total disabled veteran population

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

that faces state court proceedings of this nature might be a small percentage of the total disabled veteran population, the consequences of these situations are inevitably magnified and extremely stressful upon these particular veterans.

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

Congress has exercised exclusive legislative authority in these premises since the earliest days of the Republic. See, e.g., *Hayburn's Case*, 2 U.S. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L. Rev. 1081, 1084 (2010). For an excellent discussion of the nature of these benefits and the importance of protecting them see United States v Hall, 98 US 343, 349-355, 25 L Ed 180 (1878).

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 express federal laws excluding veterans' disability benefits from state jurisdiction and ignored

affirmative statutory law explicitly protecting them from "any legal or equitable" process. Finally, after *Rose* Congress removed any doubt that state courts have *any* jurisdiction to make decisions concerning the disposition of 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. 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 concepts have been rejected as a legitimate means of suppressing the expressed and plain language of Congress. *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).

It is time for this Court to address the *Rose* decision'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 remuneration for employment, and therefore as income, by 42 U.S.C. § 659(a);

(h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from *any legal process* whatever by 38 U.S.C. § 5301.

Federal law, and only federal law, authorizes the Secretary of Veterans Affairs to decide whether these restricted benefits may be used to support dependents. 38 U.S.C. § 5307. Absent such a determination, the decision of the Secretary on the question of a veterans' 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. § 38 U.S.C. §§ 7251, 7261. *Henderson*, *supra*.

Federal law exclusively, comprehensively and completely addresses this issue. Yet, state courts across the country 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 anomalous decision by this Court which was not based on the principles of federal supremacy.

ARGUMENT

1. Congress Preempts All State Law in this Subject

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 subject matter, "[w]henever…any conflict arises between the enactments of the two sovereignties [the state and national government], or in the enforcement of their asserted authorities, those of the National government must have supremacy…." *Id.*

This Court has said Congress's powers in military affairs is "broad and sweeping. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in general matters of the common defense, unless Congress itself cedes such authority, or exceeds its constitutional limitations in exercising

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

Military or service-connected disability pay also falls under Congress's enumerated military powers. *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017) (*McCarty* with its rule of federal preemption, still applies" and "the basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay (describing the federal interests in attracting and retaining military personnel.").

However, 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. *United States v. Tyler*, 105 U.S. 244, 245 (1881) (explaining the "manifest difference" in two kinds of military retirement from active service and retiring (or being disabled from service altogether); *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 pay does not in any way replace or substitute for the waived current retired

pay of a still serviceable member. Permanent disability pay is wholly as compensation, whether in the form of a marital asset or for child support or spousal support. See *Howell*, 137 S. Ct. at 1405-1406 (citing 38 USC § 5301(a)(1) (state courts cannot vest that which they have no authority to give) and 42 USC § 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 for employment 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 disabled and was either medically retired from service or permanently and totally disabled during service but before attaining the requisite number of years to qualify for retirement pay).

Despite the absolute preemption of state law in this area and the plain and unambiguous language of the federal statutes at issue, this 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 of 38 U.S.C. § 5301 and held that because veterans have a general obligation to support dependents these restricted benefits could be counted by the state as income, leaving state courts free repurposes these federally appropriated benefits.

2. Rose Ignored Federal Law

Despite explicit federal statutory law that protects veterans disability benefits "due or to become due" from "*any legal or equitable process whatever*, either *before* or *after* their receipt", see 38 U.S.C. § 5301(a)(1) (emphasis added), this Court held in *Rose* that because veterans have an obligation to support their dependents, state courts have carte blanche authority to assert dominion and control over these benefits, and order that they be paid by the disabled veteran to satisfy support obligations in state court divorce proceedings. *Rose*, 481 U.S. at 630-631, rejecting application of 38 U.S.C. § 5301 to VA disability benefits.[8]

The Court also rejected the argument, made by both the United States[9] and the disabled veteran, that the Veterans Administration had exclusive jurisdiction under 38 U.S.C. § 211 (amended and renumbered as part of the Veterans Judicial Review Act (VJRA) 38 U.S.C. § 511) over veterans' benefits and determinations of how such benefits should be

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[8] *Rose* applied only to child support, because minor children of the veteran are "dependents", and federal law only allows apportionment of disability benefits to "dependents", see 38 U.S.C. §§ 101, 102, 103 (defining spouses, children and certain parents as dependents); and 38 U.S.C. § 5307 (describing the VA's process for requesting apportionment of a veteran's disability pay for support of *dependents*).

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

distributed.

As pointed out by Petitioner, Congress amended 38 U.S.C. § 211 after *Rose*. See *Larrabee v. Derwinski*, 968 F.2d 1497, 1498-1502 (2d Cir. 1992). Congress made two substantial changes to the statute as it relates to the questions before the Court in this case. First, Congress created an independent Article I Court (the Board of Veterans Appeals) and gave it exclusive jurisdiction over appeals from final decisions of the Secretary of Veterans Affairs.

Second, Congress replaced the phrase from § 211 "Court of the United States" with "any court". In direct response to the discussion in *Rose* concerning the scope of a state court's authority and jurisdiction concerning the distribution of a veteran's disability benefits in divorce proceedings, Congress affirmed that the VA was the only entity with authority and exclusive jurisdiction to decide whether veterans' benefits should be paid to a dependent. 38 U.S.C. § 511.

In 2017, this Court ruled that under 38 U.S.C. § 5301(a)(1) state courts do not have authority to assert control over veterans' benefits to the extent that governing federal law says otherwise. *Howell v. Howell*, 137 S. Ct. 1400, 1404 (2017) (citing *Mansell v. Mansell*, 490 U.S. 581, 588 (1989). In doing this, the Court reaffirmed 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 Congress does give the state jurisdiction and authority over these benefits, its grant does so in precise and limited ways. *Id.*

A state court lacks authority to invade the federal benefits because they originate from Congress's enumerated powers over military affairs. U.S. Const. Art. I, § 8, cls. 11 – 14. See *United States v. Oregon*, 366 U.S. 643, 648-649 (1961); *McCarty v. McCarty*, 453 U.S. 210, 232 (1981); *Howell v. Howell*, 137 S. Ct. 1400, 1404, 1406 (2017) (*McCarty* with its rule of federal preemption, still applies" and "the basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay (describing the federal interests in attracting and retaining military personnel."). If the state could invade the benefits designated by Congress for the express purpose of support and maintenance of the armed forces, the function of government would cease. See *McCarty*, *supra* at 229, n. 23, citing *Buchanan v. Alexander*, 45 U.S. 20, 20 (1846) ("The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be *diverted and defeated by state process or otherwise*, the functions of the government may be suspended.") (emphasis added).

Congress has only given state courts jurisdiction and authority over veterans' benefits in two specific circumstances. First, as to "disposable" retired pay, 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 abide by state court support orders when 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 of disability benefits, 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 the time in service to quality for retirement, but who have become disabled in the service of the nation. 42 U.S.C. § 659(h)(1)(B)(iii).

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

In the instant case, the New Hampshire Supreme Court ignored these significant developments in the law, and, like many other states across the country, ruled that this Court's decision in *Rose* gives the state absolute authority and jurisdiction to include a veteran's disability benefits as income for purposes of child support obligations.

Nowhere has Congress given the states the "precise and limited" authority to exercise jurisdiction and control over veterans disability benefits protected by 38 U.S.C. § 5301. In fact, § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1), clearly and unambiguously exclude such benefits from state court jurisdiction or control. Despite a continuous line of cases from this Court that has declared federal laws passed pursuant to Congress's enumerated Article I Military Powers that provide benefits for our nation's veterans preempt all state laws that stand in their way, even state laws concerning domestic relations and family law matters, see, e.g., *McCarty v. McCarty*, 453 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); and *Howell*, *supra*.

Ridgway, *supra*, addressed a provision identical to § 5301 and ruled that state courts were prohibited from exercising any legal or equitable process to create equitable run-arounds to a veteran's choice to designate a specific recipient of his or her benefits upon death. Citing that part of *Gibbons v. Ogden*, 22. U.S. 1, 210-211 (1824), in which this Court declared the absolute nullity of any state action contrary to an enactment passed pursuant to Congress's delegated powers and *Free v. Bland*, 369 U.S. 663, 666 (1962), the Court said: "[the] relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway*, *supra* at 55. 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).

It should also be pointed out that as with all federal statutes protecting veterans' benefits, 38 U.S.C. § 5301 is to be liberally construed in favor of protecting the beneficiary and the funds he or she receives as compensation for his or her service-connected disabilities. *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) (interpreting 38 U.S.C. § 3101 (renumbered as § 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 is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (federal statutes protecting servicemembers from discrimination by employers is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the

burdens of the nation"); *United States v. Oregon*, 366 U.S. 643, 647 (1961) (stating "[t]he solicitude of Congress for veterans is of long standing.").

Moreover, 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*.

Despite the clear statutory law and the uninterrupted jurisprudence that has always held federal law in this specific area preempts state law, this Court held in *Rose* that state courts could force veterans to pay over their disability benefits for purposes of satisfying child support orders or awards issued by state courts.

3. Congress Responded to Rose and Created Exclusive Jurisdiction Over Veterans' Benefits Determinations

In 1988, after *Rose*, Congress overhauled both the internal review mechanism and § 211 in the Veterans Judicial Review Act (VJRA). Pub. L. No. 100-687, 102 Stat. 4105. See also *Veterans for Common Sense v. Shinseki*, 678 F. 3d 1013, 1021 (9th Cir. 2012). In doing this, Congress "made three fundamental changes to the procedures and statutes affecting review of VA decisions." *Id*.

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

noted that the Veterans Court's authority extended to "*all* questions involving benefits under laws administered by the VA. H.R. Rep. No. 100-963, at 5, 1988, U.S.C.C.A.N. at 5786." *Id.* (emphasis in original). Congress conferred the Veterans Court with "*exclusive* jurisdiction" and "the authority to decide any question of law *relevant to benefits proceedings*." 38 U.S.C. § 7252(a); 38 U.S.C. § 7261(a)(1), respectively (emphasis added).

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

Third, Congress *expanded* the provision precluding judicial review in former § 211. Under the new provision, eventually codified at 38 U.S.C. § 511,[10] 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

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

benefits," 38 U.S.C. § 511(a) (2006). This change places primary and exclusive authority over the initial 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 initial or subsequent disposition of veteran's disability benefits, which are 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.

Finally, as Petitioner pointed out in his arguments, there is (and always has been) a process for the VA to pay disability benefits to a dependent in need. 38 U.S.C. § 5307. After *Rose* guidance was issued explaining that while state courts could not attach or garnish veteran's disability pay, a dependent could seek a portion of these benefits through the VA's administrative apportionment process. (App. Vol. II, Tab G, 122a-124a). As explained, in 1998, the VA issued an information memorandum (IM 98-03) explaining the administrative apportionment process under 38 U.S.C. § 5307. *Id*., see also App. Vol. III, Tab I, 142a. The IM 98-03 explains that VA disability benefits are not considered "remuneration for employment" within

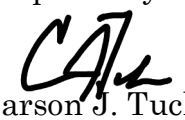
the meaning of 42 U.S.C. § 659(h)(1)(A)(ii)(V). *Id.* Consistent with 38 U.S.C. § 511 and the VJRA, the post-*Rose* process for a dependent to seek these benefits is through the apportionment procedures outlined in 38 U.S.C. § 5307 and as described in the memorandum. *Id.*

CONCLUSION

Congress has full, plenary and exclusive authority over the disposition of military disability pay. *Tarble's Case*, 80 U.S. 397, 408 (1871). This Court has recognized this absolute preemption still applies. *Howell*, 137 S. Ct. at 1404, 1406. 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). Moreover, when the veterans' benefits statutes discussed herein are construed under this Court's pronounced "canon" that they are to be "construed in the beneficiaries' favor," there simply is no room for the state to assert jurisdiction or authority over the disability benefits at issue in this case.

Petitioner respectfully requests the Court grant his petition or summarily reverse the NH Supreme Court and reinstate Petitioner's constitutional rights to his benefits.

Respectfully submitted,



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