No. 15-1031

In the Supreme Court of the United States

JOHN HOWELL,

Petitioner,

–v–

SANDRA HOWELL,

Respondent.

On Writ of Certiorari to the
Supreme Court of Arizona

AMICUS CURIAE BRIEF OF VETERANS OF FOREIGN WARS AND OPERATION FIRING FOR EFFECT IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Veterans of Foreign Wars (VFW), is a non-profit veterans service organization under 26 U.S.C. § 501(c)(19), which is comprised of eligible veterans and military service members from the active, guard and reserve forces. Part of VFW's mission is to serve our veterans, the military and our communities, and to advocate on behalf of all veterans. VFW seeks to ensure that veterans are respected for their service, always receive their earned entitlements, and recognized for the sacrifices they and their loved ones have made on behalf of the United States. VFW traces its roots back to 1899 and its membership today stands at nearly 1.7 million.

Amicus curiae, Operation Firing for Effect, Inc. (OFFE), is also a non-profit veterans' service and advocacy organization under § 501(c)(19). OFFE is dedicated to the improvement and protection of the benefits, entitlements, and services earned by our men and women for their voluntary service defending our nation. OFFE is not congressionally chartered and its allegiance is to veterans first. It is OFFE's belief that "Veterans' Affairs" is not a "special interest", but rather a legal, moral, and ethical obligation of the nation.

Congress provides veterans with multiple benefits and entitlements by enacting legislation

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

pursuant to its "Military Powers" under Article I, § 8, clauses 11 through 13 of the United States Constitution. These enumerated powers are supported by the Necessary and Proper Clause, § 8, cl. 16. These powers are further protected from state infringement by the Supremacy Clause, Article VI, cl. 2, which expressly declares the laws of Congress enacted pursuant to its Military Powers "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."

Congress provides veterans benefits for the maintenance, readiness, support and care of the nation's military servicemembers, for the common defense and protection of the nation's citizens. The type of veterans' benefits at issue in this case (retirement and disability pay) have been authorized since the dawn of this nation's independence.[2] This Court has, over the course of nearly a century, confirmed that such benefits are an exercise of Congress' exclusive Article I, § 8 Military Powers and have held, accordingly, that state courts are preempted from exercising authority or control over these benefits to the detriment of veterans. Since the Arizona Supreme Court in the case sub judice

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[2] Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228 (1977) ("[o]ne of the early resolutions of the first Congress in 1776 provided for monthly payments of up to half pay to officers, soldiers, and seaman disabled in the line of duty" and "in 1789 one of the early acts of the Congress under the new Constitution provided continuance of these payments to the disabled veterans of the Revolutionary Army.") *See also* Waterstone, *Returning Veterans and Disability Law*, 85:3 NOTRE DAME L. REV. 1081, 1084 (2010).

violated this principle, amici respectfully submit this brief in support of Petitioner to urge reversal.

INTRODUCTION

The Arizona Supreme Court ruled the Uniform Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, does not prohibit its state courts from considering "non-disposable" veterans' benefits when dividing "marital property" in a divorce proceeding, where the veteran, post-divorce, waives his or her "disposable" retired pay to receive such non-disposable pay. Despite the plain language of the USFSPA prohibiting any consideration of "non-disposable pay" in such proceedings, Arizona is among those states that assert authority over these funds and provide equitable relief to the non-military spouse by allowing post-divorce redistributions that consider or otherwise treat these benefits as divisible assets.

Amici challenge this ruling by asserting that all veterans' benefits that are not "disposable retired pay", as defined by 10 U.S.C. § 1408(a)(4)(B) and (c)(1), are federally protected benefits. Thus, amici assert all state court orders that consider, treat, attach, redistribute, or otherwise cause such benefits to be paid over in marital property distributions (whether pre- or post-divorce) are pre-empted by federal law, void ab initio, and of no force and effect.

In this latter regard, amici also contend, as a jurisdictional limitation, the plain language of 38 U.S.C. § 5301 prohibits state courts from exercising

authority over these benefits in the division of marital property. These benefits are authorized by the Secretary of Veterans Affairs for the exclusive use and benefit of veterans.

Federal law preempts all state authority over veterans' benefits except with respect to a small portion of "disposable" benefits that Congress authorized in the USFSPA, 10 U.S.C. § 1408(a)(4)(B) and (c)(1). Since this definition excludes veterans' retired pay waived to receive disability benefits, and disability benefits themselves, including the disability benefits in this case and the CRSC benefits at issue in *Merrill v. Merrill*, Case No. 15-1139, such other benefits are not "disposable" retired pay.[3] Therefore, such benefits can never be subjected to division, distribution, or re-distribution in a marital property settlement.

This Court's pre-USFSPA jurisprudence, principally *McCarty v. McCarty*, 453 U.S. 210 (1981), continues to prohibit any consideration of such pay by state courts in the division of marital property. In other words, despite broad misstatements to the contrary, state courts never had pre-existing authority, equitable or otherwise, to divide veterans' benefits as marital property. Such ostensible authority asserted by state courts before the *McCarty* decision was simply ultra vires. *Mansell v. Mansell*, 490 U.S. 581, 588-92 (1989)

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[3] *See* 10 U.S.C. § 1413a(g) (by statute "[CRSC p]ayments . . . are not retirement pay"). If they are "not retirement pay", they can never be subjected to division in marital property awards by state courts because it would contravene the plain language of the USFSPA, which allows division of only "disposable" retired pay.)

(rejecting the argument that the USFSPA erased pre-USFSPA federal pre-emption with respect to veterans' benefits).

After *McCarty*, Congress only recognized a limited exception to the absolute federal preemption in the USFSPA, 10 U.S.C. § 1408. The USFSPA allowed state courts to treat only a portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 U.S.C. § 1408(c)(1). All other military benefits (*i.e.*, non-disposable retirement benefits (defined in 10 U.S.C. § 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service) remain federally protected veterans' benefits. With respect to the latter, state courts are simply "without power to treat [such benefits] as property divisible upon divorce." *Mansell v. Mansell*, *supra* at 588-89.

In *Mansell*, after nearly a decade of post-USFSPA jurisprudence from state courts, this Court ruled the plain language of the USFSPA prohibited state courts from either directly or indirectly dividing anything other than disposable retired pay, as explicitly defined in sections 1408(a)(4)(B) and (c)(1).

Mansell also confirmed that the USFSPA did nothing to remove *McCarty's* explicit prohibition that state court orders forcing veterans to use non-disposable funds to "make up" or otherwise "offset" the waived disposable pay is contrary to federal law, void to the extent it purports to exercise authority over these funds, and therefore perpetually unsustainable. *See McCarty*, *supra* at 229, n. 23 (emphasis added), quoting *Buchanan v. Alexander*, 45 U.S. 20 (1846)

(stating "[t]he 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"). *See also* 38 U.S.C. § 5301.

Since this Court's decision in *Mansell*, many state courts have strayed far from its clear directive. Indeed, some courts have blatantly ruled the opposite is the case. Some have even had the audacity to admit to adopting Justice O'Connor's dissent, rather than follow this Court's jurisprudence.[4]

This brief provides an historical examination of the legal principles requiring a reversal of the Arizona Supreme Court's decision. Amici demonstrate that rather than abrogate *McCarty*, *supra*, the USFSPA reaffirmed federal preemption with respect to distribution of federal military benefits in marital property distributions consequent to divorce. Prior state court decisions from the mid-1960's up until the 1981 decision in *McCarty* that ruled otherwise were simply acting ultra vires of their authority vis-à-vis the Supremacy Clause by ignoring Congress' express Article I powers as expressed in veterans' benefits legislation from 1789 forward.[5]

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[4] See, *e.g.*, *Nelson v. Nelson*, 83 P.3d 889, 891-92 (Okla. App. 2003) (stating "courts of several states have agreed with Justice O'Connor's position and have taken equitable action to protect former spouses faced with a reduction in payments due to a reduction in military retirement pay" and stating Oklahoma courts would do the same).

[5] Rombauer, *supra* at 228.

BACKGROUND

Our nation's men and women in uniform have been at war in one theater or another for over 25 years.[6] During that time, progress in battlefield medicine, advances in medical technology, and rapid transportation have made it more possible than ever to save those wounded in the line of duty.[7] But progress comes with a price. "Saving lives means that more soldiers are surviving with catastrophic injuries."[8] Thus, our nation has the largest ever returning group of veterans with severe disabilities.[9]

Since 1990, there has been a 46% increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011.[10] By 2014, the number of veterans with a

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6 Trauschweizer, 32 INTERNATIONAL BIBLIOGRAPHY OF MILITARY HISTORY 1 (2012), pp. 48-49 (describing intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan.).

7 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.

8 Kriner & Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 UNIV. OF MEMPHIS L. REV. 545, 570 (2016).

9 *Id. See also* Waterstone, *supra* at 1082.

10 VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

service-connected disability was 3.8 million.[11] As of March 22, 2016, the number of veterans receiving disability benefits has increased from 3.9 million to 4.5 million.[12]

Also since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent of higher, with approximately 900,000 in 2011.[13] That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher.[14]

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.[15] Thus, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

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[11] *See* U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html.

[12] *Id. See also* VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp.

[13] VA Trends in Veterans with a Service-Connected Disability, supra, Slide 6.

[14] *Id.*

[15] *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

The National Veterans Foundation 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.[16] 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 veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.[17]

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations. Physical injuries are understandably horrific.[18] However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence.[19] As one observer has stated: "assignments can shift rapidly from altruistic humanitarian work to the delivery of immense deadly force, leaving service members with confusing internal conflicts that are difficult to integrate. During deployment, even medical personnel are at times compelled to use

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16 *See* http://nvf.org/staggering-number-of-disabled-veterans/

17 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).

18 Kriner & Shen, *Invisible Inequality*, supra.

19 Zeber, *supra* at n. 16.

deadly force to protect themselves, their patients, and their fellow soldiers.[20]

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.[21]

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. Families, already stretched by this extraordinary burden, 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 disability, coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging.[22]

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[20] *See generally*, Finley, *Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan* (Cornell Univ. Press 2011).

[21] 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).

[22] Finley, *supra*.

Rapid transition from the theater of war to the calm safety of a peaceful home environment creates existential conflicts over the meaning of deployments and future life in society. Protective vigilance and rapid response to threats in combat are maladjusted to life in a peaceful society. Moreover, a longing for reunion with family is tied to fear of reintegration into a life that now seems too foreign to contemplate. Many veterans resort to alcohol or other substances to dull the anxiety. Unfortunately it is a transition that some veterans never successfully navigate.[23]

The struggles do not stop here. Notably, the disabled veterans' difficulty assimilating back into normal society starts almost immediately. To seek care, rehabilitation, therapy, and the necessary equipment to function as near as possible to a whole human being, the veteran must navigate through a bureaucratic labyrinth that would test the patience of even the calmest among us.[24] Stories of this morass coupled with the scandalous treatment and marginalization by the federal government of those most severely disabled, nearly foreclose reintegration into normal civilian life.[25] Even aside from the well-documented neglect veterans have received for nearly three decades, a health system that had been lulled into complacency by dealing only with chronic maintenance health care for aging veterans was suddenly

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[23] Gerber, *Creating Group Identity*: *Disabled Veterans and American Government*, 23 MAGAZINE OF HISTORY, Issue 3, pp. 23-28 (July 2009).

[24] Waterstone, *supra* at 1084.

[25] *See* Finley, *supra*; Waterstone, *supra*.

flooded with new patients facing severe and widely varying physical and mental injuries.[26]

In addition to all of this consider the circumstances a disabled veteran suffering from PTSD confronts when faced with divorce. It is no secret that divorce numbers among returning veterans is high.[27] As a rule, state court judges, friend of the court agencies, and opposing lawyers seeking to divide the marital estate and award custody and control of minor children favor the more stable (both physically and mentally) of the two parties. This cold analysis results in the inevitability that the veteran suffering from such conditions will be further alienated.

Then, consider that the 70 percent rating in greater than half of the disabled veterans returning from the last 30 years of the war often prevents them from working a full-time job. Even if they are not physically disabled, those with PTSS and PTSD are still highly prone to being unemployable.[28]

Ultimately, a state court with ostensible authority to divide (either directly or indirectly) the veteran's disability benefits and award them to a former spouse is taking that veteran's only source of income. This,

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[26] Finley, *supra*.

[27] DeBaun, *The Effects of Combat Exposure on the Military Divorce Rate*, Naval Postgraduate School, California (March 2012) (finding divorce rates since at least 2001 divorce rates among all branches of service had increase (with a greater percentage of those veterans being women) and concluding combat exposure (weapons usage and casualty experience) had an even greater effect on the increasing percentages)).

[28] Finley, *supra*.

despite the fact Congress designates these funds for the exclusive use and benefit of the veteran,[29] and has made a legislative determination in both the awarding of such benefits and in the disability rating upon which they are based, the latter of which is supposed to explicitly supplement the veterans' inability to compete or otherwise perform in the regular civilian job market.[30]

Veterans who suffer from service-connected disabilities are entitled to receive separate disability benefits.[31] The VA calculates their amount based on a scale, expressed in percentages, reflecting "the average impairments of earning capacity resulting from such injuries in civil occupations."[32]

The result is a harsh reality. Despite the law, state courts are forcing veterans to use their non-disposable disability pay to supplement the loss to their former spouse because the veteran exercised his or her statutory right to waive disposable pay to

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[29] *See* 38 U.S.C. § 5301. This provision's absolute prohibition of legal process against servicemembers to force them to part with VA authorized and paid disability benefits admits of no exception in the context of marital property divisions.

[30] Eligibility for disability pay is based on having a permanent and stable disability rated at 30% or more by the Department of Defense (DOD). 10 U.S.C. § 1201(b)(3)(B); Kamarck, *supra*.

[31] See, *e.g.*, 38 U.S.C. §§ 1110 and 1131 and 10 U.S.C. § 1413a (the latter are the benefits at issue in *Merrill v. Merrill*, Case No. 15-1139).

[32] 38 U.S.C. § 1155. *See also* Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service (September 12, 2016), p. 9, available at https://www.fas.org/sgp/crs/misc/RL34751.pdf.

receive non-disposable pay. The Arizona Supreme Court, as with those other state courts noted by Petitioner, have been allowed to directly affect the veterans' receipt of his retirement and disability pay by ordering offsetting awards upon a waiver of disposable retired pay. A soldier whose only source of income may be such disability benefits, who cannot work, and therefore cannot support himself or his family without these benefits, is now being forced to pay this money over to his or her former spouse without regard or concern for his or her circumstances.

THE LAW

Summary. This section of the brief explores the meaning of the Military Powers Clauses[33] under Article I, § 8 of the Constitution, particularly, clauses 11 through 13, and connects these enumerated and federally reserved powers to the provision by Congress of veterans' benefits. The history of such benefit programs is also briefly addressed, as well as their purpose and intent. Finally, it is demonstrated that

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[33] *See* Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 54 (1999) (stating while cases often refer to "war powers," when discussing military matters falling outside the domain of "war", it is analytically more accurate to speak in terms of "military powers," that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect.)

in all areas where a state court order might come into conflict with these benefit authorizations, the constitutional mandate given to Congress prevails– state courts simply do not have authority to deviate from the strictures of these provisions.

In this latter regard, pre-*McCarty* preemption in this area was never abrogated by the USFSPA. State court judges and commentators who have carelessly stated this have ignored over a century of this Court's jurisprudence on the subject. In addition to being morally unsupportable, providing carte blanche to state courts to dispose of veterans' benefits in this matter is legally unsustainable. A careful and measured examination of this Court's cases addressing the disposition of these benefits and the constitutional framework within which they exist evidences but this singular conclusion.

An historical overview. Veterans' benefits legislation (and therefore recognition of such benefits) preceded other social welfare measures in the United States by more than a century and have continued unabated.[34] The First Congress in 1776 provided for monthly payments up to half pay for officers, soldiers and seaman disabled in the line of duty.[35]

In 1789, under the new Constitution, Congress provided for continuance of these payments to disabled veterans for service-connected disabilities incurred in

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[34] *See* Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228 (1977).

[35] *Id.* at 228-29, citing Resolution of August 26, 1 J. OF CONG. 454 (1776).

the Revolutionary War.[36] "Monthly payments to veterans for service-connected disabilities have since been provided for veterans of all our country's wars and conflicts as well as for veterans with peacetime service."[37]

Service-related retirement and pension benefits without regard to disability or service-related impairments were later recognized in 1818.[38] Thus began the tradition of providing for veterans, and their survivors, for length of service and need, old-age, or non-service-related disability, or death.[39]

The constitutional framework. The Constitution provides "[a]ll legislative powers herein granted shall be vested in a Congress . . . ." U.S. Const., Art. I, § 1. Congress is vested with "large discretion as to the means that may be employed in executing a given power." *Lottery Case*, 188 U.S. 321, 355 (1903).

These "granted" or "enumerated" powers "by definition . . . are not powers that the Constitution 'reserved to the States'", and in fact, the Tenth Amendment 'expressly disclaims any reservation of that power to the States.'" *U.S. v. Comstock*, 560 U.S. 126, 144 (2010), quoting *New York v. United States*, 505 U.S. 144, 155 (1992).

Where Congress passes legislation within its enumerated powers under the Constitution this Court

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[36] Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

[37] Rombauer, *supra* at 229.

[38] Act of Mar. 18, 1818, ch. 19, § 1, 3 Stat. 410.

[39] Rombauer, *supra*.

is concerned only "with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress." *Polish Nat. Alliance of United States v. NLRB*, 322 U.S. 643, 650 (1944).

In the very context of Congress' power to both grant, and to divide, veterans' retirement and disability benefits under the various federal veterans' benefits statutes and, particularly, the USFSPA, this Court echoed the aforementioned principle in *Mansell. Mansell*, 490 U.S. at 490 U.S. at 588-592, stating "Congress is not required to build a record in the legislative history to defend its policy choices."

The Military Powers Clauses. Among the enumerated powers given to Congress in Article I are the Military Powers Clauses, clauses 11 through 13, inter alia.[40]

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles*, 350 U.S. 11, 17 (1955). *See also Orloff v. Willoughby*, 345 U.S. 83 (1953). This responsibility rests exclusively with Congress and the President. *Rostker v. Goldberg*, 453 U.S. 57, 70-71 (1981).

Congress' power in this area "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*

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40 "The Congress shall have the power . . . [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy;" and "[t]o make Rules for the Government and Regulation of the land and naval forces."

v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47, 58 (2006).

Exercise by Congress of the Military Powers has been upheld against state authority in a variety of contexts. The Military Powers Clauses have been held to vest Congress with authority to pass legislation providing veterans with a multitude of direct benefits, including wages, bonuses, education, retirement, disability and special compensation, as well as indirect benefits or protections, such as from federal or state taxation, employment discrimination,[41] and financial harassment and hardship.

Such legislation is within Congress' power to raise and support armies under Article I, § 8, of Constitution. *Johnson v. Robison*, 415 U.S. 361 (1974). Thus, retirement programs are enacted pursuant to Congress' power to raise and maintain armies and the navy and where a state statute conflicts with a federal statute implementing such a program, federal legislation must prevail. *Cantwell v. County of San Mateo*, 631 F.2d 631 (1980), cert. den. 450 U.S. 998 (1981).

As they relate to this case, the Military Powers Clauses serve as Congress' enumerated power to provide veterans with retirement and disability benefits. The Supreme Court has repeatedly and

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[41] 38 U.S.C. § 4301. The Uniformed Services Employment and Reemployment Rights Act (USERRA) was passed to incentivize non-career military service in the active duty and reserve components. *See also* Harner, The Soldier and the State, *supra* at 93 (tracing Congressional efforts in this regard since the 1940's and explaining Congressional authority to do this under the War Powers Clauses).

consistently explained that Congressional power and authority under the Military Powers Clauses includes "enhancing military service and aiding the readjustment of military personnel to civilian life." *Johnson*, *supra* at 385. "Legislation to further these objectives is plainly within Congress' Art. I, § 8, power 'to raise and support Armies.'" *Id.* at 376.

Indeed, full power of legislation in these matters lies with Congress. *Street v. United States*, 133 U.S. 299, 307 (1890). *See also Tarble's Case*, 80 U.S. 397 (1872) (noting the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the armed forces is exclusive). This presumption overrides any presumptions of implied state authority over matters of marital property divisions in state court divorce proceedings where such proceedings involved partition of veterans' retirement and disability benefits.

The Necessary and Proper Clause. Congress' Article I, § 8 "enumerated" powers under the Armed Forces Clauses to provide military veterans with these protections are shored up by the Necessary and Proper Clause. This clause "expresses clearly the thoughts that the life of the Nation and of the States and the liberties and welfare of their Citizens are to be preserved and that they are to have the protection of the armed forces raised and maintained by the United States with power in Congress to pass all necessary and proper laws to raise, maintain, and govern such forces." *Dunne v. United States*, 138 F.2d 137, 140 (8th Cir. 1943).

The Supremacy Clause. Finally, the Supremacy Clause leaves no doubt that all laws enacted by

Congress in the direct exercise of its Military Powers are the supreme law of the land and cannot be ignored or circumvented by state courts. Article VI, § 2. No state constitution, statute, or judicial decision can contravene the supremacy of Congress' authority in exercising its enumerated constitutional powers. *Id.*

> The decisions of the state courts of last resort . . . are not conclusive upon the interpretation of the federal constitution. The supreme court of the United States is, however, the final expositor and arbiter of all disputed questions touching the scope and meaning of that sacred instrument, and its decisions thereon are binding upon all courts, both state and federal.

Mugler v. Kansas, 123 U.S. 623 (1887).

Therefore, any state judicial decision, "however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (emphasis added).

This Court has stated this principle "is but a necessary consequence of the Supremacy Clause." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981) (citing *McCarty*, *supra* and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and stating "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." Therefore, "[t]he 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 the Constitution provided that federal law must prevail." *Ridgway*, *supra* at 54-55 (emphasis

added), citing *Free v. Bland*, 369 U.S. 663, 666 (1962) and *Gibbons v. Ogden*, 9 Wheat 1 (1824).

Exercise by Congress of its enumerated Military Powers is plenary and exclusive of the States' authority. As this Court stated in *Tarble's Case*, 80 U.S. 397, 408 (1871):

> The execution of these powers falls within the line of [Congress'] duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

In re Tarble, 80 U.S. 397, 408 (1871).

In the very context of the exercise by Congress of its enumerated Military Powers in blocking a state court from imposing a "constructive trust" on federal statutory life insurance benefits for a military member's spouse, this Court has stated to the extent a

state court "fails to honor federal rights and duties", it will not hesitate to protect under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in these rights and expectancies." *Ridgway*, *supra* at 54 (emphasis added), citing *McCarty*, *supra*. Therefore, in every case where federal law controls, "state divorce decrees, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.* at 55. "That principle is but the necessary consequence of the Supremacy Clause of our National Constitution." *Id.*

As one court stated of Congress' exercise of the Military Powers: "When the Federal government, in rewarding its soldiers, determines for itself how it will expend the Federal money, and declares that this money shall be protected against transfer or diminution from any quarter, its power under the express terms of the U.S. constitution is exclusive." *Atlanta v. Stokes*, 175 Ga. 201, 212 (1932) (emphasis added). In describing the supremacy of statutes enacted by Congress under the Military Powers clauses, this Court continued:

> Congress had the supreme right to say (without let or hindrance of any kind from any quarter) upon what terms it would reward faithful service in time of war as an instrument for the continuance of like faithful service if the need of the future should demand . . . . To maintain the power to wage war, it is as much essential to the

> morale of the troops of a government that those who face death upon the field of Mars should have the right to anticipate rewards in the future (especially if they have been victorious) as to expect that they will receive the monthly compensation for service, which must be meager indeed in instances when their lives are actually exposed to danger. It seems strange, in view of the long line of decisions on this subject, that any one can suppose, even though the power of a State to tax generally is supreme, that power may be used to hamper, hinder, annoy, harass, and impede the Federal government in the exercise of its unlimited power to carry on war . . . .

Id. at 204-205 (emphasis added).

Deference to Congress' enumerated Military Powers is at its "apogee" when interpreting statutes passed thereunder. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). The Constitution granted the judiciary "no influence over either the sword or the purse."[42] Thus, courts have long recognized that Congressional acts under the authority of the Military Powers Clauses are "qualitatively different" than those passed pursuant to its other powers.[43] These emoluments of service

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[42] O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 166-67 (2000), quoting Hamilton, THE FEDERALIST, No. 78 at 465 (Rossiter ed., 1961).

[43] Harner, *The Soldier and the State: Whether Abrogation of State Sovereign Immunity in USERRA Enforcement Action is a Valid Exercise of the Congressional War Power*s, 195 MIL. L. REV. 91, 112 (2008).

are granted under a power regarded by this Court as nearly always superior to the rights of the states and its individual citizens.[44]

When Congress exercises such power, it is "complete to the extent of its exertion and dominant."[45] First uttered in defense of the exercise by Congress of the War Powers over the institution of slavery, John Quincy Adams stated: "This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life."[46]

Even where legislation in this sphere may raise constitutional issues Congress has been given great latitude. *Parker v. Levy*, 417 U.S. 733 (1974).

This of course includes barriers erected by state courts dispossessing the veterans of funds that were specifically authorized and provided for under these Military Powers. *See McCarty*, *supra*; *Mansell*, *supra*; *Hisquierdo*, *supra*. Therefore, in the premises of Congressional authority over matters relating to the armed forces, the Constitution leaves no discretion to the states.

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[44] *Id.*, citing *Tarble's Case*, 80 U.S. 397, 401-402 (1872) (state courts have no authority to release soldiers from active duty).

[45] *Id.* at 146.

[46] Reed, et al., *Modern Eloquence*, POLITICAL ORATORY (vol. IX, 1903), p. 17 (taken from speech of the Hon. J.Q. Adams in the House of Representatives, on the State of the Union, May 25, 1836).

DISCUSSION AND ANALYSIS

Amici has provided the Court with the background and plight of disabled veterans facing reintegration into society and the negative effects of state court orders dispossessing them of what is often their only source of income and sustenance. Amici has also sought to demonstrate Congress possesses plenary authority to make laws under its Article I Military Powers, and this includes legislation providing veterans with a wide-range of financial benefits and protections, including the retirement and disability benefits at issue in this case, and in the functionally identical case of *Merrill v. Merrill*, Case No. 15-1139.

As Petitioner concludes, federal law preempts state law over these benefits. The USFSPA's singular exception allows state courts to exercise authority over only "disposable" retired pay. *See* 10 U.S.C. § 1408(a)(4)(B) and (c)(1). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980). This principle nullifies any attempt by state courts to order division of <u>any other non-disposable benefits</u> not included with the only exception to pre-existing pre-emption–that portion of disposable retired pay that <u>may</u> be divided.

While state courts have continued to assert authority over these benefits when considering marital property settlements in divorce proceedings in the decades that followed passage of the USFSPA, this Court's decision in *Mansell* properly recognized that

federal preemption had preceded *McCarty*, and continued to prevail, but for that limited exception in the USFSPA. *Mansell*, *supra* at 589-92.

McCarty and *Mansell* simply confirmed over a century of federal preemption over state authority of its domestic law with respect to veterans' benefits in the division of marital property upon divorce. In *McCarty*, this Court reasoned regardless of how a state court characterized such benefits (*e.g.*, as earnings deferred during the marriage and therefore ostensibly part of the marital estate), all military retirement and disability benefits were off limits to state courts. The Court explained simply that application of state marital property law conflicts with the federal military retirement scheme. *McCarty*, *supra* at 223 and n. 16. Thus, Congress' authority to provide veterans with these benefits preempted state court authority to distribute them in a manner other than as directed by Congress.

Mansell's straightforward interpretation of the USFSPA acknowledged the continuing vitality of federal preemption. The Mansell Court ruled (1) *McCarty* had not been abrogated by the USFSPA, *Mansell*, *supra* 490 U.S. at 588-592; (2) the USFSPA applied directly to prohibit state courts from dividing retired pay waived to receive disability pay, *id.* at 589-90; and (3) state courts could not do "indirectly" what they could not do directly–they are prohibited to "treat" or "consider" all non-disposable benefits in the distribution of the marital estate. *Id.*

However, as evidenced by the state court's disposition of this case and *Merrill v. Merrill*, Case No. 15-1139, as well as countless other state court cases

throughout the country, nearly another three decades (the worst three decades for returning wounded and disabled veterans), have passed in which states continue to blatantly ignore Congress' absolute authority over these benefits, and, in doing so, disregard the plight of their designated beneficiaries–the retired and disabled veteran.

In the years following passage of the USFSPA, misinformed or uninterested state courts developed the illusion that, pre-*McCarty*, they had been given some historical right to treat veterans' retirement and disability pay as part of the marital estate. The state courts that advance this uninformed rationale cite to state court cases between the mid-1960's and the 1981 decision in *McCarty*.

Of course, if one fails to appreciate these decisions were themselves an unauthorized renouncement of the historically established jurisprudence, which had existed at least since *United States v. Tyler*, 105 U.S. 244 (1882), then they can be blindly cited for the proposition. However, these cases cannot erase the history of Congress' preemptive authority over distribution and disposition of veterans' benefits. This Court has itself recognized the "imposing number of cases" in which this principle has prevailed, including those involving divorce and distribution of marital property. *Rostker*, *supra* at 70, citing *Tyler*, *supra* and *McCarty*, *supra*. *See also Ridgway*, *supra.*

There simply was no "abrogation" of *McCarty* in the USFSPA, and there was no preexisting state authority over treatment of military benefits in matters of domestic law. It is a fiction. And, as the Court stated in *Rostker*, *supra* at 68-69, the absolute

preemption of federal law in the area of military powers admits of no "facile degrees" of judicial deference. It would be "blinking reality" to conclude otherwise. *Id.*

Second, *McCarty* is not some jurisprudential island that mystically appeared after some seismic event in the field of law on the subject. That Congress had these plenary powers, and that the funds, benefits, and measures derived therefrom were for the exclusive use of the veterans in furtherance of Congress' Military Powers had been settled for years prior to *McCarty*. Remarkably, state courts continued to propagate this illusion even after *Mansell*.

Marital property is also different in a legal sense. The principles of "marital" or "community" property "rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit." *Wissner v. Wissner*, 338 U.S. 655, 660 (1950). The Court continued: "Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." *Id.* Nonetheless, while less important to the states than alimony and child support, a marital property distribution is considerably more damaging to the long-term well-being of the veteran. Such awards ordinarily may not terminate upon a certain date or upon a change of circumstances as with child support and spousal support awards, respectively.

With all due respect to the current Solicitor General's position, it follows from what has been

stated above that military spouses never had a legitimate vested interest in a veteran's retirement or disability pay under the law of any state before or after *McCarty*. *See* SG Brief on Petition as Amicus Curiae, pp. 7-8.

Finally, *McCarty* and *Mansell* rejected the notion that offsetting awards, indemnity agreements, or any other number of creative solutions could allow substitution for the former spouse's loss due to the veteran's waiver without running afoul of the USFSPA's and *Mansell's* confirmed restrictions on allowing division of anything other than "disposable" retired pay.

To continuously repeat the vacuous rationale that the state court has authority to issue an equalizing order as long it does not expressly state that the veteran's payments to his or her former spouse are to come out of his retirement or disability pay is as absurd as it is nonsensical. The money has to come from some source. While it may be the case that some retired and disabled veterans have the financial resources to "make up" the reduction suffered by the former spouse when they exercise their statutory right to waive retirement pay, it is definitely the case that over half the veterans returning from war during the last 30 years are greater than 70 percent disabled. As noted, this also means that, in many cases, these veterans are unable to attain or sustain regular employment. The disability benefits are directly purposed for that inability. To order that the veteran replace what was taken from the former spouse by operation of a law designed to exclusively support the veteran with whatever means he or she has is more

often than not the same as exerting prohibited authority over those funds.[47]

Turning a blind eye to the economic realities and the real plight of the veteran by simply ignoring it and ordering the veteran to pay no matter where he or she gets the money is a mockery of Congress' authority, the Supremacy Clause, this Court's jurisprudence, and most of all the disabled veteran who sacrificed his or her capacities in the service of this country and, as a result of that sacrifice, now has no other source of sustenance.

As Petitioner states, this must also be prohibited. If it were otherwise, then the state courts could circumvent the federal law by crafting provisions that require the veteran to "make up" the reduction from whatever funds he or she has, regardless of his or her financial circumstances. This is exactly what is happening.

It is now time for this Court to stop state courts from doing indirectly what they are forbidden from doing directly, to wit, consider any "non-disposable" veterans' benefits as divisible marital property consequent to divorce. As one commentator has noted, "[i]t is somewhat unexplainable that personnel involved in the single most significant, exclusive, and unique federal undertaking (*i.e.*, maintenance of a national military force) have been left to the whims of fifty different judicial systems without any concern

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47 Kirchner, 43 FAMILY LAW QUARTERLY 3 (Fall 2009), p. 373.

for consistency in treatment of military personnel or interpretation of federal law from state to state."[48]

Finally, because this is a marital property distribution, 38 U.S.C. § 5301 independently protects the benefits at issue in this case and in *Merrill v. Merrill*, Case No. 15-1139, as a matter of jurisdiction. In *Rose v. Rose*, 481 U.S. 619, 631-32 (1987), the Court cited the case law from *Wissner v. Wissner*, 338 U.S. 655, 660 (1950) through *Ridgway*, *supra*, noting that where the issue regards a marital property disposition involving retirement or disability benefits, the state courts cannot impose constructive trusts (or other anticipatory mechanisms like indemnity agreements or set-off orders) because this would violate 38 U.S.C. § 770(g), "a prohibition identical . . . to § 3101" (the predecessor of 38 U.S.C. § 5301).

While as noted by the Solicitor General, SG Brief on Petition as Amicus Curiae, pp. 7-8, this issue is not before the Court, 38 U.S.C. § 5301 imposes a jurisdictional limitation against present and future dedication of non-disposable funds.

All this to say that a state court's authority over a distribution of marital property in a divorce proceeding, regardless of the honorable intent of the particular judge and the level of sanctity with which a state regards those rights within its domestic order, is necessarily of an inferior character when considered in contrast to the propriety of Congress' provisioning of the war weary and the combat wounded veteran with the basic necessities for a minimally comfortable future

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[48] Kirchner, *supra* at 370 and n. 13.

after a full career of voluntary service to his or her country.

CONCLUSION

Article I of the Constitution has given Congress plenary authority to make all provisions for the supply, maintenance and welfare of the service men and women of the armed forces so that they may operate with the skill, dedication and concentration required in the most dangerous and unpredictable of environments. As explained in this brief, Congress has put in place the apparatus to protect our veterans both during and after their service to our country. These laws are based on perhaps the most powerful of those enumerated powers given to Congress by the Constitution, the Military Powers Clauses. Congress has been accorded no greater deference by this Court than in these premises.

Yet, the state court in the case sub judice as well as in *Merrill v. Merrill*, Case No. 15-1139, and courts in numerous other states in the nation continue to ignore this pillar of constitutional hierarchy.

In military terminology, "fire for effect" is the call to artillery battery units to release the full measure of their ammunition onto an established target. The technical process requires a forward observer (FO) to confirm a target's identity, situate its range, and verify its coordinate location. The FO then communicates this to the artillery units, which will then fire rounds to gauge their range and accu-

racy. Once the FO confirms the artillery has hit its mark, the call to "Fire for Effect" is then communicated to the artillery unit for the latter to release the full wrath of the artillery battery's ammunition onto a target to effectively neutralize it. Petitioner has now precisely identified these renegade state courts, their coordinates have been established, and they have been placed squarely within this Court's range. Amici as the FO for this operation and in this war against our veterans respectfully calls now to this Honorable Court, the artillery unit that it is relying on as truly the last line of defense against the continued onslaught of abuses by the several states against some of our nation's most vulnerable disabled combat veterans to execute its mission: FIRE FOR EFFECT.

In support of Petitioner, amici respectfully requests this Court to reverse the decision of the Arizona Supreme Court.

Respectfully submitted,

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