No. 16-2651

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DENNIS M. O'BRIEN
Appellant

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS APPEALS

BRIEF OF APPELLANT, DENNIS O'BRIEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.

Constitutional Provisions

Statutes

Regulations

Cases

State Statutes

Legislative History

Other Authorities

Citations to the Record

I. ISSUE PRESENTED FOR REVIEW

This appeal presents a single issue of statutory interpretation: does 38 U.S.C. § 1115 require the Secretary to pay otherwise eligible disabled veterans additional monthly compensation for actual dependents in the veteran's household or only for dependents who have a parent-child relationship with the veteran in a nuclear family unit?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction to interpret constitutional, statutory and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary [38 U.S.C. §7261(a)(1)] and to hold unlawful and set aside decisions that are contrary to constitutional right or in excess of statutory authority. 38 U.S.C. §7261(a)(3).

B. Statement of the Case and Relevant Facts.

Appellant is a 70 year old disabled Veteran, who served from Feb 1, 1966 - Sep 15, 1969, including service in Thailand during the Vietnam War. R. at 2671, 2672, 2673 - 2675, 2803, 2999. He has been unable to work since approximately 2001 due to his disabilities. R. at 1841.

Appellant's grandson, (hereinafter, "D.B.") was born March 7, 1996, and turned 18 on March 7, 2014. R. at 2065. Appellant is the primary caregiver and legal guardian of D.B., and has been responsible for providing D.B.'s support, care, nurture, and education "since ['D.B.'] was in diapers". R. at 2064, 2291. D.B.'s biological mother is still living,

but receives permanent in-patient care in a nursing home and is unable to take care of her son[1]. R. at 2064 - 2065, 1841, 2429. D.B.'s biological father is still living, but is infrequently involved in his life. R. at 2064 - 2065. On September 28, 2012, an Illinois state court issued "Letters of Office" to Appellant, appointing him legal guardian of D.B. - then a minor. R. at 2059. The state court ordered Appellant to "do all acts required of the guardian by law". *Id*. Illinois state law requires the guardian of a minor child provide "…custody, nurture and tuition" and "provide education of the ward…" *See e.g.*, Illinois Statutes Chapter 755, Section 5/11-13(a).

Appellant filed a claim for increased rating and claims of service connection of multiple conditions on/about October 6, 2008. R. at 3003. At all times since November 1, 2008, Appellant has had a 30% or higher total disability rating.[2] R. at 3157. From October 6, 2008, through June 9, 2015, Appellant was rated 100% disabled based on Total Disability for Individual Unemployability (TDIU). R. at 542. From June 9, 2015 to present, Appellant has been rated as 100% disabled on a schedular basis. R. at 542. Additionally, Appellant receives Special Monthly Compensation K-1, and S-1 for a

[1] Record citations provided in this brief describe the nature of the medical condition that limits D.B.'s mother. *See e.g.*, R. at 1841, 2429. Out of respect for the privacy (personal and medical) of Appellant, his grandson, his grandson's biological mother and father, and their extended families, Appellant respectfully requests the Secretary and Court limit discussion of the nature of the condition as much as practicable in any decision or brief. Appellant believes it is sufficient to state D.B.'s biological mother is permanently in a nursing home and unable to care for her son.

[2] After a series of claims, appeals and decisions, Appellant has been rated at various total ratings ranging from 60% to 100%, between October 2008 and present. *Accord,* R. at 496 - 504, 527 - 540, 541 - 545, 2713 - 2714, 2718 - 2719, 2720 - 2722, 2838 - 2840, 2847 - 2853; 3046 - 3047, 3048 - 3052, 3053 - 3064, 3156 - 3161, 3162 - 3167, 3168 - 3174, 4303 - 4308, 4309 - 4314, 4315 - 4317.

portion of that time frame. R. at 543. Finally, Appellant received aid and attendance as he was the primary caregiver for his totally disabled and terminally ill wife. R. at 539, 544, 2064 - 2065.

Initially, Appellant was not provided any additional monthly compensation despite having claimed such compensation for his wife and his dependent, D.B. R. at 2064 - 2065, 2075 - 2077.

On September 24, 2013, Appellant filed a Notice of Disagreement challenging the denial of additional dependency compensation for his wife and dependent grandson. R. at 1994 - 2006. On/about December 26, 2013, the Secretary awarded dependency compensation, but only for Appellant's wife, retroactive to November 1, 2008. R at 539, 1309-1310. The Secretary notified Appellant of this award in a rating decision dated January 9, 2014. R. at 3156 - 3161. In this decision, the Secretary denied dependency compensation for Appellant's dependent grandson, stating:

> "We couldn't pay for [D.B.] because he is your grandchild and not legally adopted. The VA only recognizes biological children, stepchildren or adopted children. You may reopen your claim if you have legally adopted [D.B.] and furnish us with a copy of the adoption decree or revised birth certificate showing you as a parent for [D.B.]." R. at 1293.

Appellant filed a notice of disagreement to this decision, challenging the denial of dependency compensation for his dependent grandson. R. at 945-946. The Secretary issued a Statement of Case (SOC) on the issue of dependency compensation for D.B. on July 24, 2015. R. at 565 - 595. Appellant filed his VA Form 9, accompanied by argument and exhibits in support of his substantive appeal on the issue of dependency compensation for his dependent grandson on September 22, 2015. R. at 445. The appeal

was certified to the Board on October 28, 2015. R. at 273-274. The appeal was docketed on February 2, 2016. R. at 253. A BVA video-conference hearing was set for February 25, 2016. R. at 254- 257. Appellant withdrew his video hearing request and submitted a written summary of his arguments to the BVA on February 24, 2016. R. at 241 - 246[3]. On March 30, 2016, the Secretary issued another rating decision denying Appellant's request to add D.B. as a dependent for additional dependency compensation purposes. R. at 31 - 32. The Board issued its decision continuing the denial of additional dependency compensation for Appellant's dependent grandson on May 11, 2016. R. at 1 - 26. The Board issued a conclusion of law that "[t]he criteria for recognition of D.B. as the "child" of the veteran for purposes of establishing dependency allowance have not been met (citations omitted)". R. at 6. The Board implicitly incorporated Section 101(4)(A)'s definition of child into Section 1115's definition of dependent when it wrote:

> "Here, there is no dispute as to the essential facts. D.B. is the grandchild of the Veteran. D.B. is not the Veteran's biological child, legally adopted child, or stepchild. Therefore, he does not qualify as a dependent child for VA purposes. As a matter or law, there is no entitlement to additional disability compensation for D.B. as a dependent child." R. at 13.

This appeal followed.

III. SUMMARY OF THE ARGUMENT

Mr. O'Brien asks the court to find that as a 100% disabled veteran, he is entitled to additional monthly dependency compensation for D.B., an actual dependent in his

[3] Appellant has not included citation to Exhibit A to his 2-24-2016 written summary to the Board; the Exhibit dealt, in its entirety, with another issue not raised in this appeal.

household, the grandson whom he has cared for since infancy, and who the State of Illinois has ordered he provide for, nurture, care and educate.

This appeal presents a question of statutory interpretation of first impression: whether the word "dependents" in 38 U.S.C. §1115 include the actual dependents in a veteran's household or only the veteran's spouse and any biological, adopted and/or step-children.

In the Board decision under appeal, the Secretary asserted that Appellant's actual dependent was not a biological child, adopted child or a step-child, and conditioned Appellant's receipt of dependency compensation on the requirement that he adopt his grandson in order to live in the government-preferred nuclear family unit.

Mr. O'Brien asks this court to decline to extend deference to the Secretary's interpretation, not just because it is inconsistent with Congressional intent, but also because it puts the federal government in the business of regulating veterans' family structures. Because this interpretation conditions Appellant's receipt of government benefits on a parent-child relationship in a nuclear family, it encroaches on Appellant's fundamental liberty interests while advancing no vital government interest of paramount importance.

Instead, Appellant asks the court to adopt the ordinary dictionary meaning of the word "dependents", and Appellant's interpretation of Section 1115, since it is the interpretation most consistent with Congress's unambiguous intent and avoids constitutionally problematic classifications.

He asks the court to conclude that Section 1115 requires the Secretary pay additional monthly dependency compensation to Appellant, because D.B. is an actual dependent living in his household.

IV. STANDARD OF REVIEW.

The Court interprets statutes *de novo.* 38 USC 7261(a)(1).

V. ARGUMENT

A. The Board's interpretation of "dependent" in Section 1115 is either not entitled to deference, or cannot stand because it encroaches on a fundamental liberty interest.

1. The Board interpreted the word "dependent" in Section 1115 to mean "child" as defined in Section 101(4)(a).

38 USC § 1115 (hereinafter, "Section 1115") allows certain disabled veterans with dependents to receive additional monthly compensation stating, in relevant part:

> "Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent, shall be entitled to additional compensation for dependents in the following monthly amounts:
>
> (1) If and while rated totally disabled and—
>
> (A) has a spouse but no child, $150;
>
> (B) has a spouse and one or more children, $259 plus $75 for each child in excess of one;
>
> (C) has no spouse but one or more children, $101 plus $75 for each child in excess of one;..." 38 USC § 1115 (emphasis added).

The word "dependents" is not defined in Section 1115 or anywhere in Title 38. *But see*, 38 C.F.R. 3.4(b)(2)("An additional amount of compensation may be payable for

a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling").

In its May 11, 2016, decision, the Board denied Appellant's request for additional dependency compensation for his court-ordered dependent, D.B. R at 12 - 13. The Board acknowledged that "the Veteran has provided evidence showing he has been appointed the legal guardian of 'D.B.' by a court in the state in which he resides." *Id,* at 12. The Board observed that " 'D.B.' is the Veteran's grandchild and he was not adopted by the Veteran." *Id*. The Board concluded that because "['D.B.'] did not qualify as a dependent child for VA purposes…[a]s a matter of law there is no entitlement to additional disability compensation for 'D.B.' as a dependent child." R. at 11-12.

The Board's conclusion provides no analysis. It merely cites to 38 U.S.C. §1115 (hereinafter, "Section 1115") and 38 CFR 3.4(b)(2) for the proposition that "A veteran with service-connected disability rated at not less than 30 percent shall be entitled to additional compensation for a spouse and/or child." R. at 12. The Board concludes as a matterof law that the "criteria for recognition of 'D.B.' as the "child" of the Veteran for purposes of establishing dependency allowance have not been met." R. at 6.

As such, and while noting that the Board did not specifically lay out this analysis, it appears that the Board has used the definition of "child" in 38 U.S.C. §101(4)(A) (hereinafter, "Section 101(4)(A)") to define "dependents" in Section 1115. The Board's decision is consistent with Secretary's basis for denial of additional dependency compensation to Appellant in the Notice of Action letter to the December 23, 2013, rating

decision: for the purpose of additional dependency compensation, the Agency "only recognizes biological, step or adopted children". R. at 3157.

2. The Board's interpretation of "dependent" is inconsistent with Congressional intent, unreasonable and unreasoned, and not entitled to deference.

Congress allowed for basic levels of compensation to veterans who reached certain levels of disability. 38 U.S.C. §1114. Congress then allowed for additional compensation to dependents when the veteran's disability is rated not less than 30%. 38 USC §1115.

This court has previously commented that it "…cannot envision how Congress could have created a more direct mandate": when a veteran established a service-connected disability rating of no less than 30% disabling, "he or she shall be entitled to additional compensation for dependents." *Sharp v. Shinseki*, 23 Vet. App. 267, 271-72 (2009). The court also pointed out that Section 1115's purpose is clear: " 'to defray the costs of supporting the veteran's . . . dependents' when a service-connected disability is of a certain level hindering the veteran's employment abilities." *Id,* quoting S. REP. NO. 95-1054, at 19 (1978).

Despite this history, the parties differ widely in their interpretations of the term "dependents" in Section 1115. The Board, in the decision under appeal, interprets dependent to mean "child", and applies the definition of child in Section 101(4)(A). Appellant, on the other hand, argues a "dependent" is defined not by any degree of kinship with the veteran, but by a showing of actual financial reliance while living in a veteran's household.

Where the parties have differing interpretations, the court considers first the "ordinary, contemporary, common meaning" of the statute. *McGee v. Peake,* 511 F.3d 1352, 1356 (2008), *quoting, Williams v. Taylor,* 529 US 420, 431 (2000). This court has said that in such situations, "[i]t is commonplace to consult dictionaries to ascertain a term's ordinary meaning." *Nielson v. Shinseki*, 23 Vet.App. 56, 59 (2009).

The dictionary defines "dependent" as "a person who relies on another for support". *Merriam-Webster.com*, last visited April 24, 2017. This definition supports Appellant's position that dependency does not require a particular parent-child relationship: while a veteran's children are presumably dependent upon that veteran, people other than biological, adopted or step-children may live in a veteran's household and rely on the veteran for financial support.

Congress could have limited additional dependency compensation to a veteran's dependent-children if it wanted to, by wording Section 1115 to precisely reflect that limitation. Congress demonstrates, elsewhere in Title 38, that it knew how to word such a limiting definition of "dependent". Where Congress sought to prohibit payment of benefits to a fugitive veteran or a fugitive dependent of a veteran, it specifically wrote that "[f]or purposes of this section…[t]he term 'dependent' means a spouse, surviving spouse, child or dependent parent of a veteran." 38 U.S.C. § 5313B. *Boyer v. West*, 210 F.3d 131, 1356 (Fed. Cir. 2000), *quoting Field v. Mans*, 516 U.S. 59, 66 (1995)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposefully in the disparate inclusion or exclusion."). No such specific limitation of "dependents" is found in Section 1115.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), *but see Caribbean Ispat, Ltd, v. United States,* 450 F.3d 1336, 1340 (Fed. Circ. 2006)(*Chevron* deference "has no place" where the government's interpretation is advanced in the course of litigation).

If the Agency has promulgated a regulation that reasonably interprets a statute, that interpretation may be afforded deference. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 665 (2007).Here, 38 C.F.R. §3.4(b)(2) was promulgated pursuant to Section 1115. This regulation states "[an] additional amount of compensation may be payable for a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling." 38 C.F.R. §3.4(b)(2).

However, the regulation does not reasonably interpret Section 1115 for 2 reasons. First, it fails to define the term "dependents" in Section 1115. Second, without any explanation or reasoning, it converts the mandatory language of Section 1115 that a veteran "shall be entitled to additional compensation for dependents" into discretionary language that "additional amount of compensation may be payable" for a particular class of dependents. *Compare*, 38 USC § 1115; 38 CFR 3.4(b)(2).

While Appellant argues the Secretary's interpretation of Section 1115 is not entitled to *Chevron* deference, the interpretation may be entitled to deference to the extent it has the "power to persuade". *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In considering *Skidmore* deference, courts look to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of its interpretation. *United States v. Mead Corp*., 533 U.S. 218, 228 (2001). It is unclear whether the Federal Circuit extends *Skidmore* deference to an interpretation first advanced in the course of an appeal challenging that interpretation. *See, Caribbean Ispat, Ltd, v. United States,* 450 F.3d 1336 (Fed. Circ. 2006)("Nor do we see any reason to accord deference under [*Skidmore*] to the interpretation advanced in … this litigation.").

Even if *Skidmore* deference is appropriate, the Board's half-page conclusory statement that it is not authorized to "create a payment out of the United States Treasury which has not been provided for by Congress" lacks any discussion of Congressional intent as to who must receive additional dependency compensation under Section 1115. R. at 12. It lacks discussion of the overall statutory construction and context of Section 1115. It fails to discuss a purported interpretative regulation which reduces a Congressional mandate to a discretionary Agency action. The Board's analysis is conclusory and self-serving and dismisses of Appellant's legal duty and obligation to provide support to a member of his household as "admirable and deserving of the highest respect". R. at 12. This is not the considered interpretation or careful analysis which might find persuasive power or otherwise be entitled to *Skidmore* deference.

Because Congress's intent to provide additional dependency compensation to dependents is unambiguous; because Congress did not limit the term dependent in Section 1115 to include only spouses and children (as it did elsewhere in Title 38); because the regulation promulgated by the Agency is not a reasonable interpretation of Section 1115; and, because a conclusory, unexamined and unreasoned interpretation of Section 1115's use of the word "dependents" first appears in an appeal seeking proper interpretation of the word, any interpretation limiting additional dependency compensation to veterans with "biological, step or adopted children" merits no deference.

3. The Board's interpretation encroaches on Appellant's fundamental liberty interest and cannot stand.

The Board uses the definition of "child" in 38 U.S.C. § 101(4)(A)(hereinafter, "Section 101(4)(A)") to interpret the word "dependents" in Section 1115. In relevant part, Section 101(4)(A) states:

> "(4)
>
> (A) The term "child" means (except for purposes of chapter 19 of this title (other than with respect to a child who is an insurable dependent under subparagraph (B) or (C) of section 1965(10) of such chapter) and section 8502(b) of this title) a person who is unmarried and—
>
> (i) who is under the age of eighteen years;
>
> (ii) who, before attaining the age of eighteen years, became permanently incapable of self-support; or
>
> (iii) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years),is pursuing a course of instruction at an approved educational institution;

> and who is a legitimate child, a legally adopted child, a stepchild who is a member of a veteran's household or was a member at the time of the veteran's death, or an illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Secretary to be the father of such child. A person shall be deemed, as of the date of death of a veteran, to be the legally adopted child of such veteran if such person was at the time of the veteran's death living in the veteran's household and was legally adopted by the veteran's surviving spouse before August 26, 1961, or within two years after the veteran's death; however, this sentence shall not apply if at the time of the veteran's death, such person was receiving regular contributions toward the person's support from some individual other than the veteran or the veteran's spouse, or from any public or private welfare organization which furnishes services or assistance for children. A person with respect to whom an interlocutory decree of adoption has been issued by an appropriate adoption authority shall be recognized thereafter as a legally adopted child, unless and until that decree is rescinded, if the child remains in the custody of the adopting parent or parents during the interlocutory period. A person who has been placed for adoption under an agreement entered into by the adopting parent or parents with any agency authorized under law to so act shall be recognized thereafter as a legally adopted child, unless and until such agreement is terminated, if the child remains in the custody of the adopting parent or parents during the period of placement for adoption under such agreement. A person described in clause (ii) of the first sentence of this subparagraph who was a member of a veteran's household at the time the person became 18 years of age and who is adopted by the veteran shall be recognized as a legally adopted child of the veteran regardless of the age of such person at the time of adoption." 38 USC § 101(4)(A).

Reduced to its essentials, Section 101(4)(A)'s definition of a "child" comprises 3 elements.

First, a "child" must be unmarried. 38 U.S.C. §101(4)(A).

Second, a "child" must meet one of three age-based criterion: i) under the age of 18; ii) over the age of 18 with incapacity for self-support established before age 18; or, iii) between the age of 18 and 23 if enrolled in school. 38 U.S.C. §101(4)(A).

Third, a "child" must share one of four specific parent-child relationships with the veteran: i) his "legitimate" child; ii) his legally adopted child; iii) a stepchild who is a member of his household; and, iv) his so-called "illegitimate child"[4], if paternity has been properly established as provided in the statute. 38 USC §101(4)(A). Each of these parent-child relationships share one feature in common: there is a parent-child relationship within the "nuclear family" unit.[5] This fact is critical in this case.

When the Board's decision implicitly used the Section 101(4)(A) definition of "child" to interpret the word "dependents" in Section 1115, it placed a condition on the receipt of a government benefit: a veteran will only receive additional monthly compensation for dependents if his relationship with his dependent is a parent-child relationship in a nuclear family unit. In the concise words of the Secretary in its January 9, 2014, letter, for the purposes of additional dependency compensation, the "....VA only recognizes biological, step or adopted children". R. at 3157.

This interpretation of "dependent" is illogical: it conditions dependency compensation not on dependency but on the makeup of a family unit. As a consequence, otherwise eligible disabled veterans with long histories of providing food, clothing, shelter, nurture, care, support and education for actual dependents in their households are denied the additional monthly compensation Congress mandated in Section 1115.

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[4] Classifications based on "illegitimacy" of a child are often unconstitutional. *See, Pickett v. Brown,* 462 U.S. 1, 7(1983)(listing cases where such a classification was constitutionally invalid). The Uniform Parentage Act presents the contemporary approach: "the parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents". Uniform Parentage Act §2 (2000).

[5] The dictionary defines a "nuclear family" as "a family group that consists only of parents and children". *Merriam-Webster.com*, last visited April 24, 2017.

The Appellant in this case is a 70 year old, 100% disabled Veteran and has been unable to work since around 2001 due to his disabilities. *See above, Section II(B).* Despite the resulting financial limitations, Appellant has been the primary caregiver and legal guardian of D.B. "since he was in diapers". R. at 2064 - 2065. In 2012, the State of Illinois formally ordered Appellant to "do all acts required of the guardian by law", including "have the custody", "nurture" and "provide tuition and … education of [D.B.]." R. at 2059; *accord* Illinois Statutes Chapter 755, Section 5/11-13(a).

The record in this case is clear: D.B. has been an actual dependent in Appellant's household for nearly 2 decades. Despite a showing that Appellant, along with his devoted wife (who passed away November 2016), provided every aspect of support for D.B. (food, clothing, shelter, nurture, education, love, and more), the Secretary denies additional monthly compensation only because Appellant could not provide his dependent a nuclear family.[6]

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[6] The Board's interpretation harms entire classes of veterans, beyond this Appellant, who provide actual support for dependents in a non-nuclear household. For example, veterans who raise their grandchildren, their dependent or minor siblings, minor children of deceased siblings, or who live in one of the 29 states that do not legally recognize certain international adoptions are barred from receiving additional monthly dependency compensation not because dependency is lacking, but because the nuclear family is absent. In particular, veterans in a marriage with a same sex spouse will, because of some states' anachronistic laws, be unable to establish even a legally cognizable parent-child relationship with their dependents: a lesbian veteran living in Arkansas, who is the widow and surviving parent of her deceased wife's biological children would be deprived additional dependency compensation under the Agency's interpretation of Section 1115. *Smith v. Pavan, et al,* 505 S.W.3d 169 (Ark. 2016)(married females have no legal right to birth certificates for their minor children which displays the names of both spouses). By contrast, a heterosexual male veteran living in Arkansas as the widower and surviving parent of his deceased wife's biological children would not be deprived additional dependency compensation under the Agency's interpretation of Section 1115.

The only way Appellant and D.B. can receive this government benefit is if Appellant "…legally adopted [D.B.]" and gives the VA "…a copy of the adoption decree or revised birth certificate showing [him] as a parent for 'D.B' ." R. at 1293. Not only does the requirement of adoption compel Appellant to spend money he does not have[7], but also deprives him of the fundamental right to define the makeup of his own family. Such an adoption would limit fundamental liberties and legal interests of Appellant, D.B. and his still-living biological parents. For example, Appellant would have to procure D.B.'s consent to his own adoption since he is over the age of 14. Illinois Statutes Chapter 750, 50/12. D.B. appears to have to surrender inheritance rights from his still-living biological mother and father. Illinois Statutes Chapter 755, 5/2-4(d). His living biological mother and father would have to irrevocably surrender every parental right or privilege, including any right to visitation or input to his upbringing, and any right to inherit from D.B. *See e.g.,* Illinois Statutes Chapter 750, Section 50/11(a). Alternatively, Appellant would need to spend money he does not have to construct a will or a trust he may not want.

Congress could not have intended to require that veterans create family units deemed preferable to the federal government in order to defray the costs of supporting dependents living in their household. Congress cannot have intended a result where some veterans with dependents in their household merit additional monthly dependency

[7] "An informal survey of adoption agencies in Illinois shows that the range in fees for a completed adoption varies between approximately $10,000 and $35,000." *Adopting a Child: What it's All About*, found at http://www.adoptioncenterofillinois.org/whats-it-all-about/ (last visited April 24, 2017).

compensation while others do not. Congress cannot have intended to penalize or abridge the fundamental rights and legal interests of multiple citizens and compel them to associate in the government approved nuclear family simply to receive additional monthly dependency compensation for actual dependents living in the veteran's household.

Appellant's right of intimate association is protected by the 1st Amendment of the U.S. Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Because this right involves "choices to enter into and maintain certain intimate human relationships" it also "receives protection as a fundamental element of personal liberty" under the 14th Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

Regardless of the constitutional source of the protection, the Supreme Court has consistently "respected the private realm of family life which the state cannot enter". *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In striking down a city ordinance prohibiting certain non-nuclear living arrangements, the Supreme Court explained how such constitutional protection extended to the non-nuclear family:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. ...The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition....Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing which other cases [citations omitted] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household - indeed who may take on major responsibility for the rearing of the children." *Moore v. E. Cleveland*, 431 U.S. 494, 503-05 (1977).

From this protection it necessarily follows that a government benefit may not be conditioned in a way that penalizes the exercise of a fundamental right, such as the right of family association. *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 257 - 258 (1974)(free medical care may not be conditioned to limit the fundamental right to travel); *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 640 (1974)(government employment may not be conditioned to limit the fundamental right to procreate). Nor can the government use a statute to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

The application of these principles yields a finding that "no constitutionally sufficient justification" exists where a statute's practical effect is to condition welfare assistance to "a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both". *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 620 - 621 (1973). These principles also yield a finding that the Social Security Act violated the Constitution when the agency used a provision of that Act to divide "illegitimate" dependents into 2 categories "one of which is deemed entitled to receive benefits without any showing of dependency upon the disabled parent, and the second of which is conclusively denied benefits". *Jimenez v. Weinberger*, 417 U.S. 628, 630 (1974).

In short, formation of family relationships is an "intrinsic element of personal liberty" that requires protection "…from unwarranted state interference" so as to safeguard "…the ability independently to define one's identity that is central to any

concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). The degree of constitutional protection afforded to an association "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620. For example, a significant impairment of 1st Amendment rights must survive exacting scrutiny. *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Such an impairment must further a vital government interest by the least restrictive means. *Id*, at 349.

Under the U.S. Constitution's 14th Amendment, intrusions on "choices concerning family living arrangements" require a careful examination of "the importance of the governmental interests advanced and the extent to which they are served" by the challenged statute. *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977). The government's burden may require it to prove the statute furthers a " 'vital' government interest". *Buckley v. Valeo*, 424 U.S. 1, 94 (1976).

The Secretary has failed to articulate any governmental interest in a dependency compensation policy that recognizes only "biological, step or adopted children". R. at 1293. Appellant asserts there is no such government interest but, even if for the first time in its brief the government could articulate such an interest, there is no evidence in the record to support any post-hoc rationalization that its interest is of paramount or vital importance to the government.

In similar cases, the Supreme Court has paved a road to a decision in this case. In 1973, the Court evaluated a federal statute that conditioned receipt of "food stamps" on the existence of familial relationships within a household. *United States Dep't of Agric. v.*

Moreno, 413 U.S. 528 - 534 (1973). The government argued the classification was necessary to further the government's interest in preventing fraud in the welfare program. *Moreno*, 413 U.S. at 535 - 536. The Supreme Court found such an interest "irrational", "irrelevant to the stated purpose" of the statute, and "wholly without any rational basis". *Id*. at 532, 534, 538. The Court reasoned that "in practical operation, the government's interpretation"…excludes from participation in the food stamp program, not those persons who are 'likely to abuse the program' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Moreno*, 413 U.S. at 537 - 538.

The reasoning and outcome in *Moreno* applies to this case. Like the statute in *Moreno*, Section 1115 provides a government benefit to a specific group: veterans with a 30% (or higher) disability rating who have dependents they financially support. Like the federal government in *Moreno,* the Secretary here conditions receipt of that government benefit on the existence of particular familial relationships within a nuclear household. And like the result in *Moreno,* the government's interpretation deprives those clearly in need of a benefit that Congress intended to provide.

The Secretary has never articulated why it chooses not to interpret the word "dependents" in Section 1115 in such a way that entitlement to a dependency benefit is assessed on actual dependency within a household.

Despite evidence proving D.B. has been Appellant's actual dependent - in Appellant's household - for nearly 2 decades; despite evidence that Appellant is a 100% disabled Veteran unemployed since approximately 2001 because of the limitations of

disabilities connected to his military service; despite evidence that Appellant also had to care for his severely disabled wife until her death in November 2016; and, despite evidence an Illinois state court appointed Appellant as a guardian and required him to provide support, care and education for D.B., the Secretary denies Appellant additional dependency compensation unless he creates a parent-child relationship in a nuclear family. Conditioning receipt of this dependency benefit on such a requirement is an encroachment of a fundamental liberty interest that cannot stand.

B. By using the interpretation of the word "dependent" provided by Appellant, or by applying the doctrine of constitutional avoidance, the court can interpret Section 1115 to align with Congress's intent and avoid constitutional problems.

1. The Brown presumption resolves interpretative doubt in a veteran's favor, unless the Board's interpretation is unambiguously required by Congress.

As argued above, the Secretary's interpretation of "dependent" in Section 1115 is not entitled to deference for multiple reasons. *See above,* Section A(2). First, the interpretation of "dependent" is not consistent with its ordinary meaning. Second, the interpretation undercuts Congress's unambiguous mandate of additional compensation for veterans who support dependents. Third, regulatory interpretation reduces Section 1115's mandatory language that a veteran "shall be entitled to additional compensation for dependents" to mere permissive language that "additional amount of compensation may be payable" to veterans with dependent children, spouses and parents. *Cf.*, 38 USC § 1115 and 38 CFR 3.4(b)(2). Fourth, the Federal Circuit does not afford *Chevron* deference to statutory interpretations first advanced by the government in an appeal challenging its interpretation. Fifth, even if *Skidmore* deference were applied to

interpretations first advanced in litigation, the Board's arbitrary, unexamined, and unreasoned interpretation lacks the persuasive value *Skidmore* requires. Finally, an Agency interpretation is not entitled to deference when its "interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions". *Trafter v. Shinseki*, 26 Vet.App. 267, 272 (2013).

Where even a "plausible" statutory interpretation by the government is not entitled to deference, interpretive doubt is resolved in the Veteran's favor. *Brown v. Gardner,* 513 US 115, 118 (1994). In the context of Title 38, an interpretation less favorable to a Veteran is appropriate "only if the statutory language unambiguously" requires the less favorable interpretation. *Sursely v. Peake*, 551 F.3d 1351, 1357 (2009). The court should adopt a veteran's interpretation of a statute when it is "consistent with the beneficence inherent in the veterans' benefits scheme". *Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016).

The clear and unambiguous purpose of the additional dependency compensation required by Section 1115 " 'to defray the costs of supporting the veteran's . . . dependents' when a service-connected disability is of a certain level hindering the veteran's employment abilities." *Sharp v. Shinseki*, 23 Vet. App. 267, 272 (U.S. 2009), *quoting* S. REP. NO. 95-1054, at 19 (1978). Because Appellant's proposal to interpret of the word "dependents" in Section 1115 using the ordinary dictionary definition of that word is most clearly aligned with the purpose of the statute and the underpinnings of the veterans' benefits scheme, he urges the court to adopt his interpretation.

2. The doctrine of constitutional avoidance requires courts to construe statutes to avoid constitutional problems by aligning them with Congressional intent.

Appellant does not, in this appeal, ask the court to find either or both Section 101(4)(A) and Section 1115 unconstitutional. Instead, he asks the court to apply the doctrine of constitutional avoidance: "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided", the court's duty is to avoid the former and adopt the latter. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1914), *quoted in Jones v. United States*, 526 U.S. 227, 239 (1999). The avoidance doctrine applies even when there are "grave doubts" of its constitutionality. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

Here, interpretation of the word "dependent" in Section 1115 such that it carries its ordinary dictionary meaning would avoid grave doubts of the constitutionality of the Secretary's interpretation and application. Appellant's proposed interpretation supports a vital government interest of paramount importance, by ensuring additional monthly dependency compensation is paid to otherwise eligible disabled Veterans with actual dependents in their household, as Congress intended. His proposed interpretation avoids any infringement of any fundamental right of association or liberty interest, as it conditions a federal dependency benefit not on the existence of a parent-child relationship in a nuclear family but on a showing of actual dependency within the veteran's household. In a society where non-nuclear families are increasingly the norm,

Appellant's proposed interpretation gets the VA out of the business of using veterans' disability benefits to regulate and control the makeup of their family unit.

Appellant's proposed interpretation is buttressed by similar interpretations in federal jurisprudence. *See, Mathews v. Lucas*, 427 U.S. 495 (1976). In *Mathews v. Lucas*, the Supreme Court considered certain survivorship benefits under the Social Security Act (hereinafter, "SSA"). In a section of the SSA, survivors who were the "legitimate" children of a decedent were presumed to be dependents eligible for benefits, while survivors of so-called "illegitimate" children were required to provide proof of actual dependency to demonstrate eligibility for the same benefit. *Mathews v. Lucas,* 427 U.S. 495, 497-499.

The party harmed by the government's interpretation in *Mathews v. Lucas* argued the statute itself was unconstitutional because it conditioned receipt of government benefits on a constitutionally problematic classification of children as "legitimate" or "illegitimate". *Mathews,* 427 U.S. 495, 501. The Supreme Court seems to state that if the interpretation of the statute led to such a condition, it would not likely survive constitutional scrutiny. *Id*, at 505 - 512. However, because the statute provided a method for all classes of survivors to prove eligibility for survivor benefits - "legitimate" children were presumed eligible for the benefit and "illegitimate" children could establish eligibility through proof of actual dependency - it did not encroach on any fundamental right and was constitutional. *Id,* at 515 - 516.

In this case, the Court need not find the statute unconstitutional because it can interpret the word "dependent" in Section 1115 in a way that not only renders the statute

constitutional, but also fulfills the unambiguous intent of Congress to provide additional monthly dependency compensation to otherwise eligible disabled veterans who financially support a dependent in their household.

VI. CONCLUSION.

Appellant respectfully requests the Court withhold deference to the Agency's interpretation of the word "dependent" in Section 1115 to the extent such interpretation only allows otherwise eligible veterans to receive additional monthly compensation only for their spouse and/or "biological, adopted, and step children".

He asks the Court avoid this constitutionally problematic limitation of the fundamental right of family association and resolve interpretive doubt in his favor by interpreting the word "dependent" in Section 1115 according to its ordinary dictionary definition, and by doing so give full effect to the clear and unambiguous intent of Congress to provide additional dependency compensation to otherwise eligible disabled veterans who provide financial support for actual dependents in their household. To accommodate any concerns the Secretary might have that such an interpretation increases the cost or workload of its employees, Appellant respectfully requests that the Court interpret the use of "dependent" and "child" in Section 1115 so as to provide veterans a presumption of dependency for children using the Section 101(4)(A) definition, and allow veterans to prove actual dependency for other dependents in their household who do not meet that definition.

Dated this 24th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on April 24, 2017, I caused this motion to be served on the VA's secretary by and through the Court's E-Filing system:

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