APPLICATION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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DEREK SKELLCHOCK,
PETITIONER,

v.

ALORA-ANN VOLZ,
RESPONDENT.

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ON APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

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**PETITIONER'S APPLICATION**
**TO EXTEND TIME TO FILE A**
**PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable Neil M. Gorsuch, Associate Justice, Circuit Justice for the 10th Circuit Court of Appeals and including the State of Colorado:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, Petitioner, Derek Skellchock, for good cause, respectfully requests an extension of 60 days to file a Petition for a Writ of Certiorari to the Colorado Supreme Court in the above-captioned case from the latter court's December 19, 2022 order denying Petitioner's writ for certiorari from the Colorado Court of Appeals decision of February 24, 2022.

The Colorado Supreme Court's order denying Petitioner's writ and the opinion of the Colorado Court of Appeals are attached to this application. (Attachments 1 and 2, respectively).

The petition for a writ of certiorari in this Court is due on or before Monday, March 20, 2023.

Pursuant to the Rules of the Supreme Court, Rules 13.5 and 22, Petitioner is filing this application on or before a date 10 days prior to Monday, March 20, 2023.

## JURISDICTION OF THE COURT

This Court has jurisdiction over this application and over the Petition for Writ of Certiorari to the Supreme Court of the State of Colorado pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257, from the latter court's December 19, 2022 denial of Petitioner's writ of certiorari.

## SUMMARY OF THE CASE

In *Howell v. Howell*, 137 S. Ct. 1400 (2017), this Court ruled that federal law preempted state law based on this Court's decisions in *Mansell v. Mansell*, 490 U.S. 581 (1989), and thus, state courts could not force veterans to use their veterans' disability benefits without a specific federal authorization to do so. In the instant case, over Petitioner's objection, the Colorado Court

of Appeals ruled, without qualification, that "veteran's disability benefits are income to be included as gross income for purposes of determining child support." Attachment 2, p. 17.

In his appeal to the Colorado Supreme Court, Petitioner argued that there is no *federal statute* that allows the consideration of his specific veteran's disability as "income" for purposes of calculating his state child support obligations. Petitioner further demonstrated that his disability pay is in fact excluded from consideration by federal law, particularly, 42 U.S.C. § 659(h)(1)(B)(iii), and thus, protected from any legal or equitable orders of state court process by 38 U.S.C. § 5301(a)(1).

As an alternative and additional issue, Petitioner demonstrated that the Department of Veterans Affairs (VA), the federal agency with *exclusive* jurisdiction over all questions of law and fact respecting a veteran's disability benefits and claims for apportionment thereof made by dependents, see 38 U.S.C. § 511(a) (first sentence), had denied a claim for apportionment under 38 U.S.C. § 5307. Petitioner argued that this decision, being one that is considered final and conclusive as to *all other courts*, see 38 U.S.C. § 511(a) (second sentence), precludes state courts from exercising any jurisdiction or authority to order that these federal benefits be diverted or otherwise repurposed in a manner contrary to that designated by the VA.

This case represents a critical decision affecting disabled veterans. The Colorado courts have essentially *ignored* federal statutory law and this Court's sweeping decision in *Howell*, *supra*, which held that where 38 U.S.C. § 5301 is applicable, state courts cannot vest disability benefits in anyone other than the beneficiary. *Howell* ruled that state law was and always has been fully preempted where Congress exercises its enumerated powers under Article I of the Constitution concerning military affairs. In such cases, allowing state courts to conclude that federal disability benefits are income and may be used for any purpose other than that designated by federal statute

and the federal agencies with exclusive jurisdiction over those federal appropriations is contrary to the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2.

## BACKGROUND

Petitioner is a disabled veteran. He was married to the respondent for a period of only five months. The parties had one child together.

Petitioner initiated marital dissolution proceedings in 2018. Dissolution proceedings continued and an initial decree of dissolution was entered in April of 2020.

Meanwhile, the parties continued to engage in litigation concerning various aspects of the dissolution, including the amounts attributable to each for calculating child support obligations. Petitioner argued that the state courts could not consider his federal veterans' benefits as "income" in making that determination. Moreover, Petitioner argued that state courts could not exercise jurisdiction or authority over his federal disability benefits as there had been no ruling or decision for an apportionment of same by VA that his benefits could be used for payments to the minor child. The state court ultimately ruled that Petitioner's veterans' disability benefits could be used to calculate his income for purposes of setting his child support obligation.

In May of 2021, the VA issued a decision denying Respondent's claim, on behalf of the parties' minor child, for an apportionment of Petitioner's federal veterans' disability pay for purposes of support.

Petitioner had appealed the trial court's judgment. Petitioner continued to argue in the Court of Appeals that the state courts could not consider his federal veterans' disability pay as income for purposes of establishing his state child support obligations. The Court of Appeals disagreed with Petitioner's arguments and ruled that in accordance with prior *Colorado* state case law, the use of federal veterans' disability benefits in the calculation of income for purposes of a

disabled veteran's child support obligations in state domestic relations proceedings was proper. (Attachment 2, p. 17).

Petitioner filed a petition for a writ of certiorari to the Colorado Supreme Court, which declined to hear Petitioner's appeal.

REASONS FOR GRANTING EXTENSION OF TIME

1. Petitioner is a disabled veteran who suffers severe, service-connected disabilities.

2. Undersigned counsel is a solo practitioner and assists veterans in *pro bono* and *low bono* representation in trials and appeals throughout the United States.

3. No prejudice would arise from the requested extension. If the petition were granted, the Court would likely not hear oral argument until after the October 2023 term began.

4. This case raises issues concerning the absolute preemption of federal law over state courts in the disposition of federal veterans' disability benefits.

5. Under its enumerated Article I "Military Powers", Congress provides veterans disability benefits as a personal entitlement to the veteran. These are federal appropriations made by Congress pursuant to these aforementioned enumerated powers.

6. The Supremacy Clause provides that federal laws passed pursuant to Congress' enumerated Article I powers absolutely preempt all state law.

7. Further, pursuant to these powers, Congress has prohibited *any legal process* from being used to deprive veterans of their disability benefits. 38 U.S.C. § 5301(a)(1).

8. As this Court has held on multiple occasions, unless Congress has *lifted* the absolute preemption provided by federal law in this area, state courts and state agencies simply have no authority, or jurisdiction, to direct that such benefits be seized or paid over to someone other than their intended beneficiary. See, e.g., *McCarty v. McCarty*, 453 U.S. 210 (1981); *Ridgway v.*

*Ridgway*, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); *Hillman v. Maretta*, 569 U.S. 483 (2013); *Howell v. Howell*, 137 S. Ct. 1400 (2017); *Torres v Texas Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022).

9. Congress has lifted this absolute preemption in a small subset of cases: (1) for marital property through the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408; and (2) spousal support and child support, through the Child Support Enforcement Act (CSEA), 42 U.S.C. § 659(a), (h)(1)(A)(ii)(V).

10. However, 42 U.S.C. § 659(h)(1)(B)(iii) specifically *excludes* VA disability benefits from being considered income for purposes of allowing state courts to garnish these federal benefits to satisfy state-imposed child support orders.

11. Further, as this Court has acknowledged, if there is no federal statute authorizing the states to consider federal benefits in state court domestic relations proceedings, they may not do so. *Howell*, 137 S. Ct. at 1403-04, citing *Mansell*, *supra*.

12. In such cases, the states have no authority or jurisdiction in the premises. *Howell*, *supra* at 1405, citing 38 U.S.C. § 5301.

13. Where a state court is preempted by controlling federal law, the state court has no authority to issue an order that exceeds its authority or jurisdiction. See, e.g., *Hines v. Lowrey*, 305 U.S. 85, 91 (1938) ("Congressional enactments in pursuance of constitutional authority are the supreme law of the land."); *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."). This is especially the case where Congress has provided exclusive jurisdiction to a federal agency over persons and property. *Kalb*, *supra*.

14. When federal law, through the Supremacy Clause, preempts state law, as it does in the area of divorce in regard to veterans' benefits, then a state court lacks jurisdiction and authority to issue a ruling that contradicts the federally directed designation of these benefits.

15. While this Court in *Rose v. Rose*, 481 U.S. 619 (1987), held that state courts could use their powers of contempt to force a 100-percent disabled veteran to pay child support, Congress immediately amended 38 U.S.C. § 511 to provide that the Veterans Administration (VA) had *exclusive* jurisdiction over all claims by concerning veterans' disability benefits. See 38 U.S.C. § 511; 38 U.S.C. § 5307.

16. The only way for a dependent to receive any portion of these restricted benefits is throught the apportionment process defined in 38 U.S.C. § 5307.

17. In the instant case, the VA actually denied the dependents' claim for an apportionment of these federal disability benefits.

18. As provided in 38 U.S.C. § 511(a) (second sentence) this decision is final and conclusive as to all other courts.

19. A state court cannot force a disposition of these federally appropriated benefits that is contrary to that directed by the federal agency delegated with exclusive jurisdiction and authority to determine how these benefits are paid and distributed.

20. VA disability benefits have also been deemed constitutionally protected property rights under the Fifth and Fourteenth Amendments to the Constitution. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) and *Robinson v. McDonald*, 28 Vet. App. 178, 185 (2016) (federal veterans' benefits are constitutionally protected property rights). See also *Morris v. Shinseki*, 26 Vet. App. 494, 508 (2014) (same).

21. Petitioner has presented strong arguments that demonstrate federal law preempts state law, that state courts have no authority or jurisdiction to dispossess him of his federal service-connected disability benefits, and that his constitutional rights have been infringed upon by the decision of the Supreme Court of Colorado and the Colorado Court of Appeals.

22. Finally, and most importantly, the issues in this case are of national significance due to the increasing number of disabled veterans whose main or only source of income are service-connected federal disability benefits.

23. Petitioner is not the only disabled veteran whose disability pay is a sole means of subsistence and who relies on these benefits to survive.

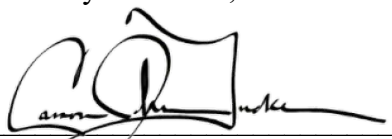
24. A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, including all subsequent contempt and related orders, are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v. Feurstein*, 308 U.S. 433, 440, n. 12 (1940). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 436 (1819) (emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

## CONCLUSION

For the foregoing reasons, undersigned counsel requests additional time to prepare a full exposition of the important legal issues underlying Petitioner's case.

WHEREFORE, for the reasons stated herein, Petitioner applies to Your Honor and respectfully requests an extension of 60 days from the Monday, March 20, 2023, due date to file a Petition for a Writ of Certiorari to the Colorado Supreme Court, so that this Court may consider said petition on or before Friday, May 19, 2023.

Respectfully submitted,



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Dated: March 9, 2023