

APPLICATION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL B. YOURKO,
PETITIONER,

v.

LEE ANN B. YOURKO,
RESPONDENT.

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

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

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To the Honorable John G. Roberts, Chief Justice, Circuit Justice for the Fourth Circuit Court of Appeals and including the State of Virginia:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, Petitioner, Michael Yourko, for good cause, respectfully requests an extension of 60 days to file a Petition for a Writ of Certiorari to the Virginia Supreme Court in the above-captioned case from the latter court's June 28, 2023 order denying Petitioner's petition for rehearing of the Court's earlier order or opinion.

The Virginia Supreme Court issued an opinion on March 30, 2023, reversing the Virginia Court of Appeals, which issued a decision in favor of Petitioner on December 21, 2021.

The Virginia Supreme Court's order denying Petitioner's application for a rehearing, and its opinion, and that of the Virginia Court of Appeals are attached to this application. (Attachments 1, 2 and 3, respectively).

The petition for a writ of certiorari in this Court from the Virginia Supreme Court's June 28, 2023 order is due on or before Tuesday, September 26, 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 Tuesday, September 26, 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 Virginia pursuant to 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257, from the latter court's June 28, 2023 denial of Petitioner's petition for rehearing.

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.

The Virginia Court of Appeals followed *Howell* and held that a marital agreement in which Petitioner agreed to dispossess himself of federal disability pay in violation of federal law and in violation of *Howell* was void ab initio. (Attachment 3). The Supreme Court of Virginia reversed, effectively holding that while the agreement by and between Petitioner and Respondent required Petitioner to dispossess himself of federal disability pay in violation of federal law, the agreement was a contract that could not be voided, even where federal law holds that such agreements are illegal.

Congress intended for military retirement pay to be the entitlement to the veteran, which cannot be judicially divided in divorce. Thus, it enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C.S. § 1408. However, if the court indeed finds the contract valid, it must be limited. The National Defense Authorization Act (NDAA) for 2017, signed into law in December 2016, drastically changes the way military retired pay can be divided in divorce cases.

The amendments to the USFSPA in the new NDAA, however, preempt state laws by mandating the method state courts must use in dividing military retired pay. The method required by the new USFSPA is the so-called "frozen benefit" approach. It requires that retired pay be established (or "frozen") based on the member's rank and years of service at the time the court order dividing military retired pay (typically the final divorce decree) is entered. This is accomplished by creating a "hypothetical" retirement division as if the servicemember retired at the time of the order, even if he or she was not yet eligible to retire on that date. Any other disposition of federal benefits is contrary to federal law and preempted, whether in the form of a court order or an agreement by and between the parties. Indeed, 38 U.S.C. § 5301(a)(3)

specifically voids any agreements wherein a beneficiary of veterans' disability pay agrees in a contract for consideration to dispossess himself or herself of more than that which would be allowed by existing federal law; to wit, the USFSPA.

This case represents a critical decision affecting a vast majority of disabled veterans. The Virginia 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.

Petitioner argued that state courts could not exercise jurisdiction or authority over his federal disability benefits or military retirement pay. The Virginia Supreme Court ultimately ruled that Petitioner's veterans' benefits could be used to calculate his income for purposes of setting his financial obligations in the contractual agreement he entered into with his former spouse.

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 and military retirement pay as income for purposes of establishing financial obligations. The Court of Appeals, following *Howell*, agreed. However, the Virginia Supreme Court reversed, effectively holding that state contract law could usurp preexisting federal law that preempted state law concerning the division and disposition of military benefits.

The Virginia Supreme Court denied Petitioner's motion for a rehearing on June 28, 2023. Petitioner seeks review in this court and hereby respectfully requests a 60-day extension of time to file said writ.

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. Any disposition of these pre-appropriated federal benefits is contrary to federal law, namely, 38 U.S.C. § 5301(a)(1) and (3).
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. 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).

16. 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 Virginia.

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

18. 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*.

19. 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.

20. There are two other cases pending in this Court on Petitions for Writ of Certiorari that have the identical, or nearly identical issue that comes before the Court in this case: Can a state court usurp preemptive federal law and a federal statute, 38 U.S.C. § 5301(a)(1) and (3), which prohibits and voids from inception agreements in which disabled veterans agree to dispossess themselves of their federal entitlement to disability benefits, by citing to state common-law rules of judicial convenience like collateral estoppel or res judicata? Those cases are *Foster v. Foster*, Docket No. 22-1089 and *Martin v. Martin*, Docket No. 23M9 (Petition submitted under Motion to Proceed as a Veteran). Both of these cases have been scheduled for consideration at the Court’s conference on September 26, 2023, the same day that the Petition in this case would be due barring an extension granted by this Court.

21. Because the Court has consolidated the latter two petitions, and because the issues in this case contain the same or nearly the same precise issue concerning the preemptive effect of federal law and statute upon state court attempts to usurp said law by reliance on mere doctrines of judicial convenience, Petitioner would respectfully urge the Court to consider the petitions together, which would require abeyance or adjournment of consideration of the petition and motion in *Foster* and *Martin*, respectively.

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 Tuesday, September 26, 2023, due date to file a Petition for a Writ of Certiorari to the Virginia Supreme Court, so that this Court may consider said petition on or before Monday, December 25, 2023.

Respectfully submitted,



Carson J. Tucker
Attorney for Petitioner

Dated: September 15, 2023