NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH H. HOLMES, PETITIONER,
v.
ALABAMA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner *in Forma Pauperis*
Joseph H. Holmes

QUESTIONS PRESENTED

Under 42 USC § 659(h)(1)(B)(iii), federal statutory law excludes from all legal process veteran's disability pay from being considered as remuneration for employment for non-retiree veterans who are in receipt of veterans' disability pay as a result of a service-connected disability. The federal government will not honor any state court order requesting the federal government to pay these benefits over to the state or a state agency to satisfy a child support or spousal support / alimony order or award. Section 5301 of Title 38 of the United States Code further states that all veterans' benefits authorized to be paid to beneficiaries are protected from all legal process whatever (whether equitable or legal), either before or after receipt by the beneficiary. With respect to such benefits, this Court has recently (and unanimously) stated that federal law passed by Congress's enumerated military powers preempts all state law and that state courts do not have authority or jurisdiction over such monies. *Howell v. Howell*, 137 S. Ct. 1400, 1404-1407 (2017), citing 38 USC § 5301(a)(1). This specific federal statutory law, 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1), clearly and unambiguously excludes such benefits from state court authority or control. Despite a continuous line of cases from this Court that has declared federal laws passed pursuant to Congress's enumerated Article I Military Powers that provide benefits for our nation's veterans preempt all state laws that stand in their way, even state laws concerning domestic relations and family law matters, see, e.g., *Wissner v. Wissner*, 338 U.S. 655 (1950); *United States v. Oregon*, 366 U.S. 643 (1961), *Johnson v.* Robison, 415 U.S. 361, 376 (1974), *McCarty v. McCarty*, 453 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); and *Howell*, *supra*.

Despite the clear statutory law and the uninterrupted jurisprudence that has always held federal law in this specific area preempts state law, this Court held in *Rose v. Rose*, 481 US 619 (1987)

that state courts could force veterans to pay over their disability benefits for purposes of satisfying child support orders or awards issued by state courts.

In this case, Respondent, Alabama Department of Human Resources (DHR) seized Petitioner's veterans' disability pay, provided no administrative or judicial hearing to determine his rights to these funds, and has dispossessed him of these funds contrary to the U.S. Constitution and federal statutory law passed pursuant thereto. The question presented is as follows:

> Did the Alabama Court of Civil Appeals correctly conclude that Petitioner's VA disability benefits could be subjected to attachment, levy, seizure, or otherwise diverted from Petitioner to Respondent, State of Alabama Department of Human Resources, where Petitioner is not a retiree, did not waive any retirement pay to receive his veterans' disability benefits, and his specific benefits are excluded from being considered remuneration for employment under 42 U.S.C. § 659(h)(1)(B)(iii), and are therefore otherwise protected from all legal process whatever, whether equitable or legal, either before or after receipt by the beneficiary under 38 U.S.C. § 5301(a)(1)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Statutes

Cases

Regulations

Law Reviews and Professional Publications

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The Alabama Supreme Court denied review on December 7, 2018. The decision appears at Appendix 1a and is unpublished.

The October 5, 218 opinion of the Alabama Court of Civil Appeals appears at Appendix 2a through 19a and is unpublished.

JURISDICTION OF THE COURT

The date on which the highest state court decided my case was December 7, 2018. A copy of that decision appears at Appendix 1a. An extension of time to file the petition for a writ of certiorari was granted to and including May 6, 2019 on February 22, 2019 in application No. 18A847.

This Court has jurisdiction over this petition pursuant 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, section 8, clauses 12 through 17

> The Congress shall have power…
>
> To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> To provide and maintain a navy;
>
> To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress….

U.S. Constitution, Article VI, clause 2, the Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, amendment XIV, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

38 U.S.C. § 5301

(a)(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments….

42 U.S.C. § 659

(a) Consent to support enforcement. Notwithstanding any other provision of law (including…section 5301 of title 38, United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law

> enacted pursuant to subsections (a)(1) and (b) of section 466, [42 U.S.C. § 666(a)(1), (b)] and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 U.S.C. §§ 651 et seq.] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.
>
> ***
>
> (h) Moneys subject to process.
>
> (1) In general. Subject to paragraph (2), moneys payable to an individual which are considered to be based upon remuneration for employment, for purposes of this section--
>
> (A) consist of…
>
> (ii) periodic benefits…or other payments…
>
> (V) by the Secretary of Veterans Affairs as compensation for a service connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation….
>
> (B) do not include any payment…
>
> (iii) of periodic benefits under title 38, United States Code, except as provided in subparagraph (A)(ii)(V).

STATEMENT OF THE CASE

Petitioner is a disabled veteran (Appendix (App.) 3a). He served in the United States Navy from September 1973 to 1976 (App. 4a). In 2017, the Veterans Administration (VA) determined he was 100 percent disabled due to a service-connected condition. *Id*. The VA determined Petitioner had been disabled since December 2010. *Id*.

Petitioner is not retired from military service. Therefore, the disability benefits he receives are those that are not considered remuneration for employment pursuant to 42 U.S.C. § 659(h)(1)(B)(iii). As it pertains to these benefits, the federal government will not honor a state

court order to direct pay for an award of child support or alimony. 42 U.S.C. § 659(a), (h)(1)(B)(iii).

Petitioner received a lump sum payment of Veterans Administration (VA) disability benefits in March 2017 (App. 3a). Respondent, the Alabama Department of Human Resources (DHR), served a notice of levy of these benefits in July 2017, which had been deposited into Petitioner's credit union account, to satisfy a past due child support obligation (App. 2a-3a). Petitioner sought a stay of the levy, but DHR seized $46,035 on October 25, 2017. Petitioner argued that, pursuant to 38 U.S.C. § 5301(a)(1), his disability benefits were not subject to levy either before or after his receipt of those benefits (App. 3a). DHR concluded that Petitioner's VA disability benefits were not exempt from lien, levy or legal process and declined to release the levy of these benefits from his account. *Id*. DHR concluded "VA benefits are not exempt from lien/levy process" and declined to release the levy. *Id*.

In August 2017, Petitioner timely sought administrative review from DHR challenging its decision. *Id*. DHR denied Petitioner's request, citing Alabama Administrative Code (DHR), Rule 660-1-5-.05(f), which allows a request for an administrative hearing to be denied "[w]hen protective or child support services are provided as required by law or by court order." *Id*.

Petitioner then filed a timely notice of appeal with DHR and a petition for judicial review in the Circuit Court for the County of Montgomery. *Id*., 3a-4a.

In his initial brief in the Circuit Court, Petitioner argued that 38 U.S.C. § 5301(a)(1) exempts his VA disability benefits from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id*., 4a-5a. Petitioner conceded that certain VA benefits may be subject to income withholding, garnishment, or other legal process brought by a state agency seeking to enforce payment of a child-support obligation, but only with

respect to those VA disability benefits received in lieu of retirement or retention benefits. *Id*., 5a, Cf. 42 U.S.C. § 659(a), (h)(1)(A)(ii)(V), and (h)(1)(B)(iii). Because Petitioner's VA disability was not received in lieu of retirement pay or retention pay, DHR could not lawfully seize them and they were off limits under 38 U.S.C. § 5301 as a personal entitlement. *Id*. See also *Howell v. Howell*, 137 S. Ct. 1400, 1405-1406 (2017) (holding state courts cannot vest that which under governing federal law they lack the authority to give, citing 38 U.S.C. § 5301, which provides that disability benefits are generally non-assignable, while noting that for military retirement pay, the state courts are allowed to take account that some retirement or retainer pay may be waived and calculate or recalculate the need for child support or spousal support, citing *Rose v. Rose*, 481 U.S. 619, 630-634, and n. 6 (1987), but reserving the questions concerning the scope and breadth of allowing the use of VA disability pay for spousal support and child support).

Petitioner also made a claim under 42 U.S.C. § 1983, alleging DHR had, by its actions, deprived him of his constitutional rights to his property, to wit, his VA disability pay. *Id*., 4a-5a. Petitioner had amended his petition to include claims against DHR under 42 U.S.C. § 1983, but withdrew the claim in the circuit court proceedings. *Id*., 4a, n. 1.

DHR countered that Petitioner's VA disability benefits were, in fact, subject to levy or attachment under federal law. *Id*., 5a. Relying first on 42 U.S.C. § 659(a), DHR argued that Petitioner's benefits were, in fact, subject to levy or attachment under federal law. *Id*. DHR further relied on *Rose v. Rose*, *supra*, in which this Court, in 1987, determined that a state court could hold a child-support obligor in contempt for refusing to pay child support out of *any of his* VA disability benefits, and *Nelms v. Nelms*, 99 So.3d 1228, 1232-33 (Ala. Civ. App. 2012), in which the Alabama Court of Appeals concluded that a trial court could consider VA disability benefits in

determining the amount of alimony to award. Based on those cases, DHR concluded, DHR was entitled to levy Petitioner's disability benefits. *Id*., 5a-6a.

Petitioner countered in a reply brief that DHR had ignored relevant portions of 42 U.S.C. § 659, and particularly, subsection (h). *Id*., 7a. As Petitioner explained, subsection (h)(1)(A)(ii)(V) only allows states to subject to process benefits that were "based on remuneration for employment". *Id*., 7a-8a. He pointed out that such benefits are limited to "periodic benefits…or other payments…by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation." *Id*., 7a, citing 42 U.S.C. § 659(h)(1)(A)(ii)(V) (emphasis in original).

In a one-line order, the Circuit Court affirmed DHR's decision.

Petitioner then filed an appeal in the Court of Appeals, arguing several bases for reversal. First, Petitioner argued that DHR violated federal statutory and constitutional provisions, including 38 U.S.C. § 5301(a)(1) and 42 U.S.C. § 659(h)(1)(A)(ii)(V), and that its decision was clearly erroneous, arbitrary and capricious. *Id*., 7a-8a. Petitioner also claimed that DHR had violated his rights under the due process clause of the 14th Amendment to the United States Constitution. Petitioner also argued that DHR's "policy" that VA disability benefits are not exempt from lien or levy influenced its decision not to provide him an administrative hearing and it was axiomatic that denial of an administrative hearing is a fundamental violation of minimal due process under the 14th amendment. *Id*.

The Court of Appeals affirmed. *Id*., 8a. The Court of Appeals undertook its review of DHR's decision based on Section 41-22-20(k) of the Alabama Code of 1975, which, *inter alia*, authorizes the court to reverse a state agency action if it finds the agency's action "is due to be set aside or

modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) in violation of any agency rule; (4) made upon unlawful procedures; (5) affected by other error of law; (6) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (7) unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *Id*., 8a-9a.

The Court of Appeals ruled that while Petitioner was correct that VA disability benefits do not fall within the exception from direct levy while those benefits are in the possession of the VA, citing 42 U.S.C. § 659(h)(1)(A)(ii)(V), this fact did not prevent DHR from seizing Petitioner's benefits after his receipt. *Id*., 9a-10a. The Court of Appeals reasoned that 42 U.S.C. § 659(a) only creates a "limited waiver of sovereign immunity" of the United States, citing *Rose*, 481 U.S. at 635, and, therefore, the requirement in § 659(a) that the benefits to be seized be "based upon remuneration for employment" did not prevent the states from enforcing child-support orders by ordering that payment be made from any VA disability benefits. *Id*., 10a.

While glossing over the sweeping language of 38 U.S.C. § 5301(a)(1), which prohibits *any legal process* from being used by states to assert rights to VA disability benefits that are deemed by preemptive federal law to be off limits, whether received before or after by the beneficiary, the Court of Appeals reasoned that the fact that VA disability benefits are intended to support not only the veteran, but the veteran's family, required the Court in *Rose*, *supra* at 634, to "[r]ecogniz[e] an exception to the application of § 5301(a)(1)'s prohibition against attachment, levy, or seizure in this context [to] further, [and] not undermine, the federal purpose in providing these benefits." *Id*., 10a-11a. The Court of Appeals followed *Rose* and held the 38 U.S.C. § 5301, does not extend to

protect VA disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support. *Id*., 10a-15a. In this regard, the Court of Appeals concluded that neither the anti-assignment provision, 38 U.S.C. § 5301 nor the requirements of 42 U.S.C. § 659 were relevant to determining whether DHR could seize, or otherwise prevent Petitioner from accessing his VA disability benefits from his credit union account.

The Court of Appeals acknowledged it had previously held that an order requiring a father to pay a child-support arrearage from his "Supplemental Security Income (SSI) under threat of contempt violated federal law. *Id*., 15a, citing *J.W.J. v. Alabama Dep't of Human Resources*, 218 So.3d 355 (Ala. Civ. App. 2016). There, the court construed 42 U.S.C. § 407(a), which, like 42 U.S.C. § 5301, prevents the transfer, assignment, levy, attachment, or garnishment of Social Security benefits and considered the effect of 42 U.S.C. § 659(a) on § 407, and held because § 659(a) "permitted withholding of federal benefits for payment of child-support or alimony obligations when 'the entitlement to [those benefits] is based upon remuneration for employment,' § 659(a) did not permit the use of SSI, which <u>was not based upon remuneration for employment</u>, to meet child-support obligations." *Id*., 16a (emphasis added). The Court of Appeals also relied on *Dep't of Public Aid ex rel. Lozada v. Rivera*, 324 Ill. App. 3d 476, 479; 755 N.E.2d 548, 550; 258 Ill. Dec. 165, 167 (2001), which held "that section 407(a) forbids ordering child support that burdens <u>any</u> SSI benefits, even those that the beneficiary has already received." *Id*.

The Court of Appeals distinguished SSI benefits and Petitioner's VA disability benefits, reasoning that SSI "is a means-tested public assistance program that has as one of its purposes to provide a subsistence allowance to those meeting certain eligibility requirements.", *Id*., citing *J.W.J.*, 318 So.3d at 356-357. The Court of Appeals continued:

> Unlike [Petitioner's] VA disability benefits, SSI benefits are not intended to be used as a means of support for the families of its recipients. See *Rose*, 481 U.S. at 630;

> *Becker County Human Servs., Re Becker Cty. Foster Care v. Peppel*, 493 N.W.2d 573, 576 (Minn. Ct. App. 1992) ("SSI benefits are designed to provide the minimum needs of the individual recipient, and should not be considered income for any other purpose."); and *Tennessee Dep't of Human Servs. ex rel. Young v. Young*, 802 S.W.2d 594, 599 (Tenn. 1990) ("SSI payments are for the benefit of the recipient alone."). Thus, the holding of *J.W.J.* is inapplicable in the context of VA disability pay.
>
> [*Id*., 16a-17a.]

The Court of Appeals dismissed Petitioner's argument that DHR's policy that VA disability benefit are not exempt from lien or levy had influenced its decision not to provide him with an administrative hearing and was in violation of the 14th Amendment's guarantee of minimal due process. *Id*., 17a18a. The Court of Appeals however went on to further reason that DHR was justified in its denial of a hearing based on its determination that in acting to levy and seize Petitioner's VA disability pay, it had been providing "child support services as required by law." Citing Ala. Admin. Code (DHR) Rule 660-1-5-.05(f). *Id*., 18a. As the Court of Appeals ruled that DHR had complied with state and federal law in seizing Petitioner's benefits, a hearing would have been of no benefit to either party *Id*. The Court of Appeals further ruled that since Petitioner was ultimately allowed to seek judicial review of the DHR's decision, he was afforded due process. *Id*., 18a-19a.

The Court of Appeals affirmed the judgment of the circuit court affirming DHR's decision to levy Holmes's VA disability benefits to satisfy his child-support obligation. *Id*., 18a.

On December 7, 2018, the Alabama Supreme Court denied Petitioner's writ of certiorari to the Alabama Court of Appeals. *Id*., 1a. Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

This case raises issues concerning the absolute preemption of federal law over state courts in the disposition of VA disability benefits. This Court recently reiterated that the absolute rule of

federal preemption over state court domestic and family law enunciated in *McCarty v. McCarty*, 453 U.S. 210 (1981) still applied to a state's purported exercise of authority over *any* benefits provided to military members or veterans by Congress in the exercise of its enumerated military powers. *Howell v.* Howell, 137 S.Ct. 1400, 1404 (2017), citing *McCarty*. Indeed, only Congress can provide precise and limited exceptions to this absolutely preempted area. *Id*., citing *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). With these powers, Congress provides veterans disability benefits as a personal entitlement to the veteran. *United States v. Oregon*, 366 U.S. 643, 648-649 (1961), *Johnson v.* Robison, 415 U.S. 361, 376 (1974).

Congress has exercised legislative authority in these premises since the earliest days of the Republic. *See, e.g.*, *Hayburn's Case*, 2 U.S. (Dall.) 409, 1 L. Ed. 436, 2 Dall. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 Wash L Rev 227, 228 (1977); Waterstone, *Returning Veterans and Disability Law*, 85:3 Notre Dame L Rev 1081, 1084 (2010). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference. *McCarty*, 453 U.S. at 236, citing *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). In *McCarty*, *supra*, the Court noted that the historical and legal basis for disallowing state courts to treat military benefits as "property" was federal supremacy, "which generally means that a state court *lacks subject matter jurisdiction* over uniquely federal programs, specifically military compensation schemes, *unless* Congress specifically confers such authority." See Kirchner, *Division of Military Retired Pay*, 43 Fam L Q 367, 371 (2009-2010).

By statute, Congress has prohibited *any legal process* (whether equitable or legal) from being used to deprive veterans of their disability benefits. 38 U.S.C. § 5301(a)(1). 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. 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; *McCarty*, *supra*, *Mansell*, *supra*, *Howell*, *supra*; and (2) spousal support and child support, through the Child Support Enforcement Act (CSEA), 42 U.S.C. § 659. However, 42 U.S.C. § 659(h)(1)(B)(iii) specifically *excludes* from being subject to process, those VA disability benefits that are paid to non-retiree disabled veterans – those veterans who had not retired, and therefore could not have waived retired or retention pay to receive disability benefits. See also *Howell v. Howell*, 137 S. Ct. 1400, (2017).

Where a state court is preempted by controlling federal law, the state court has no authority to issue an order that exceeds its jurisdictional control. 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 to issue a contrary award. "State courts may exercise jurisdiction and authority over veteran's disability pay to satisfy a child support and/or spousal support award, *but only up to the amount of his or her waiver of retired pay*." *In re Marriage of Cassinelli*, 20 Cal App 5th 1267, 1277; 229 Cal Rptr 3d 801 (2018). See also 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V), (B)(iii); 5 C.F.R. § 581.103 (2018) (emphasis supplied). *Cassinelli* was a decision on remand from this Court after *Howell*, *supra*.

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 (U.S. 2016) (federal veterans'

benefits are constitutionally protected property rights). See also *Morris v Shinseki*, 26 Vet. App. 494, 508 (2014) (same).

Petitioner has presented the arguments that demonstrate federal law preempts state law, and that his constitutional rights have been infringed upon by Respondent, DHR's seizure of his property.

Finally, *Rose* was wrongly decided. It is an anomaly in this Court's jurisprudence concerning protection of veterans' disability benefits from state court control.

Indeed, the *only* rationale from *Rose* that sustains the decision itself is based on an errant notion of the legislation Congress has passed pursuant to its enumerated Military Powers. First, Congress has absolute control and authority under its enumerated powers to provide military members and veterans with benefits. *Wissner v. Wissner*, 338 U.S. 655 (1950); *United States v. Oregon*, 366 U.S. 643 (1961), *Johnson v.* Robison, 415 U.S. 361, 376 (1974), *McCarty v. McCarty*, 453 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); and *Howell*, *supra*. In no other arena has Congress been given more deference. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). *Rose* was a decision by this Court that despite this exercise of an enumerated Article I power, and where in fact statutory language actually prohibits the exercise by states over these benefits, Congress's statutory provisions could be eclipsed by a long-stated general policy to give deference to states in the exercise of their domestic and family law matters. *Rose*, *supra*. This, even though in every other case, *Wissner*, *supra*; *Oregon*, *supra*; *McCarty*, *supra*; *Ridgway*, *supra*; *Mansell*, *supra*; and *Howell*, *supra*, *inter alia*, Congress's exercise of its Article I enumerated powers and the express legislation that it has passes pursuant to these powers to *allow* exceptions to states to the absolute preemption of federal law in this area, has always been seen as overcoming this general policy of deference to states when it comes to

matters of domestic law or family law. The rationale of *Rose* is an anomaly and does not hold sway in light of the consistent *overriding* of this deference to state courts in this particular area. Indeed, again, Congress has been given no greater deference than in the exercise of its military powers under Article I. See *McCarty*, *supra*; *Rostker*, *supra*.

Despite the fact that many courts, including the Alabama Court of Appeals in this case, have concluded that the *only* function of 42 U.S.C. § 659 is for the federal government to waive its sovereign immunity and subject it to garnishment or "process" for purposes of paying child support orders issued from state courts or state agencies, the statutory language very clearly *limits* this waiver under (h)(1)(A)(v)(II) to monies considered remuneration for employment. *Id*. That definition in the case of VA disability pay is further limited to monies where the veteran has "waived a portion" of his or her retirement pay to receive disability pay. *Id*. (emphasis added). The federal government will not honor an order from a state court if the veteran has waived all his retirement pay to receive disability pay, see, e.g., *Sanchez Dieppa v. Rodriguez Pereira*, 580 F.Supp. 735, 736-737 (U.S. Dist. Ct. P.R. 1984), nor does the federal government honor any state court orders for child support or alimony where the veteran, like Petitioner in this case, is *not* a retiree at all, is not entitled to retirement pay, and has therefore not waived any such pay to receive his or her disability benefit. See 42 U.S.C. § 659(h)(1)(B)(iii). Petitioner's disability pay, is pure, VA-authorized disability pay contemplated under 38 U.S.C. § 5301(a)(1). Thus, even though 42 U.S.C. § 659(a) says notwithstanding 38 U.S.C. § 5301, the federal government will honor garnishment orders for monies that are considered remuneration for employment, *it then excludes* from this "notwithstanding clause", monies that are not considered remuneration for employment. See 42 U.S.C. § 659(h)(1)(B)(iii). Thus, how could sovereign immunity be a concern when the federal government will refuse to honor an order where the veteran is not a recipient of retired pay

who has waived a portion of that pay to receive disability pay, and will specifically cite to 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301(a)(1) as the governing federal law that specifically prohibits it from doing so? In essence, what *Rose* held was that notwithstanding the explicit federal statutory law protecting VA disability benefits from any legal process (whether equitable or legal), and whether received before or after by the beneficiary, see 38 U.S.C. § 5301(a)(1), state courts are nonetheless free to ignore these specific, explicit, and comprehensive federal statutes and regulations passed by Congress pursuant to its military powers to protect VA disability pay, and may therefore seize such benefits, as in this case, and otherwise exercise any legal process whatever over these benefits. See *Rose*, 481 U.S. at 635. And, even this rationale is suspect from *Rose*, *supra*, because that part of the *Rose* decision that discussed sovereign immunity spoke only in terms of "a limited waiver of sovereign immunity so that state courts could issue valid orders directed against agencies of the United States Government attaching funds in the possession of those agencies." *Id*. (emphasis added). *Rose* spoke nothing of money already in the possession of the beneficiary. *Id*. Moreover, 38 U.S.C. § 5301(a)(1) directly addresses this: such benefits are off limits even if they are in the possession of the beneficiary; the plain language of this provision protects these benefits from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." It is hard to envision a clearer and more sweeping statement. Respondent DHR attempted to levy and otherwise seized Petitioner's benefits after his receipt of them into his bank account. Incidentally, this Court has held that § 5301 is to be liberally construed to protect funds granted by Congress "for maintenance and support for beneficiaries thereof" and such funds "remain inviolate." *Porter v Aetna Cas & Sur Co*, 370 U.S. 159, 162 (1962). Such payments are exempt "either before or after receipt by the beneficiary". *Id.* As such, "[t]he monies which are paid are preserved by statute for the sole use of the veteran,

'regardless of the technicalities of title and other formalities.'" *American Training Serv's, Inc v. Veterans Admin*, 434 F. Supp. 988, 995-96 (D.N.J. 1977), citing *Porter*, supra. Thus, "[a]ny legal formulation or arrangement which could dilute or evade the literal and historical thrust of the statute's protective provisions must be viewed with appropriate caution." *Id*. Justice White, in his dissent in *Rose*, pointed out the unsustainability of the Court's rationale in light of the absolute preemptive power of Congress's lawmaking authority in this realm, and the clear and sweeping language of 38 U.S.C. § 5301. See *Rose*, 481 U.S. at 644-647, citing *Ridgway v. Ridgway*, 454 U.S. 46 (1981). Moreover, Justice White pointed out the suspect nature of the majority's reasoning in *Rose*, that the purposes and objective of Congress in providing veterans' disability benefits was, in part, to support veterans' families and that this could be gleaned from a single statement "taken from the legislative history of a 1984 bill increasing disability benefits, that 'the [Veterans Affairs] Committee periodically reviews the service-connected disability compensation program with a view toward assuring the benefits authorized provide reasonable and adequate compensation for disabled veterans and their families,' S. Rep. No. 98-604, p. 24 (1984), and…38 U.S.C. § [5307], which provides for the apportionment of veterans' benefits by the Administrator when the veteran is separated from his wife or lacks custody of his children." *Id*. Justice White pointed out that the legislative history of the 1984 statute was not "intended as a comment on the scope of [§ 5301], and even if it were it would not be controlling, since it was not made in conjunction with any amendment of that statute." *Id*. Further, Justice White noted the fact that there is an apportionment process at all actually supports the opposite rationale, i.e., to the extent Congress intended any disability pay to benefit a veterans' family, rather than the veteran himself or herself, it created a mechanism for doing so. *Id*. Indeed, Congress has enacted comprehensive legislation governing

all aspects of military benefits and has considered the needs not only of the military servicemember or veteran, but those of his or her family.

Finally, while it is usually the case that this Court will wait until state courts have come to opposite conclusions on a particular issue so it can be clearly present as one of national significance before this Court, that is never going to happen in this case. Since *Rose*, ever state court has essentially interpreted it to mean that they may ignore 38 U.S.C. § 5301 and 42 U.S.C. § 659(h)(1)(B)(iii) and enter and enforce orders forcing veterans to directly pay benefits to former spouses and children, or, allow state agencies to seize or otherwise levy such funds on threat of criminal contempt against the veteran. There is no chance that in the near future this issue will become one that is thrust back into debate by conflicting state court decisions.

Most importantly, by the time that does happen, if ever, all those veterans like Petitioner, who are having these funds indiscriminately considered by state courts as available for payment of child support and spousal support, will have lost any real hope that these benefits will provide them with the support and sustenance that they need to survive.

The issues presented by this case are of current, and present national significance due to the increasing number of disabled veterans whose main or only source of income are disability benefits. Petitioner is not the only disabled veteran whose disability pay is a sole means of subsistence and who relies on these benefits to survive.

The purpose of Congress in enacting 38 U.S.C. § 5301 was to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." *Rose*, 481 U.S. at 630. Yet, *Rose* has allowed state courts to indiscriminately take these benefits from veterans. Due to the last 3 decades of up-tempo, high-volume deployment and military operations in which the U.S. military has been involved represents the largest population

of disabled veterans in existence. The significance of this cannot be understated. See Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

Indeed, the country is no longer only faced with the waning population of disabled veterans from the post-Vietnam era and prior. *Rose* was, as noted, a 1987 case, and it necessarily addressed an entirely different population of aging and disabled veterans. Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, *supra*. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html. As of March 22, 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp. 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. VA, Trends, *supra* at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id*.

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American

Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org. Thus, according to this data analysis, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation 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. See http://www.nvf.org/staggering-number-of-disabled-veterans/. Yet another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems. These veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. Physical injuries in these situations are understandably horrific. *Id*. See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family perceptions of post-deployment healthcare needs of Iraq/Afghanistan military personnel, 7(3) Mental Health in Family Medicine 135-143 (2010). 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 deadly force to protect themselves, their patients, and their fellow soldiers." Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995).

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. 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 physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. Finley, *supra*.

This younger population of disabled veterans are not entitled to retirement pay because they were injured or wounded during the first few years of their service to the country. Like Petitioner, who only served for approximately 3 years, many disabled veterans in this population do not and

will never have the financial security and economic assurances of a retirement pension and all the other benefits that come with being classified as retired. When it became apparent that this growing subset of disabled veterans were also being subjected to having their disability benefits taken by state courts to satisfy support orders in domestic relations cases, Congress acted to differentiate this class of veterans by amending the CSEA and adding 42 U.S.C. § 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) distinguishing the two subsets of veterans and the two classes of disability benefits, those which are available to former spouses and minor children from the former group of retiree veterans and those that are not from the latter group of non-retiree veterans.

Because federal law has always preempted state law in this very specific circumstance, any state-court domestic relations order awarding support (child and/or spousal) would be void and unenforceable, both going forward and retroactively. In this case, Petitioner's federal disability benefits are specifically excluded from consideration as remuneration for employment, and therefore as income, by 42 U.S.C. § 659(a); (h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from *any legal process* whatever by 38 U.S.C. § 5301. Federal law is very clear. Yet, state courts across the country continue to blindly cite *Rose* for the proposition that states have unfettered access to these disability benefits no matter what the income and status of the disabled veteran. This has caused a systemic destruction of the ability of disabled veterans to sustain themselves and their families. The greatest tragedy, of course, is the effect that this has had on the veteran community as a whole. Homelessness, destitution, alcoholism, drug abuse, criminality, incarceration and, in too many cases, suicide, are a direct result of the consequences of a blind adherence to outdated and no longer viable federal law that fails to take account of the reality of current circumstances.

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; 4 L Ed 579 (1819) (MARSHALL, CJ) (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, Petitioners requests this Court to grant the writ of certiorari to the Alabama Supreme Court..

Respectfully submitted,

/s/ Joseph H. Holmes
Joseph H. Holmes

Dated: May 6, 2019