

Record No. 05-2307

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TAMMY ADKINS, *et al.*,
Plaintiff-Appellant

v.

DONALD RUMSFELD,
in his capacity as Secretary of Defense,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria

OPENING BRIEF OF APPELLANTS

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FRAP 26.1 & 4TH Cir. R. 26.1 CORPORATE DISCLOSURE STATEMENT

One of the named Appellants-Plaintiffs, ULSG, LLC [USFSPA Litigation Support Group, LLC], is a limited liability corporation created under the laws of Florida. Its principals are Jack C. Crutchfield, John B. Noone, Jr., James R. Marrs, and Ronald J. King. ULSG, LLC, is not a publicly-held corporation, has no parent corporations, and has no shares.

The remainder of the Appellants-Plaintiffs are individuals, as listed on the full caption of the case.

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JURISDICTIONAL STATEMENT

The district court based its jurisdiction on 28 U.S.C. § 2201(a) (declaratory judgments), insofar as this was a constitutional challenge of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, a piece of federal legislation.

This appeal is taken from the final orders of the district court of October 12, 2004 (dismissing, on jurisdiction and standing grounds, the entirety of the action; A12), November 22, 2004 (reconsidering the dismissal as to appellants' procedural due process, equal protection and uniformity claims; A28), March 16, 2005 (dismissing, on the merits, appellants' equal protection and uniformity challenges; A40), and October 13, 2005 (granting summary judgment against appellants' procedural due process claims; A68). The appellants' notice of appeal was filed on November 10, 2005, and timely amended on November 21, 2005.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Pursuant to FRAP 44, notice was made to the U.S. Department of Justice that this appeal calls into question the constitutionality of an Act of Congress.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in dismissing the entirety of the veterans' substantive due process challenge against the Uniformed Services Former Spouses

Protection Act (USFSPA), 10 U.S.C. § 1408, and some of their procedural due process claims, for lack of standing and res judicata, based on an extended application of the *Rooker-Feldman* doctrine?

2. Whether USFSPA is constitutionally defective, owing to its failure to provide basic procedural protections to veterans receiving military retired pay before such property interests are deprived through garnishment by the government?

3. Whether USFSPA violates equal protection insofar as it subjects the retired pay of veterans to increased encumbrances (as compared to other groups of retired federal employees), based on the expectation (at the time USFSPA was legislated) that most, if not all, former spouses of servicemembers would be women?

4. Whether Congress was required to legislate USFSPA's substantive provisions with uniform effect among veterans domiciled in all states, pursuant to the Constitution's Full Faith and Credit and Regulation of Armed Forces Clauses?

STATEMENT OF THE CASE

This case presents an issue of first impression: whether the Uniformed Services Former Spouses Protection Act ("USFSPA" or "the Act"), 10 U.S.C. § 1408, is constitutionally defective in many material respects.

This action sought declaratory relief from the district court in order to determine

the constitutionality of various provisions and operational aspects of USFSPA. This action did not seek money damages from the government. Nor did it seek to retrospectively affect or undo any prior dissolution of marriage or any other property settlements entered into by the named plaintiffs or by any affected veteran. Rather, this suit sought a determination as to the constitutionality of various provisions of the Act, and to declare the proper construction and application of other provisions, if deemed necessary. Seeking such declaratory relief has been necessitated (a) by the textual omissions, errors and ambiguities of the Act, (b) by the failure of the defendant – the Department of Defense, which is charged with the administration of the Act – to provide procedural safeguards in respect to various federal government functions required by the statute, and (c) by the widely divergent interpretations that have been given USFSPA’s provisions by state courts construing its provisions. These defects in the Act each have constitutional implications, which this case sought to address.

This appeal thus implicates the merits of the appellants’ procedural due process, equal protection, and uniformity challenges to USFSPA. It also raises whether the substantive due process, or retroactivity, challenge to the Act (as well as one procedural due process attack) should have been dismissed on *Rooker-Feldman* grounds. Taken together, this case features the most concerted – and coherent – challenge to the constitutionality of USFSPA ever brought in a federal or state court.

At issue are the rights and property interests of hundreds of thousands of divorced veterans whose retired pay has been improperly diverted to former spouses, without regard for uniform results for veterans resident in different states, concern for the equal treatment of federal retirees, or even a scintilla of due process.

STATEMENT OF THE FACTS

A. The Enactment of USFSPA.

In exercise of its powers under the Constitution, U.S. Const. art. I, § 8, cls.12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (though retired) are still obliged to comport themselves in accordance with the Uniform Code of Military Justice (UCMJ) and are subject to recall for active duty. See 10 U.S.C. §§ 1401 et seq. Unlike any other retirement system in the public or private sector, military retirees are considered in a retired status subject to their employer's disciplinary actions and subject to recall by that employer in return for reduced pay. Article 2 of the UCMJ specifically refers to these individuals as “[r]etired members

of a regular component of the armed forces who are entitled to pay.” USFSPA does not relieve the military retiree of either of these conditions to receiving retirement pay.

Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a community asset in divorce proceedings involving a former member of the armed forces. In a 1981 decision, the Supreme Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military retired pay pursuant to state community property laws. See *id.* at 235.

In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408.¹ For the purposes of the present appeal, the crucial provisions of USFSPA concern Congress’s grant to state courts of the authority to treat retired pay as property “solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . .” *Id.* § 1408(c)(1). USFSPA by no means required states to treat military retired pay as divisible property, but merely allowed them to do so without any federal preemptive effect, should state community property or divorce settlement laws so prescribe. In any event, USFSPA designates the “disposable

¹ For the Court’s ease of reference, the relevant provisions of USFSPA are reprinted in Appendix A to this brief.

retired pay,” *id.*, that is subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that a veteran was obliged to waive as a condition of receiving disability compensation. See *id.* § 1408(a)(4)(B).

An additional feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran’s retired pay, garnished by the government, provided that certain statutory requisites were satisfied by the former spouse. See *id.* § 1408(d). In addition, Congress imposed a percentage cap on amounts of a veteran’s retired pay that could be directly remitted under this scheme. See *id.* § 1408(e)(1). However, USFSPA allowed the Department of Defense to garnish veterans retired pay merely upon the presentation (by a former spouse) of a state court order that appeared “regular on its face,” *id.* §§ 1408(b)(2) (definition); 1408(d); 1408(e)(5); 1408(f)(1), with only cursory notice being given to the veteran, *id.* § 1408(g), without a procedure to challenge wrongful garnishments, to claim refunds for amounts improperly paid to former spouses, *id.* § 1408(e)(3), or to protect the rights of active servicemembers, *id.* § 1408(b)(1)(D).

Defendant Secretary has issued regulations, pursuant to USFSPA section 1408(j), which are now contained in volume 7B, chapter 29 of the Department of

Defense's Financial Management Regulations (DODFMR), effective September 1999. See A164. The Defendant Secretary has delegated his functions under USFSPA to the Defense Finance and Accounting Service (DFA S).

Since USFSPA was legislated, substantial disparities have arisen as to the application of a number of its provisions relative to veterans resident in different states. Taken together, this lack of regularity in the application of USFSPA has clearly been contrary to Congress's professed intent to create a uniform set of rules for the distribution of veterans' retired pay.

B. The Plaintiffs and This Litigation.

The fifty-eight individual plaintiffs in this case are all retired veterans of the United States Armed Forces, who have honorably served their country, and who are currently drawing (or are eligible to draw) retirement pay by virtue of their service, or are active duty servicemembers who will be eligible to receive retired pay. See Amended Complaint ¶ 5, A 112. Each of the individual plaintiffs is also divorced, and, as part of their divorce decrees or related property settlements, were required to grant their former spouses a designated portion of their retired pay. See *id.*

The association plaintiff – ULSG, LLC – is a voluntary organization of veterans seeking reform of the laws affecting veterans' retired pay. See *id.* ¶ 6, A112. In their

amended complaint, plaintiffs pled further facts in relation to ULSG as an associational entity, and also the characteristics and profiles of its individual members. Aside from specifying more fully the purposes and objectives of ULSG, see *id.*, the amended complaint gave precise information about the financing of the organization through the voluntary contributions of nearly 1250 of its 2500 enrolled members. See *id.* ¶ 6A, A113. The amended complaint acknowledged that the vast majority of ULSG’s members are individuals “who are divorced military retirees from all the United States Armed Forces who currently are, or will be subject to and are directly affected by, the provisions of the USFSPA by virtue of a divorce court order. . . .” *Id.* ¶ 6B, A113.

Nevertheless, the amended complaint disclosed that some ULSG members fall into other and different profiles. These included divorced members who could not have raised federal constitutional challenges to USFSPA (including its retroactive application to those individuals already in the service, or even drawing retired pay, at the time of its enactment) in their state divorce proceedings, or where such challenges were made but not ruled upon by the state court. See *id.* ¶ 6C(a)(i), A114; see also Declaration of Ronald J. King [“King Decl.”] ¶¶ 5, 11, 14, A145-46, A148-49 . Next, there were a number of ULSG members who had not yet been divorced. See *id.* ¶ 6C(c), A115; see also Declaration of John R. Youngquist [“Youngquist Decl.”] ¶¶ 4-6,

A158. This includes “persons who are legally separated, but not yet finally divorced, and have an interest in not having the Act applied to divide their retired pay.” Id. ¶ 6C(c)(i), A115. Lastly, ULSG members included other individuals “who have a concern in how persons subject to the Act may be treated.” Id. ¶ 6C(d), A116.

C. Course of the Proceedings Below.

After filing the original complaint, A81, Defendant Secretary moved for dismissal on the theory (based on an extended reading of the *Rooker-Feldman* doctrine) that all of the named individual plaintiffs were barred from challenging USFSPA because they had all had a previous opportunity to litigate such constitutional issues in state court during the pendency of their original divorce decrees and property settlements. The district court agreed in its October 12, 2004 order. A12.

Plaintiffs then sought reconsideration, pointing out to the trial court that its application of *Rooker-Feldman* swept too broadly, and, at a minimum, that the associational plaintiff – ULSG, LLC – should be given leave to amend the complaint and more fully account for its organizational standing. The district court granted leave to amend as to the standing of ULSG, LLC, in its November 22, 2004 order, but upheld its dismissal of the individual plaintiffs’ substantive due process (or

retroactivity) claim. See 11/22/04 Order at 4-5, A32-33.

Plaintiffs then amended their complaint, A111, and Defendant Secretary again moved to dismiss. In its March 16, 2005 order, the district court held that ULSG, LLC, had associational standing to bring the constitutional challenges to USFSPA, with the exception of the substantive due process (retroactivity) attack. See 3/16/2005 Order at 8-9, A48-49. Moving to the merits, the trial court held that USFSPA withstood Plaintiffs' uniformity and equal protection challenges, *id.* at 16-26, A56-66, but that factual issues remained as to the manner in which the Secretary and Department of Defense had construed and applied USFSPA's limited procedural due process protections to veterans, through its regulations and procedures. See *id.* at 15, A55. The district court did find, though, that USFSPA's allowance that veterans be informed of garnishment procedures, through notice sent to their last known address, 10 U.S.C. § 1408(g), did pass constitutional muster. 3/16/05 Order at 11-12, A51-52.

After a round of discovery, in which the defendant Secretary divulged some of the relevant regulations and internal operating procedures for its administration of USFSPA, through its Defense Finance and Accounting Service (DFAS), both sides cross-moved for summary judgment. In its October 13, 2005 Order the district court granted summary judgment to the government. The trial court held that ULSG, LLC, had no standing to bring a challenge as to USFSPA's failure to provide a mechanism

for refund of amounts retained in cases of conflicting state awards or overpayments to former spouses. 10/13/05 Order at 6-7, A74-75. Otherwise, the district court held that veterans subject to USFSPA's garnishment procedure for their military retired pay are accorded all the process due to them. *Id.* at 5-11, A73-79.

This timely appeal follows, presenting novel and significant issues as to the constitutionality of an Act of Congress, affecting the livelihoods of hundreds of thousands of veterans.

SUMMARY OF THE ARGUMENT

Four distinct issues are raised in this appeal.

1. The district court erred by applying a broad version of the *Rooker-Feldman* doctrine to deny jurisdiction and standing to the plaintiffs' due process challenges to USFSPA, simply because they may have participated in earlier state court divorce and property settlement proceedings. This expansive construction of *Rooker-Feldman* has since been rejected by the Supreme Court. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005).

In any event, *Rooker-Feldman* has never operated to bar federal jurisdiction over claims for which a party had no opportunity, or, indeed, could not have raised, in state court. See *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 198, 201 (4th

Cir. 2000). Plaintiffs' substantive due process (retroactivity) and procedural due process claims could not have possibly been raised in earlier state court divorce proceedings because they would not have been ripe at that juncture. Just as significantly, plaintiffs' due process claims fall into the "general attack" or "public interest" exception under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486-87 (1983); *Guess v. Board of Medical Examiners*, 967 F.2d 998, 1002-04 (4th Cir. 1992).

2. The district court erred in rejecting the remainder of plaintiffs' procedural due process attacks on USFSPA. The Act, and the manner in which it is administered by defendant, is constitutionally deficient insofar as it allows for garnishment of a veterans' retired pay merely upon the presentation of a state court order that appears "regular on its face," without any further inquiry by the defendant Secretary as to whether the state court even had proper jurisdiction over the servicemember. Moreover, the defendant's procedures do not allow for an effective means to challenge improper garnishments or to ensure that the rights of active-duty servicemembers, under the Civil Relief Act, 50 App. U.S.C. § 501 et seq., are, in fact, being observed.

These deficiencies run afoul of well-established due process jurisprudence. See *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-06 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 332-41 (1976). That garnishment procedures are triggered

by the party seeking a share of the veterans' retired pay, without any real or effective opportunity for a veteran to challenge such garnishment, raises the specter of inaccurate and unfair deprivations. See *Mallette v. Arlington County Employees' Supplemental Retirement Sys.*, 91 F.3d 630, 641 (4th Cir. 1996).

3. The district court erred in dismissing plaintiffs' equal protection challenge of USFSPA. The statute discriminates (a) between different classes of federal retirees, (b) between veterans and non-servicemember spouses, and (c) between female veterans and non-servicemember ex-husbands. Although the Act is facially gender neutral, it was legislated against a back-drop of concern for veterans' wives and at a time where there were virtually no female servicemembers, muchless female veterans receiving retired pay.

Whether reviewed under immediate scrutiny, see *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274-79 (1979), or under rational-relation scrutiny, *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992), the statute flunks equal protection analysis. Congress had no rational basis (either in 1982, muchless today) to discriminate against veterans in the allocation of their retired pay, insofar as veterans owe a continued duty of service to the armed forces and that military retired pay is subject to greater encumbrances (including continued payment to a former spouse even after he remarries) than that of other federal retirees.

4. The district court erred in dismissing plaintiffs' uniformity attack on USFSPA. Apparently conceding that state courts have subjected material provisions of the statute to divergent interpretations, resulting in a lack of uniformity of application for servicemembers resident in different states, the trial court nonetheless rejected any constitutional duty of Congress to legislate uniformly in respect to the Act. But USFSPA was legislated at the confluence of two grants of power under the Constitution: the Regulation of the Armed Forces Clause and the Full Faith and Credit Clause. See USFSPA Committee Report, 1982 U.S.C.C.A.N. 1596, 1603; *Simanonok v. Simanonok*, 787 F.2d 1517, 1522 (11th Cir. 1986). Both of these grants of constitutional authority require uniform legislation, which USFSPA manifestly does not. See *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); *Hughes v. Fetter*, 341 U.S. 609, 612 & n.9 (1951).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THE DUE PROCESS CHALLENGES TO USFSPA AND THEIR CLAIMS ARE NOT BARRED BY RES JUDICATA OR THE *ROOKER-FELDMAN* DOCTRINE.

A. Standard of Review.

A district court's dismissal of claims, based on a lack of standing, res judicata,

or the application of the *Rooker-Feldman* doctrine, are reviewed *de novo* by this Court, except to the extent that factual findings made by the trial court (essential to the legal ruling) are reviewed for clear error. See *Piney Run Preservation Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 262 (4th Cir. 2001) (standing); *Marshall v. Meadows*, 105 F.3d 904, 905-06 (4th Cir. 1997) (standing); *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir. 1990) (res judicata); *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 491 (6th Cir. 2001) (*Rooker-Feldman*).

B. The District Court Erred in Entirely Dismissing Plaintiffs' Retroactivity Challenge to USFSPA, and Some of Their Procedural Due Process Attacks, on Standing, Res Judicata or *Rooker-Feldman* Grounds.

The district court appeared to deny the claims of the individual plaintiffs on the jurisdictional ground that to entertain them would violate the *Rooker-Feldman* doctrine,² 10/12/2004 Order, at 5-12, A17-24, but also on standing and res judicata principles. See *id.* at 12-13, A24-25. This blending of doctrinal idioms was repeated when the trial court denied, in part, plaintiffs' motion for reconsideration of the dismissal of the individual plaintiffs, on standing grounds. See 11/22/04 Order, at 7-8, A35-36. Lastly, the court below mixed standing and *Rooker-Feldman* rationales when

² See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

it dismissed ULSG, LLC's claim to bring the substantive due process (retroactivity) challenges of USFSPA, see 3/16/2005 Order, at 8-9, A48-49, as well as particular procedural due process attacks against the statute. See 10/13/05 Order at 6-7, A74-75.

The key issue here is whether the individual named plaintiffs – and the members of ULSG, LLC – are barred from bring these constitutional attacks, because they ostensibly had earlier had an opportunity to do so in their original state court divorce and property settlement proceedings. According to this theory, these parties are now precluded, under *res judicata* or *Rooker-Feldman* principles, from bringing these challenges in federal court, and, therefore, lack standing. This legal holding is error for three reasons: (1) the district court's expansive application of *Rooker-Feldman* is not applicable in a case such as this; (2) even if *Rooker-Feldman* applies, the individual plaintiffs' constitutional challenges of USFSPA are not “inextricably intertwined” with the issues decided in their state court divorce and property settlement proceedings, and, indeed, in many instances could not have even been raised in those earlier proceedings; and (3) in any event, plaintiffs' “general attack” on USFSPA's constitutionality falls into *Rooker-Feldman*'s public interest exception.

1. An Expansive Application of *Rooker-Feldman* is Not Appropriate in a Case of This Sort.

The *Rooker-Feldman* doctrine bars a party from seeking in a federal district

court what would effectively be appellate review of a state court judgment. *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311 (4th Cir. 2003). In determining whether the doctrine bars a claim, courts look to whether the party seeks to have the merits of the case in state court reviewed by the federal district court, or whether the party seeks to set aside the state court’s judgment, as opposed to presenting an independent claim. *Id.* at 316. The essential question is whether the relief sought by a party would require a federal court to “effectively reverse the state [court] decision or void its ruling.” *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996) (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995)).

The U.S. Supreme Court, in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005), substantially clarified and narrowed the scope of the *Rooker-Feldman* doctrine. First, the Court observed that, at least after *Feldman* was decided in 1983, the Supreme Court “has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction,” *id.* at 1523, and had sought to limit its application in subsequent cases. See *id.* at 1523-24. In *Exxon Mobil*, the Supreme Court pared back the *Rooker-Feldman* doctrine to its core, holding that it “is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those

judgments.” *Id.* at 1521-22. Finally, in discussing the statutory predicate for *Rooker-Feldman*, 28 U.S.C. § 1257, the Court observed:

Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff “present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.”

Id. at 1527 (quoting *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993), and citing *Noel v. Hall*, 341 F.3d 1148, 1163-1164 (9th Cir. 2003)).

Exxon Mobil fundamentally changes the complexion of the *Rooker-Feldman* doctrine. See *Hoblock v. Albany Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005) (“The Supreme Court’s recent decision in *Exxon Mobil*, examined the *Rooker-Feldman* doctrine as it has been applied by the lower federal courts. *Exxon Mobil* thus requires us . . . to examine anew the doctrine itself.”). Under *Exxon Mobil*, there are three requirements for the application of *Rooker-Feldman* in this case. First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must “complain[] of injuries caused by [a] state-court judgment[.]” Third, the plaintiff must “invit[e] district court review and rejection of [that] judgment[.]” 125 S. Ct. at 1521-22; see also *Washington v. Wilmore*, 407 F.3d 274, 279 (4th Cir. 2005). As already noted, neither the individual plaintiffs in this case, nor the associational

members of ULSG, LLC, are seeking to complain of injuries arising from their state court divorce decrees or property settlements, or to have a federal court review and reject those decrees or settlements. Rather, they are seeking a declaratory judgment as to the constitutionality of USFSPA, the legal effects of which necessarily postdate any state court judgments.

2. The Plaintiffs’ Constitutional Challenges are not “Inextricably Intertwined” With Their State Court Divorce Decrees or Settlements.

In *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194 (4th Cir. 2000), this Court stated that a federal claim would be regarded as “inextricably intertwined” with a state court proceeding only where the claim’s success would involve a determination that the state court “wrongly decided the issues before it.” *Id.* at 198; see also *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379, 383 (4th Cir. 2004).

The plaintiffs here do not contend that the state courts necessarily wrongly decided any issues. For example, plaintiffs’ challenges of procedural due process violations have nothing to do with any action a state court can take – the procedures are supposedly mandated by USFSPA itself, and are administered by the defendant Secretary. The substantive due process and retroactivity challenge raised in the complaint are essentially facial in character; they do not necessarily depend on the specific circumstances of any particular plaintiff, aside from being a member of an

affected class of veteran. In short, as pled in their complaint, the constitutional infirmities of USFSPA asserted by plaintiffs are not ones that could have, or should have, been raised in state court proceedings.

Further, this Court's decision in *Brown & Root* makes clear that the *Rooker-Feldman* doctrine does not apply to cases where the plaintiffs did not have a reasonable opportunity to raise the present issues in their state court proceedings. 211 F.3d at 201; see also *Stillwell*, 336 F.3d at 316. In determining whether the doctrine bars a claim, courts look to whether the party seeks to have the merits of the case in state court reviewed by the federal district court, or whether the party seeks to set aside the state court's judgment, as opposed to presenting an independent claim. *Id.* The key question is thus whether the relief sought by a party would require a federal court to "effectively reverse the state [court] decision or void its ruling." *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996) (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995)).

The district court concluded that simply by virtue of procuring divorces and property settlements in state court, that the individual plaintiffs were thereby precluded under the *Rooker-Feldman* doctrine from litigating any federal constitutional challenge of USFSPA in federal court. But such a ruling cannot apply where the individual plaintiffs could not possibly have had the opportunity to raise

federal constitutional challenges of USFSPA, because those challenges could not possibly have been ripe for determination.

Count One of plaintiffs' complaint was a substantive due process challenge to the retroactive effect of USFSPA to individuals who were already in the service (or even retired) before its enactment. For veterans who had both retired from active duty (and begun drawing retirement pay) prior to USFSPA's enactment, and had actually been divorced prior to USFSPA's effective date, there cannot possibly be any preclusion. A party cannot be said to have had the opportunity to bring a claim in state court, for purposes of the *Rooker-Feldman* bar, if that claim did not exist – or was not ripe – during the time of pendency of an action in state court. See *Brown & Root*, 211 F.3d at 198, 201. A constitutional challenge of USFSPA, brought at a time before USFSPA had even been legislated, would have obviously been dismissed on lack of ripeness grounds. In these situations, courts have ruled that *Rooker-Feldman* cannot bar a later federal action raising a claim that could not possibly have been brought earlier in state court. See *DLX, Inc. v. Kentucky*, 381 F.3d 511, 517 (6th Cir. 2004).

This reasoning applies also with special force to Count Two of plaintiffs' complaint, which concerns alleged procedural due process violations arising from the manner in which the defendant, the Secretary of Defense and DFAS, as a Defense

Department agency, have administered USFSPA. The nature of the procedural due process defects, as pled in the complaint, involved the lack of recoupment or refund mechanisms under the statute for veterans who were owed overpayments by former spouses, due to DFAS's defective procedures in administering the Act. See Amended Complaint, ¶¶ 15-16, A136-37.

This issue could not possibly have been the subject of a state court divorce or marital property settlement proceeding, because a plaintiff could not possibly have been aware at the time of such state litigation of the procedural defects in how the defendant might administer the Act. This federal procedural due process challenge involves the garnishment provisions of USFSPA and the manner in which the defendant interprets and administers the statute. No plaintiff would have had standing to raise these procedural due process challenges at the time of their divorce or property settlement, for the simple reason that none of these claims would have been ripe in state court at the time of the state court proceedings. Indeed, the well established case law is that *Rooker-Feldman* doctrine can only apply to bar federal hearings of causes of action for injuries that arose *prior* to the state court determinations, not *after*. See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring); *Hood v. Keller*, 341 F.3d 593, 597-599 (6th Cir. 2003) (reversing district court's application of the *Rooker-Feldman* doctrine where plaintiff

had raised facial and as-applied constitutional challenges in prior state-court criminal proceeding).

Plaintiffs cannot be penalized, under the *Rooker-Feldman* doctrine, for failing to litigate claims in state court that did not exist at the time of those state proceedings. Clearly, the retroactivity and procedural aspects of USFSPA could not have been litigated in a state divorce court proceeding, because the servicemember would not have even been aware until after the court's judgment that the USFSPA procedures would apply to him or her; a servicemember would not necessarily be able to predict whether the court would decide to divide his military retired pay as opposed to compensating the former spouse through the division of other property.

To affirm the holding below – “interpret[ing] *Rooker* to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court” – “might pose due process problems. Such a harsh rule might deprive the plaintiff of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, a result arguably contrary to the requirements of due process.” *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983) (citing *Testa v. Katt*, 330 U.S. 386 (1947); *General Oil Co. v. Crain*, 209

U.S. 211 (1908)).³

3. Inasmuch as This Case Presents a “General Attack” on USFSPA, it Falls Within the Public Interest Exception to *Rooker-Feldman*.

The Supreme Court itself has expressed a significant caveat or exception to the *Rooker-Feldman* doctrine. In *Feldman*, the Court observed that “[t]he remaining allegations in the complaints, however, involve a general attack on the constitutionality of Rule 46 I(b)(3). . . . The respondents’ claims . . . do not require review of a judicial decision in a particular case. The District Court, therefore, has subject matter jurisdiction over these elements of the respondents’ complaints.” 460 U.S. at 486-87. This “general attack” or “public interest” exception has been recognized and applied by many courts of appeals, including this Circuit. See *Guess v. Board of Medical Examiners*, 967 F.2d 998, 1002-04 (4th Cir. 1992). The exception will apply so long as the relief sought in federal court is not directed towards undoing

³ The court below held that Plaintiffs’ action can be treated in the same manner as the plaintiff’s in *Powell v. Powell*, 80 F.3d 464 (11th Cir. 1996). However, *Powell* is easily distinguishable from the instant action in terms of the relief sought by the Plaintiffs here. *Powell* involved a plaintiff who sought to enjoin the Defense Finance and Accounting Service (DFAS) from following a state court judgment ordering that his former spouse receive portions of his military retired pay. *Id.* at 476. The instant action seeks only declaratory relief, and does not seek to enjoin any state court order, only to “prohibit[] . . . state . . . courts from enforcing provisions of the Act [USFSPA] that are determined to be unconstitutional.” Amended Complaint, prayers, A140.

the prior state judgment. See *Kenmen Eng 'g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002) (“In conducting [*Rooker-Feldman*] analysis, we must pay close attention to the *relief* sought by the federal-court plaintiff.” (emphasis in original)).

To the extent that the district court appeared to blend a *Rooker-Feldman* analysis with a discussion of standing, it is important to realize that a standing analysis under *Rooker-Feldman* will turn on whether an individual plaintiff can show that she will be subject to the challenged law or rules again, or remain interested if the law or rules are found to be unconstitutional. See *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976). Because it has been uncontroverted that (1) many plaintiffs remain under the jurisdiction of DFAS for purposes of the garnishment of their retired pay, (2) some of the named plaintiffs currently have (or will have) multiple ex-spouses receiving pay under the Act, and (3) that military retirees are always subject to active duty recall (indeed, some have been recalled to active duty) and face the possibility of another divorce from a current spouse, they are subject to either a state court’s or DFAS’s application of USFSPA at a later date. Under the rule of *Facio v. Jones*, 929 F.2d 541, 544-45 (10th Cir. 1991), the named plaintiffs thus have sufficient standing to make a general challenge of the statute.

On these grounds, *Rooker-Feldman* does not apply to the individual Plaintiffs, nor does it disqualify the associational standing of any individual ULSG, LLC

members. As already noted, plaintiffs made a general constitutional attack on USFSPA in this case, much like the facial counts brought by the plaintiffs in *Feldman*, challenges found by the Supreme Court to be within a federal court's jurisdiction. The *Rooker-Feldman* doctrine is simply inapplicable to this case. The district court erred, therefore, in refusing to rule on the merits of (1) plaintiffs' substantive due process or retroactivity challenge of USFSPA, see 10/12/04 Order at 15, A27, and 3/16/2005 Order at 8-9, A48-49, and (2) plaintiffs' procedural due process attack on USFSPA's failure to provide a mechanism for refund of amounts retained in cases of conflicting state awards or overpayments to former spouses. 10/13/05 Order at 6-7, A74-75.

II. USFSPA, AS ADMINISTERED BY DEFENDANT, DENIES ESSENTIAL PROCEDURAL DUE PROCESS PROTECTIONS TO VETERANS WHOSE RETIRED PAY IS GARNISHED BY THE GOVERNMENT.

A. Standard of Review.

Appellants' procedural due process challenges, as appealed here, were resolved on summary judgment below. See Fed. R. Civ. P. 56(c). Although the district court appeared to hold that plaintiffs had failed to make a showing sufficient to establish the existence of an element essential to that party's case, 10/13/05 Order at 4 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)), A72, the trial court essentially ruled that Defendant was entitled to "a judgment as a matter of law," irrespective of

the facts. Under these circumstances, this Court shall review the district court's ruling on a *de novo* basis. See *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997). This Court will view the evidence in a light most favorable to the nonmoving party and to give her the benefit of all reasonable inferences. See *United States v. West Virginia*, 339 F.3d 212, 214 (4th Cir. 2003).

B. USFSPA's Garnishment Mechanism Violates Procedural Due Process by Failing to Provide Adequate Notice to a Veteran, Merely Upon Presentation of an Order Appearing "Regular on its Face," Without an Effective Way to Challenge Wrongful Claims, or Protect the Rights of Active Servicemembers.

Appellants renew three procedural due process challenges made to USFSPA's garnishment mechanism, and the manner in which Defendant Secretary administers those procedures: (1) that garnishment can occur merely upon the presentation (by a former spouse) of a state court order that appears "regular on its face," *id.* §§ 1408(b)(2) (definition); 1408(d); 1408(e)(5); 1408(f)(1), without any independent review by the Secretary, (2) without an effective procedure to challenge wrongful garnishments, or (3) to protect the rights of active servicemembers, *id.* § 1408(b)(1)(D).

While plaintiffs acknowledge that courts have upheld the constitutionality of statutes immunizing the United States from liability arising from the operation of 42 U.S.C. § 659(f) (allowing for garnishment of federal employee wages for child

support), see *United States v. Morton*, 467 U.S. 822 (1984), that is analytically distinct from the question of whether USFSPA can withstand procedural due process scrutiny, seeing that the Act allows for the garnishment of a federal benefit upon the mere presentation of a document appearing “regular on its face,” without an opportunity to be heard, and without provision for recoupment of funds improperly or improvidently withheld. USFSPA’s garnishment provisions fail this test, whether viewed from the perspective of general procedural due process analysis or specific case law involving the disputed statute itself.

The district court assumed, as part of its decision, that veterans have a property interest in the unencumbered receipt of their military retired pay. See 10/13/05 Order at 6, A74. Nor did the district court question whether the governmental garnishment procedure involved here implicates procedural due process. See *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-06 (1975) (garnishment statutes violate procedural due process when they allow property to be frozen pending litigation but do not require notice or opportunity for an early hearing). It is also beyond cavil that the sections of USFSPA which allow for automatic deductions of military retired pay to satisfy court-ordered property settlements operate as a garnishment or other deprivation of a property right. See *Simanonok v. Simanonok*, 787 F.2d 1517, 1521-22 (11th Cir. 1986). Defendant’s own informal rules concede as

much. See DODFMR, §§ 2902, 2906, 2907; A164, A168-69. Automatic deductions of retired pay can be accomplished upon a former spouse presenting a divorce decree or property settlement that appears merely “regular on its face.” 10 U.S.C. § 1408(b)(1)(B). Aside from a copy of the order being sent to the former servicemember at his or her “last known address,” id. § 1408(g), no other notice or opportunity to be heard is provided for in the statute before the automatic deduction of retired pay is made.

Nor is there any real dispute as to the controlling procedural due process jurisprudence in this case. The Due Process Clause of the Fifth Amendment guarantees that no person shall be deprived of life, liberty or property, without due process of law. Individuals must receive notice and an opportunity to be heard before the government deprives them of property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993). The purpose of this is to protect the individual’s use and possession of property from arbitrary encroachment and to minimize substantively unfair or mistaken deprivations of property. *Id.* at 53

Procedural due process imposes constraints on government when it deprives individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The fundamental requirement of due process is the opportunity to be

heard at a meaningful time and in a meaningful manner. *Id.* at 333. The U.S. Supreme Court has long held that some type of hearing is required before depriving an individual of a property interest. *Id.* Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. See *id.* at 334. Due process is flexible and calls for such procedural protections as the particular situation demands. *Id.*

In determining whether existing procedures satisfy procedural due process, courts typically look to the governmental and private interests affected. *Id.* Specifically, courts consider three main factors: (1) the private interests affected, (2) the risk of an erroneous deprivation of the private interest because of the procedures in place, and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens that an alternative procedural requirement would entail. *Id.* at 335.

Although pre-deprivation evidentiary hearings are not always necessary, courts will almost always require adequate notice and opportunity to reply prior to deprivation. *Id.* The Court also noted that the possible length of wrongful deprivation is an important factor in assessing the impact of the governmental action upon the private interests. *Id.* at 341 (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)). Post-deprivation remedies may satisfy due process only where pre-deprivation

hearings may be unduly burdensome in proportion to the property interest at stake or where the government is truly unable to anticipate and prevent the deprivation. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

The timing of the notice and hearing is crucial – they must be provided at a time when deprivation of the property can still be prevented, regardless of whether the owner may at a later hearing, post-deprivation, receive his property after he establishes that the deprivation was wrongful. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (holding that “no later hearing or damages award can undo the fact that an arbitrary taking that was subject to the right of procedural due process has already occurred”). Further, it is not enough if a statute requires the claimants be subject to liability and damages if they are wrong, because the right to a prior hearing is “the only truly effective safeguard against arbitrary deprivation of property.” *Id.* at 83-84. A temporary, nonfinal deprivation of property still constitutes a “deprivation.” *Id.* at 85.

Courts have made clear that the goal of procedural due process is not efficiency or accommodating all possible interests; its goal is to protect an individual’s property interest. See *id.* at 92. Therefore, any “ordinary costs in time, effort and expense” that a pre-deprivation hearing requires cannot outweigh an individual’s constitutional right to such a hearing. See *id.* Accordingly, the garnishing of property without notice or

a hearing can only be justified in extraordinary circumstances, when it is “directly necessary to secure an important governmental or general public interest, there is a special need for very prompt action, and the state keeps strict control over its monopoly of legitimate force.” *Id.* at 90-92.

Lastly, despite the government’s and lower court’s reliance (10/13/05 Order at 8-9, A76-77) on *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), it cannot seriously be suggested that the only process that veterans are due in their federal garnishment procedure is to have participated in a state court action that might (or might not) have established their underlying liability. The Supreme Court in *Endicott-Johnson* dealt with a post-judgment garnishment statute only applicable to persons earning more than \$12 per week, and then only to 10% of their earnings. The judgment creditor had to prove in advance of issuance of the writ of garnishment that more than \$12 per week was due and owing the debtor. See 266 U.S. at 286. In short, the garnishment statute at issue in that case was narrowly-drawn as to impact only a small portion of a garnishee’s income. By contrast, USFSPA and DFAS garnishments can affect a far larger portion of a retired veteran’s income, usually up to 50% of their income, far exceeding the parameters of *Endicott*.

Much more importantly, *Endicott-Johnson*’s procedural due process jurisprudence has been abrogated by the Supreme Court’s analysis in *Mathews v.*

Eldridge, 424 U.S. 319 (1976), and its admonition that “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’.” Id. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965)). Subsequent cases, including those decided by this Court, have held that *Endicott* simply did not consider the existence of exempt property that might nevertheless be erroneously seized if some post-judgment notice and hearing are not accorded to the debtor or garnishee. See *Reigh v. Schleigh*, 784 F.2d 1191, 1194 (4th Cir. 1986). Finally, both *North Ga. Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 601, 605-06 (1975), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 337 & n.1 (1969), involved situations where there had been some prior state court judicial process, but the U.S. Supreme Court still insisted on additional procedural due process protections for garnishments.

Even under the fairly relaxed procedural due process standards enunciated by the U.S. Supreme Court, the lack of any meaningful post-deprivation (much less pre-deprivation) hearing or review is fatal for the disputed provisions of USFSPA. Other courts have so held. In *Simanonok*, the U.S. Court of Appeals for the Eleventh Circuit – for purposes of reversing a district court’s dismissal of a due process challenge of USFSPA – held that “it is not clear that the Act and its accompanying regulations provide individuals in Simanonok’s position with all the process due them.” 787 F.2d

at 1522 (at the time of that case, defendant had promulgated regulations under USFSPA, then codified at 32 C.F.R. § 63.6; these regulations are no longer in force). Distinguishing the statute at issue in *Morton*, 467 U.S. 822 (1984), the *Simanonok* Court ruled that the unavailability of basic procedural safeguards in USFSPA – the lack of effective notice, no opportunity to be heard, and no mechanism for amounts improperly garnished or withheld – raised serious questions about USFSPA’s constitutionality. See 787 F.2d at 1523. This Court should also so rule.

1. The “Regular on its Face” Provision

The “regular on its face” provision of the Act gives insufficient protection to the servicemember from frivolous, abusive or fraudulent filings, or from proceedings in state courts that lacked the necessary jurisdiction over the former servicemember in the first place. 10 U.S.C. §§ 1408(b)(2) (definition); 1408(d); 1408(e)(5); 1408(f)(1). As currently formulated, USFSPA imposes a duty on defendant to mandatorily reduce a servicemember’s retired or retention pay upon receipt of a state court order that appears “regular on its face.” This violates procedural due process by relieving defendant Secretary from independently determining the validity of a state court order, even to the extent of declining to ascertain whether the issuing state court had jurisdiction to issue the order.

Particularly worrisome is the provision in section 1408(b)(2) that a court order only appear “legal in form” and give no “reasonable notice that it is issued without authority of law.” Id. § 1408(b)(2)(C). Given also that officers and employees of the United States are relieved from liability if the state court order is “regular on its face,” it disallows a servicemember the opportunity to seek indemnification from the United States for an improper deduction of retirement pay. See id. § 1408(f); see also *Goad v. United States*, 24 Cl. Ct. 777, 785 (1991); *Millard v. United States*, 16 Cl. Ct. 485, 488 (1989). Indeed, the informal rules relied upon by defendant confirm that the servicemember receives no protections whatsoever from DFAS in the determination of the acceptable form of state court orders. See 7B DoD Financial Management Regulations [“DODFMR”] §§ 2906, 291003, A168-69, A172 (“If a court order on its face appears to confirm to the laws of the jurisdiction from which it was issued, the designated agent [DFAS] will not be required to ascertain whether the court had obtained personal jurisdiction over the retiree.”).

USFSPA sections 1408(b)(2), 1408(d) and 1408(e)(5) are unconstitutional to the extent that they would permit the Secretary to enforce a state court order that merely appears “regular on its face.” Procedural due process requires a higher level of certification for such orders. At a minimum, procedural due process requires that (1) the Secretary exercise full diligence in reviewing state court orders, especially to

ascertain that the issuing state court had proper jurisdiction over the servicemember, as specified in sections 1408(c)(4) and 1408(d)(7) of the Act; and (2) a servicemember be fully indemnified in situations where a deduction to retired pay was premised on an order later found to be improper.

Finally, it certainly does not offend federalism for a federal agency to actually exercise independent judgment in reviewing the propriety of a state court order (whether for garnishment or other purposes). Under the federal Full Faith and Credit Act, 28 U.S.C. § 1738 (state “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”), federal courts (and, by implication, federal agencies) must confirm whether the issuing state court properly had both subject-matter and personal jurisdiction in the matter, before granting full faith and credit. See *Robart Wood & Wire Products Corp. v. Namaco Industries, Inc.*, 797 F.2d 176, 178 (4th Cir. 1986) (applying an independent personal jurisdiction analysis even where New York order was “regular on its face”).

2. The Lack of a Pre- or Post-Deprivation Hearing and Review of SCRA Compliance.

The district court, relying essentially on the representations made by the

defendant Secretary as to the procedural protections afforded veterans whose retired pay was being garnished, 10/13/05 Order at 9-11, A77-79, concluded that these passed constitutional muster by providing adequate pre-deprivation process. They do not.

a. Defendant Secretary has insisted, and the district court apparently agreed, that USFSPA actually affords substantial procedural protections to former servicemembers who are having their retired pay garnished by the Defense Finance and Accounting Service (DFAS), the defendant agency charged with administering the Act. However, on closer examination of defendant's argument and contentions, these supposed procedural protections are utterly illusory.

Defendant is correct that before a garnishment of retired pay can occur, (1) DFAS must be properly served at their "last known address,"⁴ (2) with a certified copy of a state court divorce or property settlement decree, which (3) properly identifies a former servicemember, which (4) is "regular on its face," 10 U.S.C. § 1408(b)(2), and which (5) certifies that it is in compliance with the Servicemembers' Civil Relief Act ("SCRA"), 50 U.S.C. App. § 501 et seq. The Secretary's contention is problematic in that each of these supposed procedural protections depends on the submissions,

⁴ While Plaintiffs do not, on appeal, renew their specific challenge of the "last known address" notice requirement of USFSPA section 1408(g), they do observe that, in combination with the lack of other procedural protections in the statute, that veterans might be entirely unaware that their retired pay is being garnished, until such time when they see a deduction in their monthly payment.

statements or certifications made either by the party seeking garnishment (the former spouse) or within the text of a state court divorce or property settlement decree. Neither of these sources is likely to represent or reflect the interests or concerns of the former servicemember, and neither of these sources of the indicia of procedural due process is subject to any independent review by the defendant Secretary or by DFAS. By its very terms, DFAS regulations, see DODFMR, §§ 2906, 291003, A168-69, A172, indicate that the agency will not conduct an independent review of (1) whether the state court actually had jurisdiction over the former servicemember; (2) whether there are other substantive defects in a state court order otherwise “valid on its face,” and (3) whether or not the SCRA was actually complied with or not.

One specific example is that while the Act requires that state courts issuing decrees against active duty servicemembers comply with the Servicemembers Civil Relief Act (SCRA), 50 App. U.S.C. § 501 et seq. (formerly known as the Soldiers’ and Sailors’ Civil Relief Act), see 10 U.S.C. § 1408(b)(1)(D), no way is provided to a servicemember to later challenge, either before or after garnishment of their retirement pay by DFAS, whether the provisions of the SCRA were, in fact, “observed” by the state court. DFAS Rules merely provide that a state court order should “certify that the rights of the member were observed under” the SCRA. DODFMR, § 290602, A168. Indeed, DFAS’s own Training Materials for its

employees blithely asserts that “SSCRA [compliance] is usually not a problem in USFSPA applications.” DFAS Training Materials, Plaintiffs’ Summary Judgment Opposition, Exh. B, at 2 (¶ III.A.2). In view of the fact that the SCRA, consistent with the Due Process Clause, is to be liberally construed in favor of servicemembers, see *Boone v. Lightner*, 319 U.S. 561, 575 (1943), it is particularly important that some procedural mechanism be available under USFSPA to test the sufficiency of state court compliance with SCRA, insofar as orders issue from state courts with the effect of garnishing a servicemember’s retired pay.

b. There should be no doubt that neither USFSPA, nor DFAS regulations thereto, provide adequate pre- or post-deprivation remedies. One federal court of appeals has so ruled. In *Simanonok*, the Eleventh Circuit held that, unlike the Social Security Act’s garnishment procedures which “provide that the payment of money shall be suspended if the individual whose pay has been garnished challenges the validity of either the garnishment procedures or the underlying court order,” USFSPA gives no such opportunity. 787 F.2d at 1523 (citation omitted).

DFAS Rules provide scant authority for any form of internal review by DFAS, in the event that a servicemember (or, for that matter, a former spouse) is dissatisfied by a decision made by a DFAS paralegal or attorney. Section 290903, A172, of the Department of Defense Financial Management Regulations (DODFMR) does not

provide for any structured review or determination made in response to a challenge by a veteran. All it indicates is that “[t]he designated agent [often a DFAS paralegal] will consider any response by the retiree and will not honor the court order if it is defective or is modified, superseded or set aside.” Indeed, this provision is consistent with other DODFMR provisions which disclaim the responsibility of DFAS to conduct an independent review of whether a state court actually had jurisdiction over the former servicemember; or whether there are other substantive defects in a state court order otherwise “valid on its face,” or whether or not the SCRA was actually complied with or not.

The other DODFMR provision relied upon by defendant Secretary (and, ostensibly, the lower court), is section 2912 (denominated “Reconsideration”). See A174. This provision hardly qualifies as offering a clear and structured procedure for review of an adverse DFAS decision nor as a robust procedural due process protection to any party involved in a DFAS garnishment matter. Although there appears to be some requirement that a determination be made, it is not required to be in writing or even that it be communicated to the parties involved. In the event that it is the former spouse that is seeking reconsideration of an order *favorable* to a former servicemember, there is no procedure for a responsive filing by that former servicemember. In short, the reconsideration process contemplated under DODFMR

section 2912, A174, is informal, ex parte, and incomplete.

c. Under these circumstances, the risks of erroneous deprivations of veterans' property (in the form of retired pay) through the USFSPA and DFAS garnishment process are significant and weighty when viewed under the analysis of *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (need to analyze "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."). Quite apart from the illusory protections of the statute, USFSPA acts as a unilateral mechanism for garnishment of retired pay in favor of a former spouse. The garnishment process is initiated by the former spouse, through the submission to DFAS of a state court decree, and it is the former spouse who makes the self-serving declarations that such a decree conforms with law and that the SCRA was complied with. It is thus manifestly clear that DFAS's decision-making process is one-sided and the risks of erroneous deprivations are correspondingly higher. See *Mallette v. Arlington County Employees' Supplemental Retirement Sys.*, 91 F.3d 630, 641 (4th Cir. 1996) ("The risk of an inaccurate and unfair deprivation mounts when the decisionmaking is one-sided.")

Defendant Secretary will likely persist with the contention that, under the *Mathews v. Eldridge* analysis, a cost-benefit calculus can be imposed that if hearings

are required as a remedy, that such may be deemed to be too costly or inefficient. For starters, plaintiffs have never suggested that DFAS would be required to hold a hearing or “mini-trial” for every alleged servicemember challenge of a garnishment; an exchange of correspondence between the servicemember and former spouse, with a written ruling by DFAS, will often be sufficient. But neither the Act nor DFAS regulations provide for even this relatively unstructured form of procedural due process. See *Mathews*, 424 U.S. at 333; *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970). There is certainly no requirement for DFAS to provide written grounds for its garnishment decision, nor any stated avenue for appeal. Cf. DODFMR § 290903, A172 (requiring only that DFAS employee “will consider any response by the retiree”).

In another respect, defendant’s argument about the application of a cost-benefit analysis is suspect. If such cost-benefit analysis applies, it is only relevant to the necessity of pre-deprivation procedures; it has no application at all to post-deprivation remedies. See *Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981) (“However, as many of the above cases recognize, we have rejected the proposition that ‘at a meaningful time and in a meaningful manner’ always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any *preseizure* hearing under a

state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.”) (emphasis added).

In short, veterans are denied due process when the government garnishes their military retired pay on behalf of former spouses. Neither USFSPA, nor defendant Secretary’s regulations issued pursuant thereto, provide such adequate process, in the form of an effective and real pre-deprivation or post-deprivation challenge mechanism. In these particular respects, the statute is thus unconstitutional.

III. USFSPA’S TREATMENT OF DIFFERENT CLASSES OF FEDERAL RETIRED PAY VIOLATES EQUAL PROTECTION.

A. Standard of Review.

The district court disposed of plaintiffs’ equal protection challenge on dismissal for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). See 3/16/05 Order at 18-26, A58-66. A Rule 12(b)(6) motion should be granted only in limited circumstances. Specifically, such a motion “should only be granted if, after accepting all well-pleaded allegations in the plaintiff’s complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff’s favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 244

(4th Cir. 1999). This Court reviews a district court's dismissal under Rule 12(b)(6) *de novo*. See, e.g., *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991).

B. USFSPA Violates Equal Protection by Impermissibly Discriminating, Without a Rational Purpose and Based on Gender Stereotypes, Between Different Classes of Federal Retirees.

The essence of plaintiffs' equal protection claim is that the operative provisions of the statute are premised on three crucial classifications. The first is the unfavorable and discriminatory treatment of the retired pay of uniformed servicemembers, as distinct from other groups of former federal government employees. The second classification is that the former spouses of uniformed servicemembers, a group largely defined as women by Congress (in enacting the statute in 1982), are entitled to a higher degree of income and property protection as would be accorded in relation to the former spouses of other classes of federal government employees. The third classification is that the spouses (whether men or women) of former uniformed servicemembers receive more favorable treatment in the collection of retired pay than do servicemembers themselves because former spouses are not subject to the same conditions and duty obligations as former servicemembers are required to observe (including availability for recall to service and comportment with the Uniform Code of Military Justice (UCMJ)) if they are to continue to collect retirement pay. Amended

Complaint ¶ 22, A138-39.

1. *Constitutional Standards for Equal Protection Claims.* The equal protection claims raised by plaintiffs involve both gender distinctions (as to the second classification raised in paragraph 22 of the complaint), and to non-suspect classifications (as to the first and third classifications). These distinctions obviously implicate different constitutional standards of review.

a. *Gender-based Classifications.* When a statute is gender-neutral on its face but disproportionately impacts women, a court must first decide whether it is in fact neutral or whether it is gender-based.⁵ *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979). If the classification, covert or overt, is neutral, then a court must determine whether the adverse effect reflects “invidious gender-based discrimination.” *Id.* In deciding this, courts look to the impact of a statute, and if purposeful discrimination is found, then the statute will be subject to heightened scrutiny. *Id.* Since discriminatory purpose may be difficult to prove, courts have held that there are cases in which “impact alone can unmask an invidious classification.” *Id.* at 275. Further, the magnitude of the discrimination is irrelevant; discrimination was

⁵ The district court found USFSPA to be ostensibly gender neutral. 3/16/05 Order at 20, A60. And although section 1408(a)(6) refers generically to spouses, in no less than five other sections, the male pronoun (“his”) is used to refer to the servicemember. See *id.* §§ 1408(c), 1408(c)(4), 1408(d)(2), 1408(d)(5), 1408(g).

either a factor that influenced the legislature or it was not. *Id.* at 277.

Discriminatory purpose requires that the legislator purposely chose a certain course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. *Id.* at 279. Proof of discriminatory intent is dependent upon practical, objective factors, including historical background and events leading up to the statute's enactment. *Id.*; see also *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). Nonetheless, a legislature's true intent may be obvious based on the statute's results or the results it avoids. *Feeney*, 442 U.S. at 279.

b. *Non-Race/Non-Gender Classifications.* When a statute classifies persons according to categories other than race or gender, it must be rationally related to a legitimate governmental interest in order to satisfy the Equal Protection Clause. *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). Specifically, it must meet three criteria: (1) there must be a plausible policy reason for the classification, (2) the legislative facts on which the classification is based must have been rationally considered to be true by the legislature, and (3) the relationship of the classification to its goal cannot be so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Further, the governmental interest advanced must be identifiable, even if the legislature was silent. *Id.* at 16.

2. *USFSPA unfairly burdens female servicemembers and veterans.* Drafted at

a time when there were relatively few female servicemembers (and virtually no female veterans drawing retired pay), USFSPA was clearly intended to benefit the female spouses of then-serving officers and enlisted personnel. See *Department of Defense Authorization Act, 1983*, S. Rep. No. 97-502, 97th Cong., 2d Sess. 8 (1982) [“USFSPA Report”], reprinted in 1982 U.S.C.C.A.N. 1596, 1602-03; see also 1982 CONG. REC. 18314, 18315 (remarks of the Act’s floor sponsor), 18318 (remarks of Rep. Ferraro), 18319 (remarks of Rep. Whitehurst) (July 28, 1982). Today, nearly one in six members of the armed forces are women, and a similar percentage of women are making the military a career and are thus entitled to full retirement pay. See U.S. Census Bureau, <http://www.census.gov/Press-Release/www/2003/cb03-ff04se.html> (2003 statistics) (visited January 17, 2006).

As a consequence of this, the factual premises of the curative aspects of the statute are simply no longer applicable. But, even more significantly, the large numbers of women servicemembers and retirees – something not contemplated by Congress – has resulted in some classifications present in the Act resulting in substantial burdens to female servicemembers and veterans. A number of the female plaintiffs herein have alleged unfair treatment by virtue of USFSPA’s provisions. See Amended Complaint ¶¶ 7(a), 7(gg), 7(uu), A116, A126, A130-31.

The chief burden is that USFSPA’s treatment of a female servicemember’s retired

pay places her at a substantial disadvantage in relation to a non-servicemember husband. In legislating USFSPA in 1982, Congress assumed that the “service spouse” was typically a stay-at-home wife, who had no independent career, or opportunity to work and thus earn her own pension. See USFSPA Report at 8, 1982 U.S.C.C.A.N. at 1603 (quoting a survey indicating that “Male and female workers are equally likely to be awarded their own pensions in a divorce settlement. However, since men are more likely than women to hold jobs that allow them to acquire pensions, they are also more likely to be awarded those pensions at divorce.”). In situations where the female servicemember’s only asset is likely to be her entitlement to retirement pay, allowing it to be subject to the claims of a non-servicemember husband (who may well have multiple sources of income, including his own pension) is manifestly unfair, and essentially reverses the polarity of the gender assumptions that Congress employed in legislating the statute.

3. *As between former servicemembers and their non-veteran former spouses, veterans are impermissibly disadvantaged to the extent that they must continue to be subject to military discipline and recall to active duty in order to continue receiving their retired pay, while their former spouses will receive their share of retired pay irrespective.* Those former servicemembers receiving retired pay owe continuing duties to the U.S. armed forces, not the least of which is continued availability for active

service, continued comportment with the strictures of military discipline, and compliance with the Uniform Code of Military Justice. See *United States v. Tyler*, 105 U.S. 244, 245 (1881); *Hostinsky v. United States*, 292 F.2d 508, 510 (Ct. Cl. 1961); *United States v. Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986). By way of contrast, non-veteran former spouses can receive their share of the former servicemember's retired pay, even if they have been convicted of a criminal offense or are not U.S. citizens. Former spouses (unless they are themselves servicemembers) do not sign an enlistment contract or take a commission, do not take an oath of enlistment or commission, and perform no official duties paid for by taxpayers. Therefore, USFSPA's legal effect is that former spouses have greater rights to military retainer or retired pay than do the armed forces personnel who served and fulfill the on-going requirements to earn such pay.

Although this distinction and classification perpetuated by USFSPA is not gender related, and is thus not subject to heightened scrutiny, it cannot be held to be rationally related to a legitimate governmental interest, even under the most forgiving equal protection standard. To allow non-veteran former spouses to receive military retired pay by way of a property settlement upon divorce, without any qualification or restriction, even as the former servicemember has to comply with substantial, on-going duties, bears no relation to Congress's stated goal of recognizing the sacrifices made by

service spouses. Plaintiffs would have no constitutional complaint with any statute which allows former spouses to receive retired military pay portions when the servicemember has been disciplined for abuse. Cf. *In re Marriage of Beltran*, 183 Cal. App. 3d 292, 227 Cal. Rptr. 924 (Cal. App. 1986) (holding that where former servicemember had forfeited his entitlement to retired pay, by virtue of being court-martialed, he was nonetheless liable for reimbursing his former spouse for her lost share of his retired pay). But such a provision, in order to be consistent with the Equal Protection Clause, must be applied symmetrically. Former spouses who engage in behavior or conduct that, if engaged in by the former servicemember would render them ineligible for further retired pay, should likewise be barred from receipt of such payments. At a minimum, those veterans that are actually recalled to active duty – such availability being a legal predicate for the receipt of retired pay – should not be obliged to reimburse or retribute to a former spouse retired pay that is foregone by reason of such recall to active service.

4. *In legislating USFSPA, Congress subjected the military retired pay of veterans to greater encumbrances by former spouses than the retirement pay or pensions of other classes of government employees.* Congress has legislated statutory schemes for the allocation of the pensions, annuities, or benefits due to other classes of federal government employees, when such pensions, annuities or benefits are the subject

of state court divorce decrees or property settlements. These statutes include (1) the general civil service retirement laws, see 5 U.S.C. §§ 8345, 8417, 8445 [Civil Service Retirement Act]; (2) those applicable to Foreign Service officers of the Department of State, see 22 U.S.C. §§ 4044, 4054, 4069a, 4069b, 4069b-1, 4071j, 4159 [Foreign Service Retirement Act]; and (3) the statute regarding agents and officers of the Central Intelligence Agency, see 50 U.S.C. §§ 2032, 2033, 2034, 2035, 2154 [CIA Retirement Act]. Even a cursory review of these other statutory schemes governing the allocation of retirement pay and benefits in the event of divorce, and the rights of former spouses to encumber such pay and benefits, indicate that the retired pay of veterans of the armed forces is subjected to a much higher degree of encumbrance under USFSPA, than that of similarly-situated former government employees under the Civil Service, Foreign Service, and CIA Retirement Acts.

To take just one example, under USFSPA, a former spouse is entitled to make a claim on a former servicemember's retired pay, even if the former spouse has remarried. Under *all* of the other federal statutes regarding allocation of retirement pensions, annuities and benefits between a former government employee and a former spouse, the rights of a former spouse to claim an entitlement to these pensions, annuities and benefits terminates if the former spouse remarries before a certain age. See Civil Service Retirement Act, 5 U.S.C. § 8445(c)(2) (benefits terminate if former spouse

remarries before age 55); id. § 8445(h) (remarriage termination provision does not apply if former spouse and government employee were married at least 30 years); Foreign Service Retirement Act, 22 U.S.C. § 4054(a)(2); id. § 4054(b)(2); id. § 4054(c)(3)(c) (terminating benefits if former spouse remarries prior to age 60); id. § 4069a(b)(1); id. § 4069a-1(b)(1); id. § 4069b(c)(1); id. § 4069b-1(c)(1); id. § 4071j (terminating benefits if former spouse remarries prior to age 55); CIA Retirement Act, 50 U.S.C. § 2032(a)(2); id. § 2032(b)(2); id. § 2032(b)(5); id. § 2032(c)(3)(C); id. § 2034(b)(1); id. § 2035(b)(1); id. § 2154(c)(3); id. § 2154(d)(3) (terminating benefits if former spouse remarries prior to age 55).

This distinction in the treatment of military retired pay from that afforded to other classes of federal government employees is supported by no plausible policy reason, and the relationship of the classification to its goal is so attenuated as to render the distinction arbitrary or irrational. See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Congress's ostensible goal was to provide income security to the former spouses of military servicemembers, especially as they entered later working years or retirement, and to protect them from the financial dislocations that sometimes arise from divorce. See USFSPA Reort at 8, 1982 U.S.C.C.A.N. at 1603. Obviously, former spouses that have formed new families prior to ending their work life or entering retirement are insulated from the effects of income or wealth loss arising from the ending of an earlier

marriage. Congress has recognized this in legislating the Civil Service, Foreign Service and CIA Retirement Acts, by prescribing a rule that the former spouse of a government employee who remarries prior to age 55 or 60 is not entitled to the retirement pay or benefits of a former spouse. USFSPA, by contrast, has led to situations in which former spouses are free to remarry, to form new families, and still draw their former spouse's retirement pay. As defendant noted in its 2001 Report to Congress, A Report to Congress Concerning Federal Former Spouse Protection Laws (Sept. 4, 2001), available at <http://www.dod.mil/prhome/spouserev.html> (visited January 14, 2006), at least one government agency is on record as taking the position that, "in most circumstances, it is difficult to 'rationalize' continued payments after the remarriage of a former spouse." Id. at 57.

The district court thus legally erred in dismissing plaintiffs' equal protection claims.

IV. USFSPA WAS ENACTED UNDER THE REGULATION OF THE ARMED FORCES AND FULL FAITH AND CREDIT CLAUSES, DEMANDING UNIFORMITY OF APPLICATION.

A. Standard of Review.

The district court disposed of plaintiffs' uniformity challenge on dismissal for failure to state a claim upon which relief could be granted under Fed. R. Civ. P.

12(b)(6). See 3/16/05 Order at 16-18, A56-58. The same standard of review, as discussed supra at 43, is applicable here.

B. The Act's Unique Constitutional Predicates Demand Uniformity of Application.

1. In legislating certain aspects of USFSPA, Congress was required to legislate uniformly, so that there would be consistent application of the statute to servicemembers located in various states around the country and that discordant applications of the statute by state courts would not give rise to disparate treatment to servicemembers affected by its provisions dependent on the vagaries of state law. See Amended Complaint ¶ 18, A137. While the district court noted that various state courts had interpreted provisions of USFSPA divergently, 3/16/05 Order at 17, A57, the trial court rejected plaintiffs' legal predicate that Congress was constitutionally required to legislate uniformly. This ruling was error. The district court thus did not reach the questions of whether the non-uniformity in USFSPA was substantial and material, and what relief was appropriate in that event.

2. *Congress was required to legislate uniformly with respect to USFSPA's treatment of military retired pay and the full faith and credit to be accorded to state court property settlements that affect the disposition of military retired pay.* At the outset, appellants wish to be clear that they are not asserting a general constitutional

duty for Congress to legislate uniformly in respect of the exercise of all its powers granted under Articles I and IV of the Constitution. Such a position would be unsustainable. But USFSPA is no typical statute. Rather, it was legislated at the confluence of two congressional powers: the authority “to make Rules for the Government and Regulation of the land and naval forces,” U.S. CONST. Art. I, § 8, cl. 14; and the power “by general Laws prescribe the Manner in which [state court judicial] Proceedings shall be proved, and the Effect thereof.” *Id.* Art. IV, § 1. Because of the text and context of these grants of power, both have been assumed by the U.S. Supreme Court to require Congress to legislate in such a way as to give rise to uniform application by state courts.

a. The United States Supreme Court has recognized the military’s need for uniformity in its governing standards. See *United States v. Shearer*, 473 U.S. 52, 58, n. 4 (1985) (in discussing *Feres* doctrine, the Court concluded that “it would be anomalous for the Government’s duty to supervise servicemen to depend on the local law of the various states”); *United States v. Johnson*, 481 U.S. 681, 695 (1987) (Scalia, J., dissenting) (“Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the ‘distinctively federal’ relationship between the United States and enlisted personnel.”); *United States v. Stanley*, 483 U.S. 669, 702-703 (1987) (Brennan, J., concurring in part and dissenting).

The relationship between the government and members of the armed forces is distinctively federal in character. *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947). This distinctiveness transcends a mere presumption of federal preemption under the Supremacy Clause, and has become a constitutional command of uniformity. To whatever extent state law may apply to govern the relations between soldiers and persons outside the armed forces, the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority. See *id.* at 305-306. Certain powers and relations of the federal government and military personnel require uniform national disposition rather than diversified state rulings. See *id.* at 307. Federal fiscal policy matters involving the military are more appropriate for uniform national treatment rather than diversified local treatment, and should be determined by federal judicial decision, rather than by varying state policies. *Id.* As the federal government has the exclusive power to establish and define the relationship by virtue of its military and other powers, it also has the power to protect the relation once formed from harms inflicted by others. See *id.* at 306.

b. USFSPA's provisions granting recognition and enforcement of state court property settlements following divorce, see 10 U.S.C. §§ 1408(a)(1) - (3), 1408(b), 1408(c), 1408(d), were clearly intended to give a form of full faith and credit

to state court property settlements involving military retired pay and to enforce them through not only a federal mechanism (the garnishment of retired pay), but also through a requirement of recognition by other state courts. As such, these provisions of USFSPA were legislated pursuant to Congress' powers under the Full Faith and Credit Clause of Article IV of the Constitution. Although the Clause was not specifically invoked in the statutory text or legislative history, Congress's interest was in enforcing state court judgments and to ensure against inappropriate forum shopping. See USFSPA Report at 8-9, 1982 U.S.C.C.A.N. at 1603-04 (committee report), 1630-31 (statement by Lawrence J. Korb, Assistant Secretary of Defense); see also *Simanonok*, 787 F.2d at 1522 (noting connection between USFSPA and full faith and credit principles).

Congress's powers in acting under the Full Faith and Credit Clause are not unlimited, and are subject to a textual stricture found only in a handful of other provisions in the Constitution. In acting under this provision, Congress is required to legislate through "general Laws," U.S. CONST. Art. IV, § 1, which must have uniform effect throughout the nation. See *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813). The requirement of general, uniform legislation has been recognized by the Supreme Court as a limit on Congress's power to legislate under the Full Faith and Credit Clause. See *Sherrer v.*

Sherrer, 334 U.S. 343, 352 & n.18 (1948). Indeed, the Court has said that “the Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections,” *Estin v. Estin*, 334 U.S. 541, 545-46 (1948), but, rather, in a uniform fashion in a way consistent with the Framers’ purpose of unifying the nation by making it easier to enforce state court judgments and orders across state lines. See *id.*, see also *Hughes v. Fetter*, 341 U.S. 609, 612 & n.9 (1951) (describing the “strong unifying principle embodied in the Full Faith and Credit Clause”).

The district court thus erred in holding that USFSPA was not governed by constitutional uniformity concerns. If this Court agrees, this claim should be remanded to the district court for further proceedings as to the appropriate remedy to cure this constitutional defect.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed, the relevant portions of the Uniformed Services Former Spouses Protection Act (USFSPA) be held unconstitutional or rendered constitutionally-consistent, and the case be remanded to the district court for any further proceedings.

REQUEST FOR ORAL ARGUMENT

This appeal presents an issue of first impression in this Circuit: the constitutionality of various aspects of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408. In addition to raising procedural due process, equal protection, and uniformity challenges to USFSPA, this case raises an issue as to the application of the *Rooker-Feldman* doctrine in relation to Appellants' substantive due process claims. In view of the issues raised, and the wide public importance of the case, oral argument may be of value to the Court in resolving this appeal.

Respectfully submitted,

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January 23, 2006

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of FRAP 32(a)(7)(B) because this brief contains 13,529 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the typestyle requirements of FRAP 32(a)(6) because this brief has been prepared with a proportionately spaced typeface using WordPerfect 9 in font size 14, Times New Roman.

Attorney for Appellants

Dated: January 23, 2006

Appendix A

Relevant Provisions of USFSPA, 10 U.S.C. § 1408

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A--GENERAL MILITARY LAW
PART II--PERSONNEL
CHAPTER 71--COMPUTATION OF RETIRED PAY

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process.--For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the

Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because

of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations

of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(6) In the case of a court order for which effective service is made on the Secretary concerned on or after August 22, 1996, and which provides for payments from the disposable retired pay of a member to satisfy the amount of child support set forth in the order, the authority provided in paragraph (1) to make payments from the disposable retired pay of a member to satisfy the amount of child support set forth in a court order shall apply to payment of any amount of child support arrearages set forth in that order as well as to amounts of child support that currently become due.

(7)(A) The Secretary concerned may not accept service of a court order that is an out-of-State modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c)(4) over both the member and the spouse or former spouse involved.

(B) A court order shall be considered to be an out-of-State modification for purposes of this paragraph if the order--

(i) modifies a previous court order under this section upon which payments under this subsection are based; and

(ii) is issued by a court of a State other than the State of the court that issued the previous court order.

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the

spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of officers and employees of United States.--(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on Secretary concerned.--A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

....

(j) Regulations.--The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(k) Relationship to other laws.--In any case involving an order providing for payment of child support (as defined in section 459(i)(2) of the Social Security Act) by a member who has never been married to the other parent of the child, the provisions of this section shall not apply, and the case shall be subject to the provisions of section 459 of such Act.

CREDIT(S)

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov.

14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226; Pub.L. 107-296, Title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 108-189, § 2(c), Dec. 19, 2003, 117 Stat. 2866.)

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of January, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Brief of Appellants and Appendix. Service was made on the following counsel by causing a true copy of the foregoing to be served on Appellee by first class mail addressed to:

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The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.

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