No. 09-2393

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANDRE GORDON,

Plaintiff-Appellant

v.

PETE'S AUTO SERVICE OF DENBIGH,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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RULE:

Federal Rule of Appellate Procedure 29. 2

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
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INTEREST OF THE UNITED STATES

Congress enacted the Servicemembers' Civil Relief Act (SCRA) "to provide for, strengthen, and expedite the national defense" by enabling servicemembers "to devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. 502(1). In *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964), this Court held that the United States may sue to enforce the Soldiers' and Sailors' Civil Relief Act (SSCRA) – the predecessor of the SCRA. *Id.* at 932-933 (The "interest of the national government in the proper implementation of its policies and programs involving the national defense is such as to vest in it the non-statutory right to maintain this [SSCRA] action."). Indeed, without vigorous

enforcement of the SCRA, the nation's ability to meet its critical defense needs may suffer. In view of the limited resources available to the United States to enforce the SCRA, private actions such as this one serve an important role in the SCRA's enforcement. Accordingly, the United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29.

ISSUES PRESENTED

The United States will address the following issues:

1. Whether 50 U.S.C. App. 512(c), Section 102(c) of the SCRA, eliminates federal question jurisdiction where the SCRA claim is the only federal claim.

2. Whether 50 U.S.C. App. 537, Section 307 of the SCRA, creates an implied private cause of action for damages.

STATEMENT

1. Congress first enacted the SSCRA in 1918, soon after the United States entered World War I. See Soldiers' And Sailors' Civil Relief Act, Pub. L. No. 65-103, 40 Stat. 440. The Act "covered default judgments, stays of proceedings, evictions, mortgage foreclosure, insurance, and installment contracts." See H.R. Rep. No. 81, 108th Cong., 1st Sess. 33 (2003). The Act expired after the war but was reenacted with only minor changes in 1940. *Ibid*; see Soldiers' And Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, 54 Stat. 1178. Then, in 1942, Congress modified many of the existing provisions of the Act and added new protections. See H.R. Rep. No. 81, 108th Cong., 1st Sess. 33 (2003); Soldiers' And Sailors' Civil Relief Act Amendments of 1942, Pub. L. No. 77-732, 56 Stat.

769. Congress amended the Act 12 more times between 1942 and 2003. See H.R. Rep. No. 81, 108th Cong., 1st Sess. 34 (2003). In *Dameron* v. *Brodhead*, 345 U.S. 322, 225 (1953), the Supreme Court ruled that the SSCRA is constitutional because its passage was a legitimate exercise of Congress's power "to declare war" (U.S. Const. Art. I, § 8, cl. 11) and "to raise and support armies" (U.S. Const. Art. I, § 8, cl. 12). In 2003, Congress re-titled the law as the Servicemembers' Civil Relief Act, and comprehensively restated, clarified, and strengthened many of its protections. See H.R. Rep. No. 81, 108th Congress, 1st Sess. 35 (2003); Pub. L. No. 108-189, 117 Stat. 2835.

The SCRA provides many important protections for servicemembers, including the right: not to be charged interest on obligations or liabilities in excess of 6% per year during a period of military service, 50 U.S.C. App. 527; not to be evicted from the servicemember's residence except by court order, 50 U.S.C. App. 531; not to have an installment contract for purchase or lease of personal property rescinded or terminated for breach during military service, 50 U.S.C. App. 532; and not to have property seized or foreclosed upon without court order, 50 U.S.C. App. 533. The SCRA also protects servicemembers' life insurance policies by granting the right not to have an assignee of the policy exercise any right or option obtained under the assignment without a court order. 50 U.S.C. App. 536. In addition, the Act contains protections for servicemembers and their families from: cancellation of life insurance, 50 U.S.C. App. 542-549; taxation in multiple jurisdictions, 50 U.S.C. App. 570-571; foreclosure on property pursuant

to a tax lien, 50 U.S.C. App. 561, 571; and losing certain rights related to public lands, 50 U.S.C. App. 562-566.

The provision of the SCRA principally at issue in this case is 50 U.S.C. App. 537.[1] The protection afforded in Section 537 (Section 307 of the Act) was

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[1] Section 537 currently provides:

(a) Liens

(1) Limitation on foreclosure or enforcement

A person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement. * * *

(b) Stay of proceedings

In a proceeding to foreclose or enforce a lien subject to this section, the court may on its own motion, and shall if requested by a service-member whose ability to comply with the obligation resulting in the proceeding is materially affected by military service –

(1) stay the proceeding for a period of time as justice and equity require; or

(2) adjust the obligation to preserve the interests of all parties. * * *

(c) Penalties

(continued...)

added during the first major revision of the SSCRA in 1942. It protects servicemembers by giving them a right not to have their property taken pursuant to a lien during their period of military service, or 90 days thereafter, without a court order. 50 U.S.C. App. 537(a)(1). The provision of Section 537 that preserves an otherwise available conversion claim for "the person claiming relief under this section" was added when Congress comprehensively restated, clarified, and strengthened the Act in 2003. See 50 U.S.C. App. 537(c)(2); Pub. L. No. 108-189, 117 Stat. 2835.

A second SCRA provision at issue in this case – because the district court relied upon it in concluding it lacked jurisdiction – is 50 U.S.C. App. 512(c).[2] An

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[1](...continued)

> (1) Misdemeanor
>
> A person who knowingly takes an action contrary to this section, or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.
>
> (2) Preservation of other remedies
>
> The remedy and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any consequential or punitive damages.

[2] Section 512 provides:

(continued...)

SCRA claim will sometimes arise in an existing case, such as a foreclosure proceeding where the SCRA provides a defense to the servicemember. Section 512(b) provides that, in such a case, the SCRA "applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to [the] Act." At other times, an SCRA claim will arise where "no proceeding has already been commenced." See 50 U.S.C. App. 512(c). In this

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[2](...continued)
(a) Jurisdiction

This Act [sections 501 to 596 of this Appendix] applies to –

(1) the United States;

(2) each of the States, including the political subdivisions thereof; and

(3) all territory subject to the jurisdiction of the United States.

(b) Applicability to proceedings

This Act [sections 501 to 596 of this Appendix] applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act [said sections]. This Act [said sections] does not apply to criminal proceedings.

(c) Court in which application may be made

When under this Act [sections 501 to 596 of this Appendix] any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter.

type of case, Section 512(c) simply provides that an "application [for relief under the SCRA] may be made to any court which would otherwise have jurisdiction over the matter."

2. According to his complaint – which the district court had to accept as true for purposes of its ruling, *Nemet Chevrolet, Ltd.* v. *Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) – in March 2007, plaintiff Andre Gordon was an active duty member of the United States Navy, stationed in Norfolk, Virginia. APX10.[3] Gordon and his wife rented an apartment in an apartment complex owned by American Investment and Management Company (AIMCO). APX10. Before renting the apartment, Gordon informed an AIMCO employee that he would be deploying as part of his military duties and, while he was away, his wife would return to their prior residence. APX10-11. The employee agreed that Gordon could leave his 2002 Jeep Grand Cherokee on apartment complex property, that the vehicle would be kept safe, and that Gordon's wife would be notified in the event of an emergency. APX11. Gordon's car had a United States Department of Defense decal on its front windshield. APX10. In May 2007, defendant Pete's Auto Service of Denbigh, Inc., towed the vehicle from the apartment complex. APX11. On June 25, 2007, Pete's Auto sold the vehicle without obtaining a court order. APX11, 14. Neither AIMCO nor Pete's Auto attempted to contact Gordon or his wife regarding the sale. APX11.

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[3] "APX__" refers to the consecutively numbered pages of Appellant's Appendix.

Gordon filed suit in the United States District Court for the Eastern District of Virginia. He asserted claims of bailment and conversion against AIMCO (counts 1 and 2) and claims of conversion and a violation of the SCRA, 50 U.S.C. App. 537, against Pete's Auto (counts 3 and 4). APX12-14. The complaint sought damages and costs. APX14. Gordon settled with AIMCO, and his case against AIMCO was therefore dismissed. See APX45, 59.

On November 17, 2009, the district court, *sua sponte*, dismissed the case against Pete's Auto for lack of jurisdiction because it determined that the case raised no federal question. APX91-97. First, the court interpreted 50 U.S.C. App. 512(c) to mean that "the SCRA, by itself, cannot be a basis for federal question jurisdiction." APX95. Second, the court concluded that the SCRA does not provide a private cause of action for damages, but rather gives courts only "the authority to *stay*, *postpone*, *suspend*, or *vacate*" judicial or administrative proceedings or transactions. APX93. The court reasoned that since Gordon sought damages, and the SCRA does not provide a private cause of action for damages, there was no federal claim.

Gordon asked the court to reconsider its dismissal of the case. He pointed out that several district courts have held that the SCRA creates a private cause of action. APX103-104. He also noted that, in a case pending before a different judge in the Eastern District of Virginia, the United States brought suit against a towing company seeking damages on behalf of aggrieved servicemembers for violations of Section 537. APX104-105 (citing *United States* v. *B.C. Enterprises,*

Inc., No. 2:08-cv-590). Gordon argued that the judge in *B.C. Enterprises* had already impliedly recognized "the existence of a private cause of action for damages." APX105.

In its reply to the motion to reconsider, Pete's Auto relied principally on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). It argued that there is no indication in the SCRA of an intent to create a private cause of action for damages. APX158. This conclusion is reinforced, Pete's Auto argued, by the fact that the SCRA expressly provides remedies other than damages. APX159.

On December 11, 2009, the court denied the motion for reconsideration. APX162-169. The court was not persuaded by Gordon's citation of other district court cases that held that the SCRA creates private rights of action, and concluded that *B.C. Enterprises* had not addressed "whether the [SCRA] explicitly or implicitly provides a cause of action for damages." APX164.[4] The court again determined that it lacked jurisdiction over the case. It did, however, add new reasoning. The court concluded that Section 537(c)(2) – the language added to the statute in 2003 – "only makes sense if the remedies afforded under the SCRA are different from those a plaintiff might otherwise seek for wrongful conversion."

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[4] The court in *B.C. Enterprises* has since ruled explicitly that an award of damages is available to redress a Section 537 violation. *United States* v. *B.C. Enterprises, Inc.*, No. 2:08-cv-590, Docket Entry No. 92 (E.D. Va. March 11, 2010).

APX167. The court also determined that the *Cort* v. *Ash*, 422 U.S. 66 (1975), factors cut against recognition of a private cause of action. APX166 n.5.

SUMMARY OF ARGUMENT

This Court should reverse the district court's erroneous determination that it lacks jurisdiction over this case.

1. The district court had jurisdiction over the case pursuant to 28 U.S.C. 1331 because nothing in the SCRA removes jurisdiction from the district courts. Indeed, the SCRA explicitly preserves the jurisdictional status quo.

2. Section 537 – which must be liberally construed in favor of the servicemember – creates a private cause of action for damages because its text and structure, as well as the text and structure of the statute as a whole, evince a congressional intent to create both a private right and a private remedy. First, Section 537 is rights-creating – it gives servicemembers the right not to have their property taken pursuant to a lien without a court order during their military service or 90 days thereafter. Second, Section 537 and the SCRA as a whole manifest Congress's intent to allow servicemembers to enforce this right:

(a) When Congress created the right found in Section 537, it set that right upon the legal foundation of the day – the bedrock legal principle that every wrong shall have a remedy. This historical fact provides an interpretive key for understanding what the text of Section 537 means.

(b) A provision added to the statute in 2003 – Section 537(c)(2) – expressly presumes that servicemembers may "claim[] relief under" Section 537, and thus indicates Congress's intent that servicemembers can sue to enforce the statute.

(c) As many district courts have concluded, it does not make sense for Congress to have created very specific and uniquely federal rights for servicemembers, but no federal remedy when these rights are violated.

Finally, because the SCRA does not express an intent to preclude damages awards, damages are presumptively available.

ARGUMENT

I

50 U.S.C. APP. 512(C) DOES NOT ELIMINATE FEDERAL QUESTION JURISDICTION IN CASES WHERE THE SCRA CLAIM IS THE ONLY FEDERAL CLAIM

The district court was plainly incorrect in holding that Section 512(c) divests federal courts of jurisdiction over SCRA claims unless the case contains some other federal claim. Under 28 U.S.C. 1331, the district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This case arises under federal law because the plaintiff seeks relief for a violation of the SCRA – 50 U.S.C. App. 537. Of course, in a specific statute, Congress can assign jurisdiction elsewhere. See *International Sci. & Tech. Inst., Inc.* v. *Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997). But unless the SCRA assigns jurisdiction elsewhere, Section 1331 gives the district court jurisdiction. See *Whitman* v. *Department of Transp.*, 547 U.S. 512, 514

(2006) ("The question * * * is not whether [a particular statute] confers jurisdiction, but whether [it] removes the jurisdiction given to the federal courts [under Section 1331]."); *Verizon Maryland, Inc.* v. *Public Serv. Comm'n of Maryland*, 535 U.S. 635, 643 (2002) (concluding that a claim "falls within 28 U.S.C. § 1331's general grant of jurisdiction" where nothing in the applicable statute "purports to strip this jurisdiction").

The question, therefore, is whether Section 512(c) strips the district court of the jurisdiction provided in Section 1331, not whether Section 512(c) provides an independent basis for jurisdiction. Section 512(c) states that when an application for relief under the SCRA "is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter." 50 U.S.C. App. 512(c). Nothing in this language indicates an intent to eliminate normal federal question jurisdiction over SCRA claims. Indeed, Section 512(c) explicitly preserves the status quo concerning jurisdiction by providing that an SCRA claim "may be made to any court which would otherwise have jurisdiction over the matter." 50 U.S.C. App. 512(c). Under Section 1331, the district court for the district within which a dispute giving rise to an SCRA claim occurs "would otherwise have jurisdiction over the matter." See 50 U.S.C. App. 512(c).

In erroneously interpreting Section 512(c), the district court relied on *Kindy* v. *Koenke*, 216 F.2d 907 (8th Cir. 1954), and *Davidson* v. *General Finance Corp.*,

295 F. Supp. 878 (N.D. Ga. 1968). The court misunderstood both cases. The court relied upon the statement in *Kindy* that the SCRA "confers no jurisdiction in a court to determine rights between parties, which jurisdiction the court would not have possessed, absent this Act." 216 F.2d at 912. Examined in context, this statement merely expresses the court's conclusion that the district court did not have jurisdiction to determine the parties' contractual rights after a stay granted pursuant to the SCRA had expired. *Id.* at 911-912. Indeed, the court in *Kindy* recognized that the district court had jurisdication over the servicemember's original application for an injunction. *Id.* at 909-911. *Davidson* likewise recognized that "the federal courts have jurisdiction under the [SCRA] for certain purposes," and held only that the SCRA did not permit the particular claim presented – a collateral attack on a state court eviction judgment. 295 F. Supp. at 880-882.

This Court should therefore reverse the district court's erroneous holding that Section 512(c) deprives it of jurisdiction over this case.

II

50 U.S.C. APP. 537 CREATES AN IMPLIED PRIVATE CAUSE OF ACTION FOR DAMAGES

A. Legal Standard

The SCRA – like its predecessor the SSCRA – "must be read with an eye friendly to those who dropped their affairs to answer their country's call." *United States* v. *Onslow County Bd. of Educ.*, 728 F.2d 628, 636 (4th Cir. 1984) (citing *Le*

Maistre v. *Leffers*, 333 U.S. 1, 6 (1948)); see also *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (stating that the SSCRA is "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"). Accordingly, in determining whether the SCRA creates a cause of action, its text should "be liberally construed." See *Boone*, 319 U.S. at 575.

In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the Court said a cause of action does not exist unless Congress intended to create one. *Id.* at 286-287. Two separate inquires into congressional intent are required: whether Congress intended to create (1) a private right and (2) a private remedy. *Id.* at 286.

To decide whether Congress intended to create a right, this Court should consider the "text and structure of" the statute. *Sandoval*, 532 U.S. at 288. Specifically, it should look for "'rights-creating' language." *Ibid.* The Supreme Court explained that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Id.* at 289 (internal quotation marks and citation omitted); see also *Pee Dee Health Care, P.A.* v. *Sanford*, 509 F.3d 204, 210 (4th Cir. 2007) ("[A] court must be careful to ensure that the statute at issue contains 'rights-creating language' and that the language is phrased in terms of the persons benefitted, not in terms of a general 'policy or practice.'") (quoting *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284, 287 (2002)).

This Court must also look to the text and structure of the statute to determine whether the statute "manifest[s] an intent to create a private remedy." *Sandoval*, U.S. at 289-291. Of course, in analyzing both prongs of the test, this Court should be mindful of the liberal construction that must be afforded the SCRA.

B. Section 537 Creates A Private Cause Of Action For Damages

1. Section 537(a)(1), the provision of the SCRA under which Gordon brought his federal claim for damages, provides that "[a] person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement." This language confers a right upon servicemembers not to have property taken pursuant to a lien without a court order during a period of military service, or 90 days thereafter.

After the Supreme Court's decisions in *Sandoval* and *Gonzaga*, this Court has held that analogous statutory language demonstrates a congressional intent to create an actionable federal right. In *Pee Dee Health Care*, this Court held that a provision of the Medicaid Act – 42 U.S.C. 1396a(bb) – creates a right that is enforceable under 42 U.S.C. 1983. 509 F.3d at 211-212. That statute states in relevant part that "a '[s]tate plan shall provide for payment for services . . . furnished by a Federally-qualified health center and services . . . furnished by a rural health clinic in accordance with the provisions of this subsection.'" *Id.* at

211. This Court concluded that "as required by *Gonzaga*, * * * [Section] 1396a(bb) contains rights-creating language because it specifically designates the beneficiaries – the [rural health clinics] – and it mandates action on the part of the states." *Id.* at 212. The Court concluded further that the statute "has an individual focus rather than an aggregate focus on institutional policy or practice" and "stands in stark contrast to the 'policy or practice' language present in the provision interpreted in *Gonzaga*." *Ibid.*

Section 537 is even more clearly rights-creating than the statute at issue in *Pee Dee Health Care*. It also "specifically designates the beneficiaries" – servicemembers – and clearly "mandates action" on the part of the lienholder. See *Pee Dee Health Care*, 509 F.3d at 212. Section 537 – like the statute considered in *Pee Dee Health Care* – "has an individual focus," see *ibid.*, namely, protecting servicemembers' property during their military service. See also *Doe* v. *Kidd*, 501 F.3d 348, 356-357 (4th Cir. 2007) (holding that other requirements of the Medicaid Act create individual federal rights enforceable under Section 1983), cert. denied, 128 S. Ct. 1483 (2008); *Grammer* v. *John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009) (concluding that provisions of the Federal Nursing Home Reform Amendments that focus on what "a nursing facility must" do confer rights upon medicaid recipients), cert. denied, No. 09-696, 2010 WL 596577 (Feb. 22, 2010).

Moreover, Section 537 is leagues away from the provisions that the Supreme Court found to lack rights-creating language in *Sandoval* and *Gonzaga*.

The statute at issue in *Sandoval* authorized rule-making by federal agencies, 532 U.S. at 288, and the statute at issue in *Gonzaga* directed the Secretary of Education to withhold funding from institutions that had a prohibited policy or practice, 536 U.S. at 287. While those statutes did not confer an "individual entitlement," Section 537 clearly does. See *Gonzaga*, 536 U.S. at 287. *Gonzaga* did not suggest that only statutes with the paradigmatically rights-creating formulation (*i.e.*, "no person shall be subjected to discrimination") are rights-creating. Indeed, such a reading would improperly elevate form over substance. See *Grammer*, 570 F.3d at 530 ("We are not concerned that the provisions relied upon by the Appellant are phrased in terms of responsibilities imposed on the state or the nursing home. The plain purpose of these provisions is to protect rights afforded to individuals."). Accordingly, Section 537 creates an individual right for a servicemember not to have his or her property foreclosed on without a court order during a period of military service or 90 days thereafter.

2. The language of Section 537 and the structure of the SCRA as a whole manifest a congressional intent to make the right conferred enforceable in a private cause of action. See *Sandoval*, 532 U.S. at 286. This intent is revealed in three ways. First, the language of Section 537 – like all federal statutes – must be read in light of the state of the law as it existed when Congress enacted the statute. Read in light of the law as it existed in 1942 when the protection in Section 537 was first enacted, the rights-creating language of that Section evinces a congressional intent to create a private cause of action to enforce that right.

Second, the addition to the Act of Section 537(c)(2) and identical provisions in other SCRA sections in 2003 confirms that Congress continues to intend that servicemembers may sue to enforce Section 537 and other SCRA rights. Third, the conclusion that Section 537 contains a private cause of action is fortified – as the majority of cases considering the issue have reasoned – by the unacceptable consequences of the contrary conclusion.

a. When Section 537 was enacted in 1942 – as well as when the original SSCRA containing similar protections was enacted in 1918 – it was a fundamental legal principle that every wrong shall have a remedy. Just two years before Congress first enacted the SSCRA, in *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U.S. 33 (1916), the Court said that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.* at 39. Likewise in *Texas & N.O.R. Co.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569 (1930), the Court explained that "[t]he creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties." Instead, the Court stated simply that "[t]he right is created and the remedy exists." *Id.* at 569-570. And the Court repeated the same principle just a few years after Congress enacted the protection embodied in Section 537. See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule *from the beginning* that courts will be alert to adjust their remedies so as to

grant the necessary relief.") (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803)) (emphasis added).

Indeed, in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982), the Court described the approach embodied in *Rigsby* for determining whether a statute contained an implied private causes of action: "If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule." *Id.* at 374-375 (citation omitted). Though the law had changed by 1982, *id.* at 374, the Court recognized that it was "the *Rigsby* approach [that] prevailed throughout most of our history." *Id.* at 375 (citing cases); see also *Community and Econ. Dev. Ass'n of Cook County, Inc.* v. *Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 664 (7th Cir. 1985) (declining to imply a private cause of action to enforce the Comprehensive Older Americans Act, but recognizing that "[a]t another time [*i.e.*, before the mid-1970s], federal courts, relying primarily on common-law tort principles, generously conferred rights of action on private litigants") (citing *Rigsby* and *Marbury* v. *Madison*).

Thus, when Congress enacted Section 537 in 1942 – explicitly creating a federal right for servicemembers not to have their property taken during their military service absent a court order – there is every reason to think that Congress intended for those servicemembers to be able to enforce that right in federal court. Indeed, it is a basic tenet of statutory interpretation that courts should "assume that

Congress is aware of existing law when it passes legislation." *Atlantic Sounding Co.* v. *Townsend*, 129 S. Ct. 2561, 2573 (2009) (citation omitted); see also *Dixon* v. *United States*, 548 U.S. 1, 13-14 (2006) (concluding that "we can safely assume" that Congress was aware of the common law principles that were operative when it enacted a statute and, absent express provision to the contrary, "would have expected federal courts" to follow the common-law framework).

Sandoval is not to the contrary. In *Sandoval*, the Court said that "[i]n determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text." 532 U.S. at 288 (citation omitted). And the Court concluded that reference to legal context did not help clarify the text of Section 602 of Title VI – a provision that authorizes agency rule-making to effectuate rights created in Section 601. *Id.* at 287-289. Section 602 itself created *no* legal right, and perforce no remedy for any such legal right. But legal context *does* clarify the text of Section 537. Given the state of the law in 1942, Congress's creation of a right to benefit servicemembers necessarily meant that Congress intended servicemembers to be able to sue to enforce that right in federal court. This analysis does not give "dispositive weight to context shorn of text." See *Sandoval*, 532 U.S. at 288. Instead, it recognizes that the legal context in which Section 537 was enacted provides an interpretive key to understanding the meaning of the statutory language.

b. Congress confirmed this understanding of Section 537 when, in reenacting the statute in 2003, it stated that "[t]he remedy and rights provided

under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any consequential or punitive damages." 50 U.S.C. App. 537(c)(2). This provision explicitly indicates that servicemembers may "claim[] relief under this section." 50 U.S.C. App. 537(c)(2).

The district court in this case determined that Section 537(c)(2) means that "the SCRA, itself, does not explicitly or implicitly provide grounds for relief which would include damages." APX166. It relied on its belief that "[t]his section only makes sense if the remedies afforded under the SCRA are different from those a plaintiff might otherwise seek for wrongful conversion." APX167.[5]

In fact, just the opposite is true. The Section only makes sense if the SCRA provides an independent ground for relief. It plainly states that a person claiming relief under the SCRA may also claim alternative or additional relief under a state-law conversion theory. This makes little sense if one assumes – as the district court apparently did – that the "relief under this section" means only the right to seek a stay set out in Section 537(b).

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[5] The district court also cited Section 513 for the proposition that the SCRA "only grant[s] courts 'the authority to stay, postpone, suspend, or vacate any judicial or administrative proceedings or transactions which impair the civil rights of an armed servicemember.'" APX163 (citing APX93). Section 513 does not support this reading. It allows courts to extend *to a party other than the servicemember* a stay, postponement, suspension, or decision to vacate judicial or administrative proceedings. Section 513 does not purport to define the universe of remedies available under the SCRA.

First, it is obvious that seeking to stay enforcement of a lien does not preclude a conversion claim once the lienholder improperly takes the servicemember's property. There would be no need for Congress to state such an obvious fact explicitly. The availability of a state-law conversion claim need only be explicitly preserved if the "relief under this section" is similar to, and may be thought to overlap with, the relief available in a conversion claim. Second, if a servicemember obtained a stay, the lienholder would be prevented from taking the servicemember's property without a court order and so there would be no conversion. It is only after the servicemember's property has been taken without a court order that the need for a state-law conversion claim arises for a person "claiming relief" under Section 537. Accordingly, Section 537(c)(2) indicates that servicemembers can sue to enforce the statute.

The language and structure of other provisions of the SCRA confirm this reading of Section 537. The language of Section 537(c)(2) is identical to language added to the SCRA in five other places when Congress revised the Act in 2003. Each section of the SCRA to which this language was added creates a right for servicemembers and, in each, the added language expresses Congress's understanding that servicemembers can sue to enforce that right. See 50 U.S.C. App. 531 (right not to be evicted from primary residence during a period of military service); 50 U.S.C. App. 532 (right against repossession of personal property based on breach of contract, lease, or bailment without a court order); 50 U.S.C. App. 533 (right not to have property seized or foreclosed upon without

court order); 50 U.S.C. App. 535 (right to terminate a lease and receive payment of amounts paid in advance for a servicemember called into service after executing the lease); 50 U.S.C. App. 536 (right preventing an assignee of a servicemember's life insurance policy from exercising any right or option under the assignment without a court order during a period of military service or within one year thereafter).

The life insurance provision, Section 536, is particularly illustrative. There are no explicit remedies contained in that section. Yet, Congress included a provision that explicitly states that persons may "claim[] relief under this section." 50 U.S.C. App. 536(e)(2). The only way a person could claim relief under Section 536 is if the remedy is implied. Section 536(e)(2) thus manifests Congress's intention that Section 536 create a private cause of action. Accordingly, the identical language in Section 537(c)(2) manifests the same intent. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (stating "identical words used in different parts of the same act are intended to have the same meaning") (citation omitted).

c. This interpretation of Section 537 is fortified by the unacceptable consequence of the district court's holding in this case. Congress could not plausibly have intended to create very specific rights for servicemembers, but no remedy when those rights are violated. That is why the majority of cases to consider the issue have held that the SCRA creates private causes of action to enforce Section 537 and comparable sections. See *Hurley* v. *Deutsche Bank Trust Co. Americas*, No. 1:08-cv-361, 2009 WL 701006, at *4 (W.D. Mich. Mar. 13,

2009) (concluding "that Congress intended to confer a private right of action for a violation of § 533(c) [a provision the court found 'very similar' to Section 537]" and determining that "the statute and legislative history strongly support the conclusion that Congress must have intended to provide a means of enforcing the special rights it created in favor of servicemembers[;] otherwise, rights granted by the SCRA would essentially be illusory"); *Linscott* v. *Vector Aerospace*, No. CV-05-682-HU, 2006 WL 240529, at *7 (D. Or. Jan. 31, 2006) (determining that "[t]he legislative intent factor [which the court recognized as the preeminent inquiry] clearly favors" the conclusion that Section 537 creates a private right of action because "[t]here is no indication that in enacting and renewing the Act, Congress intended to create rights without remedies"); *Marin* v. *Armstrong*, No. 3:97-cv-2784-D, 1998 WL 1765716, at *3-4 (N.D. Tex. Sept. 21, 1998) (concluding that "Congress must have intended a private cause of action to exist to enforce" Sections 531 and 518 of the SSCRA because otherwise creditors could "simply ignore" the requirements of Sections 531 and 518 and suffer little or no repercussion); *id.* at *3 ("A result that fails to make the service member whole defies the purpose of the statute.") (cited with approval in *Marin* v. *Citibank, N.A., Inc.*, 208 F.3d 203 (2d Cir. 2000) (unpublished) (concluding that the district court improperly dismissed plaintiff's claims, and determining that the plaintiff may have a valid private right of action under Sections 518 and 531 of the SSCRA)); *Moll* v. *Ford Consumer Finance Co.*, No. 97-C-5044, 1998 WL 142411, at *4 (N.D. Ill. Mar. 23, 1998) (concluding that the SSCRA's maximum interest rate

provision "confers a benefit on a military person that is not otherwise available to civilians" and "therefore, that Congress must have intended that a private right of action be available" to enforce it); *ibid.* (finding that "if no private cause of action is implied, creditors could simply ignore" the SSCRA's mandate, and concluding "Congress could not have intended such a result").[6]

It is no answer to say – as the district court did in this case (APX168) – that these rights may be pursued through a conversion suit in state court. Section 537(c)(2) forecloses this interpretation by clearly stating that relief under Section 537 is "in addition to and does not preclude" a conversion claim. Moreover, the right created in Section 537 is particularly federal. It protects servicemembers, especially when the United States calls upon them to fight wars on its behalf. Indeed, the law was enacted pursuant to Congress's war powers "to provide for, strengthen, and expedite the national defense" by enabling servicemembers "to

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[6] See also, *Frazier* v. *HSBC Mortg. Servs., Inc.*, No. 8:08-cv-02396-T-24 TGW, 2009 WL 4015574, at *4 (M.D. Fla. Nov. 19, 2009) ("[Defendant] correctly claims that the SCRA does not explicitly provide [plaintiff] with a private cause of action under which she can seek damages. However, the Court finds that the SCRA implicitly provides [plaintiff] with a private cause of action [to enforce Section 527]."); *Cathey* v. *First Republic Bank*, No. 00-cv-2001-M, 2001 U.S. Dist. LEXIS 13195 (W.D. La. Aug. 13, 2001) (concluding that Section 527 of the SSCRA creates a private cause of action); but see *Davidson* v. *General Fin. Corp.*, 295 F. Supp. 878, 881 (N.D. Ga. 1968) (concluding that the SSCRA provision protecting servicemembers from default judgments does not provide a basis for "federal courts to hear collateral attacks on judgments in state courts"); *ibid.* (stating, in dicta, that "the Act nowhere allows a damage action") (quoted in APX94).

devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. 502(1). Even if the text did not make this point explicit, it would be odd in view of the uniquely federal nature of this law for Congress to rely solely on state-law causes of action in state courts to enforce it.

d. To be sure, the Supreme Court has said that inclusion of some remedies in a statute suggests an intent to exclude others. See, *e.g.*, *Sandoval*, 532 U.S. at 290; *Karahalios* v. *Federal Employees*, 489 U.S. 527, 533 (1989). Undeniably, the SCRA expressly provides certain remedies, most frequently stays of court proceedings or other actions that may prejudice servicemembers. But neither this Court nor the Supreme Court has held that a statute's inclusion of some express remedies is an absolute bar to concluding that Congress intended to also include other remedies not made express. Indeed, in *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 (1979), the Supreme Court explained that Title IX of the Education Amendments Act of 1972, 20 U.S.C. 1681 *et seq.*, was enacted to accomplish related but different objectives: (1) to avoid the use of federal funds to support discriminatory practices and (2) provide individuals with protection against those practices. That Congress included an explicit remedy to accomplish the first objective did not mean that it intended that the statute should be devoid of a remedy to accomplish the second. *Cannon*, 441 U.S. at 704-706. Similarly, the SCRA was enacted principally to (1) prevent violation of servicemembers' property rights during their military service and (2) redress violations when they occur. That the statute contains express remedies to accomplish the first goal does

not mean that Congress intended to leave the statute devoid of a remedy to accomplish the second.

Indeed, the SCRA is unique in that it contains express textual reference to the implied relief. See pp. 20-23, *supra*. In the face of the specific textual basis for concluding that the SCRA contains implied remedies, the general bias against finding implied remedies in statutes containing express remedies loses its force. This is particularly true given the liberal construction that must be applied to the SCRA, and the historical context in which the right in Section 537 was created.

3. After determining that Section 537 creates a private cause of action, the next question is: What relief is available? In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court said that "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66 (citation omitted). The Court in *Franklin* did not find an express indication that Congress intended to make damages unavailable, and therefore held that "a damages remedy is available for an action brought to enforce Title IX." *Id.* at 76.

Likewise, there is no express indication in the SCRA of an intent to preclude an award of damages. Accordingly, under *Franklin*, courts should presume that damages are available. *Franklin*, 503 U.S. at 66; see also *Hurley*, 2009 WL 701006, at *10 ("Because there is no indication in the statute that Congress intended to exclude punitive damages as a remedy, the Court finds no

basis to conclude that such damages are unavailable."); *Linscott*, 2006 WL 240529, at *7 (concluding "that damages are consistent with the underlying purposes of " Section 537).

CONCLUSION

This Court should reverse the district court's dismissal for lack of jurisdiction and remand for consideration of the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7). This brief contains 6985 words, as calculated by the WordPerfect X4 word-count system. The typeface is Times New Roman, 14-point font.

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s/ Nathaniel S. Pollock
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Date: April 6, 2010

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