No. 06-1132

In the Supreme Court of the United States

TAMMY ADKINS, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL S. RAAB
MARK A. TOTTEN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408 (2000 & Supp. IV 2004), allows state courts in divorce proceedings to apply state law in determining the status of a service member's disposable retired pay, and it establishes a mechanism for garnishing retired pay to satisfy an appropriate court order. The questions presented are:

1. Whether the statute violates the substantive component of the Due Process Clause insofar as it applies to service members who entered the military prior to its enactment.

2. Whether the statute violates the equal protection component of the Due Process Clause.

3. Whether the statute's garnishment mechanism violates the procedural component of the Due Process Clause.

4. Whether the statute violates the Armed Forces Clauses and the Full Faith and Credit Clause insofar as it allows state law to govern the treatment of a service member's disposable retirement pay in a divorce proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 464 F.3d 456. The October 13, 2005 decision (Pet. App. 31a-40a) and the March 16, 2005 decision (Pet. App. 41a-64a) of the district court are unreported. The October 12, 2004 decision (Pet. App. 65a-78a) of the district court is reported at 370 F. Supp. 2d 426.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2006. A petition for rehearing was denied on November 14, 2006 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on February 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Members of the military services who have served for the requisite period may retire from active duty and receive retirement pay. See 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. 6321 *et seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et seq.* (Air Force). In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating a service member's retirement pay as community property divisible between the service member and his or her former spouse upon divorce. The Court emphasized that Congress could specify a different rule if it chose: "Congress may well decide * * * that more protection should be afforded a former spouse of a retired service member. This decision * * * is for Congress alone." *Id.* at 235-236.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA or Act), 10 U.S.C. 1408 (2000 & Supp. IV 2004). In its current form, the Act authorizes a state court to treat "disposable retired pay" either "as property solely of the [service] member or as property of the [service] member and his spouse in accordance with the law of the jurisdiction of such court."[1] 10 U.S.C. 1408(c)(1). If a court has personal jurisdiction over the service member by means of residence (other than on the basis of military assignment), domicile, or consent, then the disposable retirement pay is subject to division

[1] "Disposable retired pay" is defined in the statute as "the total monthly retired pay to which a member is entitled," less certain amounts, including any amount a service member was required to waive as a condition of receiving disability compensation. 10 U.S.C. 1408(a)(4). See *Mansell* v. *Mansell*, 490 U.S. 581, 594-595 (1989).

with a former spouse if state law permits. 10 U.S.C. 1408(c)(4).

The Act also establishes a process whereby a spouse or former spouse may apply to have the Secretary of Defense (Secretary) pay the court-ordered portion of retirement pay directly to him or her. 10 U.S.C. 1408(d) (2000 & Supp. IV 2004). The total amount of the garnishment cannot exceed 50% of the member's disposable retired pay. 10 U.S.C. 1408(e). To garnish a service member's disposable retired pay, the Secretary must ensure that two conditions are satisfied. First, the Secretary must receive effective service of an appropriate court order. 10 U.S.C. 1408(d)(1). The requirements of effective service include that the court order be "regular on its face," 10 U.S.C. 1408(b)(1)(B), in that it is issued from a court having the requisite jurisdiction over the service member, is "legal in form," and "includes nothing on its face that provides reasonable notice that it is issued without authority of law." 10 U.S.C. 1408(b)(2)(B) and (C). The Secretary must notify a service member of such a court order within 30 days of receiving effective service. 10 U.S.C. 1408(g). Second, the Secretary must conclude that the spouse or former spouse was married to the service member during ten or more years of creditable service. 10 U.S.C. 1408(d)(2).

As authorized by the statute, the Secretary has prescribed detailed regulations governing the garnishment process. See 7B DOD Financial Mgmt. Regs. 7000.14-R, Ch. 29 (2005) (DODFMR) <http://www.dod.mil/comptroller/fmr/07b/07b_29.pdf>. These regulations go beyond what Congress required in providing protections for service members. For example, the spouse or former spouse must agree, before receiving any payment, "that any future overpayments are recov-

erable and subject to involuntary collection from the former spouse or his or her estate." *Id.* para. 290502(F).

2. The individual petitioners in this case are either retired service members receiving retirement pay or active-duty members who are eligible for that pay upon their retirement. Pet. App. 7a. These individuals were all divorced sometime between 1978 and 2003 and are subject to state-court divorce orders granting their former spouses a portion of their retirement pay. *Ibid.* Moreover, the Defense Finance and Accounting Service—the office responsible for administering claims under the Act—makes direct payments to the former spouses of at least some of the plaintiffs. *Ibid.* Also party to this proceeding is the Uniformed Services Former Spouses' Protection Act Litigation Support Group (ULSG), with approximately 2500 members. *Ibid.*

Petitioners filed suit to challenge the constitutionality of the Act on four separate grounds. First, they claimed that the statute violates substantive due process because it alters the compensation expectations of members who joined the service prior to passage of the Act. Pet. App. 12a-13a. Second, they alleged that the statute's mechanism for the garnishment of military retired pay pursuant to a court order in a divorce proceeding fails to meet the requirements of procedural due process because it provides inadequate safeguards against errors and abuse. *Id.* at 22a-23a. Third, petitioners claimed that the statute violates the Constitution's Armed Forces Clauses, U.S. Const. Art. I, § 8, Cls. 12-14, and the Full Faith and Credit Clause, *id.* Art. IV, § 1, because it depends on state divorce law governing the distribution of property, resulting in non-uniform application among retired service members in different States. Pet. App. 16a. Finally, petitioners asserted that

the Act violates the equal protection component of the Due Process Clause because it impermissibly discriminates on the basis of three separate classifications: female service members vis-a-vis their male ex-husbands; service members vis-a-vis their former spouses; and retired service members vis-a-vis other retired federal employees. *Id.* at 17a-22a.

3. The district court dismissed petitioners' claims. Pet. App. 65a-78a. The court concluded that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine, because petitioners were effectively asking a federal court to review their state-court divorce judgments. *Id.* at 69a-76a (citing *District of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)). The court further held that the individual petitioners lacked standing because their divorce decrees had already been entered, *id.* at 74a, and that ULSG lacked standing because it failed to show that its members had standing to sue in their own right, *id.* at 76a-77a.

After petitioners filed an amended complaint, the court held that ULSG had met its burden to establish standing on three of its four claims. Pet. App. 44a-48a. At least one member of ULSG faced an imminent divorce subject to the requirements of the Act, and since he was not yet subject to a state court judgment, his claim fell outside the *Rooker-Feldman* doctrine. *Id.* at 46a-47a. The court dismissed the substantive due process claim, since the one petitioner who satisfied the standing requirements was not subject to the retroactivity problems that petitioners alleged. *Id.* at 47a.

On the merits, the court dismissed petitioners' uniformity and equal protection claims. Pet. App. 54a-63a. The court subsequently granted the Secretary's motion

for summary judgment on the procedural due process claims. *Id.* at 34a-40a.

4. The court of appeals affirmed. Pet. App. 1a-28a.

a. The court held that both the individual petitioners and ULSG had standing, because the garnishment of their retirement pay constituted an injury, and a determination that the Act was unconstitutional would redress that injury. Pet. App. 11a-12a. It also determined that the *Rooker-Feldman* doctrine was inapplicable because "an examination of the federal constitutional challenge presented here against the Act does not require scrutinizing and invalidating any individual state court judgment." *Id.* at 10a.

The court then addressed the merits, and it rejected petitioners' constitutional claims. First, the court concluded that the Act was not unconstitutionally retroactive, in violation of substantive due process. Pet. App. 12a-15a. The court stated that the presumption against retroactivity was inapplicable because Congress made clear its intent to apply the USFSPA retroactively. *Id.* at 14a. The court further determined that the statute was constitutional because it disrupted no settled expectations of the individual service members, none of whom alleged that he or she was divorced in the period between this Court's decision in *McCarty* and the enactment of the USFSPA. *Id.* at 15a.

The court next rejected plaintiffs' claims under the Armed Forces Clauses and the Full Faith and Credit Clause. Pet. App. 16a-17a. The court explained that the Full Faith and Credit Clause "does not impose on Congress any requirement of substantive uniformity in any area of the law," *id.* at 16a, and that legislation under the Armed Forces Clauses is entitled to special deference, *id.* at 16a-17a. The court also held that the Act

does not violate the equal protection component of the Due Process Clause. *Id.* at 17a-22a. The Act does not classify people on the basis of sex, and it is therefore subject only to rational-basis review. *Id.* at 19a. It satisfies that review, the court explained, because it is rationally related to the legitimate government interest in protecting former spouses of service members, who have made sacrifices that are "more intense than the ordinary sacrifices associated with marriage to civilian employees." *Id.* at 20a.

Finally, the court rejected petitioners' procedural due process claims. Pet. App. 22a-27a. Although petitioners have a property interest in their retirement pay, the court concluded that they had failed to present any evidence of past error in the administration of the garnishment mechanism. Weighing the risk of such error against the costs of further review, the court determined that the procedures afforded to petitioners satisfied the Due Process Clause. *Id.* at 25a-27a (citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

b. Judge Widener concurred in the result. Pet. App. 27a-28a. In his view, "the district court correctly determined that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine." *Id.* at 27a.

ARGUMENT

Petitioners assert (Pet. 14-28) that the USFSPA violates four different provisions of the Constitution. The court of appeals carefully considered and properly rejected petitioners' claims. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that application of the USFSPA to service members who joined the

armed forces before its enactment does not violate the substantive component of the Due Process Clause. As applied to those who joined the armed forces before *McCarty* v. *McCarty*, 453 U.S. 210 (1981), the Act is not impermissibly retroactive because it does not "attach[] new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270 (1994). Rather, as petitioners recognize, disposable retired pay of service members involved in divorce proceedings was subject to state law until this Court's decision in *McCarty*. The Act merely restored state law as the proper authority governing the treatment of a service member's retired pay in that context.

Petitioners assert (Pet. 16) that "prior to *McCarty*, those serving in the military would have had a reasonable expectation that their military retired pay was not subject to division with a former spouse." They acknowledge, however (Pet. 16 n.2) that this expectation was based entirely on the status of state law in the years leading up to the adoption of the Act. Therefore, the only "reasonable expectation" that petitioners could have held was an expectation that, in the event of a divorce, a court would decide how to treat their retired pay on the basis of state law. That is precisely what the Act provides.

To be sure, the Act might be thought to apply retroactively to the relatively short window between the date of the decision in *McCarty* (June 26, 1981) and the date the Act was signed into law (September 8, 1982). But petitioners do not allege that any petitioner joined the armed forces during that period, nor was any of petitioners' divorce decrees entered then. Pet. App. 15a. Accordingly, a challenge to that aspect of the statute is not presented in this case.

Petitioners principally rely (Pet. 17) on *United States* v. *Larionoff*, 431 U.S. 864 (1977). That reliance is misplaced. In *Larionoff*, the Court refused to construe a statute as having retroactive effect where that effect would have allowed the Navy to deny service members a special bonus that was promised when they agreed to extend their enlistment. *Id.* at 865-869. The Court observed that if Congress had revoked the bonus, "serious constitutional questions would be presented." *Id.* at 879.

Those constitutional concerns are inapplicable here. In *Larionoff*, the plaintiffs were denied their monetary bonus. But as the court of appeals observed in the present case, "the Act does not deprive members of their retirement pay. It simply gives state courts the option to divide that pay." Pet. App. 14a. The cases that *Larionoff* cites, 431 U.S. at 879, regarding the constitutional issues that might arise if Congress intended to make the law retroactive are also not applicable in this context. *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), stand for the limited proposition that the United States, having entered into a valid contract, cannot break the contract, even where it does so by an express statement. Congress's decision to make clear that a service member's retired pay is subject to state law in the event of a divorce proceeding does not remotely parallel the revocation of rights created under a valid contract.

2. The court of appeals also correctly held that the Act does not violate the constitutional right to equal protection. Petitioners focus their claim (Pet. 19) on the classification that the statute draws between retired service members and their former spouses. Under the Act, if state law permits, former spouses can share in

the service member's retirement pay, even though they are not bound to perform duties for the government if called upon and are not subject to military justice provisions. Pet. App. 20a-21a. Because the classification at issue involves neither a fundamental right nor a suspect class, it is subject to rational-basis review. *Heller* v. *Doe,* 509 U.S. 312, 319-320 (1993). Under this deferential standard, courts ask only whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320.[2]

As the court of appeals concluded, the Act easily satisfies that test. Congress was concerned with the financial security of the military spouse, who often makes enormous sacrifices in that role. See S. Rep. No. 502, 97th Cong., 2d Sess. 6 (1982). That concern was a legitimate reason to make a service member's retirement pay subject to state law in a divorce proceeding, and thereby divisible in some jurisdictions. As the court of appeals determined, the distinction between retired service members and their former spouses is rationally related to that legitimate governmental purpose. "[The Act] simply freed state courts to divide upon divorce military retirement pay based on service completed during the marriage, which allowed the state courts to increase the property available to the former spouse." Pet. App. 20a.

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[2] Petitioners suggest (Pet. 19 n.3) that heightened scrutiny may apply because "it was assumed by Congress that virtually all veterans receiving retired pay were men, and their former spouses were women." But to make heightened scrutiny applicable, petitioners would have to show that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979). Petitioners have made no effort to meet that standard.

Petitioners contend (Pet. 21) that there is a "dramatic tension" between *McCarty* and *Barker* v. *Kansas,* 503 U.S. 594 (1992), regarding the characterization of military retired pay, and that this case is an appropriate vehicle for resolving it. On examination, however, no such tension exists. In *McCarty*, this Court recognized that it had previously characterized retired military pay as "reduced compensation for reduced current services." 453 U.S. at 222 (citing *United States* v. *Tyler,* 105 U.S. 244, 245 (1881)). But the Court emphasized that it "need not decide * * * whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.* at 223; see also *Barker*, 503 U.S. at 601.

In *Barker*, the Court held that under a federal law consenting to state taxation of a federal employee's pay, "military retirement benefits are to be considered deferred pay for past services." 503 U.S. at 605. *Barker* considered whether Kansas' practice of taxing military retirement benefits, while not taxing the retirement benefits of state and local employees, violated a federal law prohibiting States from taxing federal compensation where such taxation discriminated against the retired federal officer or employee on account of the source of the pay or compensation. *Id.* at 596. Drawing on *Tyler,* the Kansas Supreme Court had held that the state law did not discriminate against United States military retirees in violation of federal law, because their compensation was for current services. *Id.* at 597. This Court rejected that reasoning, holding instead that for pur-

poses of state taxation, retired military pay is compensation for past services and therefore the Kansas law discriminated against service members in that State. *Id.* at 605.

In support of that conclusion, the Court in *Barker* not only observed that the characterization of military pay in *Tyler* was unnecessary to the Court's holding in that case, 503 U.S. at 601, but also noted that Congress adopted the characterization of retired military pay as compensation for past services in passing USFSPA. "Because the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services, see *McCarty* * * * Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services." *Id.* at 603. Thus, rather than reflecting a "dramatic tension," the line of cases from *Tyler* to *Barker* demonstrates a consistent willingness to allow States to characterize retired military pay as deferred compensation.[3] Indeed, petitioners cite no court of appeals decisions that identify any divergent treatment in this Court's characterization of retired military pay after *Barker*.[4]

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[3] Petitioners contend (Pet. 21) that "[r]etired pay cannot be deferred compensation in order to defeat petitioners' key equal protection challenge, and also be characterized as something less than a 'settled expectation' in order to repel their substantive and procedural due process attacks." But what is "less than a 'settled expectation'" is not the pay itself (although the military can discontinue it under certain limited circumstances), but the expectation that the pay is exempt from division in a state-court divorce proceeding.

[4] Three of the four cases petitioners cite (Pet. 21) as purportedly noting the "divergent treatment of military pay" as between this

3. Petitioners' procedural due process claim (Pet. 22-25) also lacks merit. The USFSPA and its implementing regulations provide numerous procedural protections to minimize the risk of error in garnishment. Garnishment may be conducted only under a court order that "is issued by a court of competent jurisdiction," that "is legal in form," and that "includes nothing on its face that provides reasonable notice that it is issued without authority of law." 10 U.S.C. 1408(b)(2). In applying for garnishment, the former spouse must present a certified copy of the court order. DODFMR 7000.14-R para. 290502(B). The government administrator must notify the service member of the order as soon as possible, and not later than 30 days after being served. 10 U.S.C. 1408(g). The administrator then must examine the order for compliance with the statutory requirements. DODFMR 7000.14-R para. 2906. If the service member believes the administrator has erred, he or she can request reconsideration, and the administrator is required to respond with an explanation for the decision reached. *Id.* para. 2912. If the service member is still not satisfied, he or she can appeal to the Defense Office of Hearings and Appeals, which will review the written submissions of the member and the administrator, and return a written opinion. 32 C.F.R. 282.5(b), 282 App. E.

Taken together, these requirements provide service members with more than sufficient process to satisfy the Constitution. Moreover, as the court of appeals recognized, petitioners have presented no evidence that the statutory and regulatory protections are insufficient in

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Court's decisions in *McCarty* and *Barker* were decided several years before *Barker*. The only post-*Barker* case that petitioners cite, *In re Moorhous*, 108 F.3d 51, 54 (4th Cir. 1997), simply follows the holding in *Barker*.

practice. In particular, there is no evidence that the Department of Defense "makes an unacceptably high number of errors" or that it "commonly overpays former spouses." Pet. App. 25a.

Petitioners object (Pet. 23) that the court of appeals' decision was based in part on *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), which upheld a state law allowing a creditor holding a valid judgment to garnish the debtor's wages without further process. In petitioners' view, *Endicott Johnson* was implicitly overruled by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But as petitioners acknowledge, the court of appeals explicitly stated that it was unnecessary to decide "whether [petitioners'] claim is properly assessed through a direct application of *Endicott-Johnson* or through the *Mathews* balancing test, because in the end they show the same thing: the Act and the regulations provide all that due process requires." Pet. App. 24a.

Petitioners mistakenly assume that because the court of appeals' *Mathews* analysis reached the same conclusion as its analysis under *Endicott Johnson*, the former necessarily relied on one or more questionable premises of the latter. That is incorrect. In fact, the court properly applied *Mathews*, recognizing that "retirement pay is a significant asset" but determining that the statutory procedures posed a "minimal" risk of error and that additional procedures would "harm the government's interest in minimizing administrative expenses without demonstrably reducing the error rate of the existing enforcement system." Pet. App. 25a-27a. That conclusion was entirely independent of *Endicott Johnson*, so this case presents no occasion for addressing the relationship between that decision and *Mathews*.

Petitioners err in suggesting (Pet. 25) that the decision below conflicts with *Simanonok* v. *Simanonok*, 787 F.2d 1517 (11th Cir. 1986). *Simanonok* held only that a federal court had subject-matter jurisdiction over a due process challenge to the Act—the same conclusion reached by the court of appeals here. See *id.* at 1522-1523. On remand in that case, the district court held that the Act provided all the process due under the circumstances. See *Simanonok* v. *Simanonok*, 918 F.2d 947, 949 (Fed. Cir. 1990).

4. Finally, petitioners rely (Pet. 25-28) on the Armed Forces and Full Faith and Credit Clauses in arguing that the Constitution prohibits Congress from allowing state law to determine the division of property in the event of a service member's divorce. That claim lacks merit.

As the court of appeals recognized, Congress's exercise of its authority under the Armed Forces Clauses is entitled to considerable deference. Pet. App. 16a-17a; see *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006). Petitioners cite no authority for the proposition that the Constitution prohibits Congress from invoking state law when it legislates under the Armed Forces Clauses.

Similarly, as the court of appeals explained, even assuming that the USFSPA was enacted under the Full Faith and Credit Clause, that provision also "does not impose on Congress any requirement of substantive uniformity in any area of the law." Pet. App. 16a. Petitioners cite several cases (Pet. 27-28) supporting the unremarkable principle that the Clause requires States to recognize and give effect to the judicial decisions of other States. Underlying that principle, however, is the assumption that state laws are in fact often not uniform.

Petitioners' position—that the Clause bars federal law from incorporating non-uniform state law—is at odds with the plain meaning of the Clause, finds no support in this Court's decisions, and would invalidate the many instances in which federal law incorporates divergent state laws.

Indeed, even when Congress legislates under a provision of the Constitution that does contain a uniformity requirement, it does not offend that requirement when it incorporates state law into a uniform federal rule. For example, the Bankruptcy Clause—which authorizes Congress to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4—is not violated by 11 U.S.C. 522, which permits States to opt out of the federally prescribed exemptions. See *In re Sullivan*, 680 F.2d 1131 (7th Cir.), cert. denied, 459 U.S. 992 (1982); see also *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181 (1902). The same is true of the Naturalization Clause. U.S. Const. Art. I, § 8, Cl. 4 (authorizing Congress to "establish an uniform rule of Naturalization"); see, *e.g.*, *Nehme* v. *INS*, 252 F.3d 415, 429 (5th Cir. 2001) ("[T]he Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state."). The court of appeals properly held that the Constitution does not bar Congress from allowing state law to determine the division of property under USFSPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MICHAEL S. RAAB
MARK A. TOTTEN
Attorneys

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