No. 10-1372

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

B.C. ENTERPRISES, INC., d/b/a ARISTOCRAT TOWING
and ARISTOCRAT TOWING, INC.,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1345. On March 11, 2010, the district court issued an order denying Aristocrat's[1] motion for

[1] This brief, like Appellants' own opening brief, refers to Appellants collectively as "Aristocrat." See Br. 1 n.2. "Br. _" refers to the page numbers within Aristocrat's opening brief. "J.A. _" refers to the page numbers within the Joint Appendix.

judgment on the pleadings. J.A. 107-116. The court held that the United States can bring a civil action for damages to enforce 50 U.S.C. App. 537. J.A. 115. The court also certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). J.A. 116. Defendants filed a timely petition for permission for an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (J.A. 117), which this Court granted on April 5, 2010, (J.A. 119). Accordingly, this Court has jurisdiction under Section 1292(b).

STATEMENT OF THE ISSUE

Whether the United States can file suit for damages to enforce 50 U.S.C. App. 537, Section 307 of the Servicemembers' Civil Relief Act (SCRA).

STATEMENT OF THE CASE

This interlocutory appeal arises out of a lawsuit filed by the United States alleging that Aristocrat sold servicemembers' vehicles in violation of 50 U.S.C. App. 537.

Aristocrat moved to dismiss the case for lack of standing, and the district court denied that motion. J.A. 20-27. The parties then filed cross-motions for summary judgment. The district court granted the United States' motion for summary judgment as to liability, stating "the undisputed facts in this case establish violations of the SCRA, and that [Aristocrat is] liable for such violations." J.A. 34.

Aristocrat again moved for dismissal of the case, claiming – based on another case within the Eastern District of Virginia, *Gordon* v. *Pete's Auto Service of Denbigh, Inc.*, 670 F. Supp. 2d 453 (E.D. Va. 2009) – that the United States lacks authority to sue for damages on behalf of the aggrieved servicemembers. J.A. 107-108. The district court denied the motion, but certified its order for interlocutory appeal under Section 1292(b). J.A. 116. This Court granted Aristocrat's petition for permission to appeal. J.A. 119.

STATEMENT OF FACTS

The facts of this case are undisputed. Aristocrat admits that it towed the automobiles of Lieutenant Yahya Jaboori and 20 other people serving in the United States military. Br. 5-6. Aristocrat admits further that it sold the servicemembers' cars without obtaining court orders. Br. 5-6. That is precisely what Section 537 prohibits. See 50 U.S.C. App. 537(a)(1). Thus, this appeal requires the Court to ascertain what can be done to remedy Aristocrat's SCRA violation.

1. Statutory Background

Congress enacted the SCRA in order "to provide for, strengthen, and expedite the national defense" by protecting servicemembers so that they can "devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. 502(1). The SCRA's predecessor – the Soldiers' And Sailors' Civil Relief Act (SSCRA) – was first enacted 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. Congress has amended the SSCRA a number of times since, including in 2003, when it re-titled the statute as the Servicemembers' Civil Relief Act (SCRA). See H.R. Rep. No. 81, 108th Cong., 1st Sess. 35 (2003); Pub. L. No. 108-189, 117 Stat. 2835. In *Dameron* v. *Brodhead*, 345 U.S. 322, 325 (1953), the Supreme Court ruled that the SSCRA is 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).

The SCRA provides many important protections for servicemembers. Subject to some statutorily defined limitations, these include 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. 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 at issue in this case is 50 U.S.C. App. 537.[2] Section 537 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

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[2] Section 537 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

(1) Misdemeanor

(continued…)

thereafter, without a court order. 50 U.S.C. App. 537(a)(1).

2. The Present Litigation

The United States filed suit and alleged that Aristocrat towed and sold Navy Lieutenant Yahya Jaboori's car without obtaining a court order while he was serving in the military on active duty. J.A. 14. The United Stated further alleged that Aristocrat may have towed and sold, without obtaining court orders, the vehicles of other servicemembers as well. J.A. 14. The United States subsequently obtained evidence that Aristocrat towed and sold the cars of at least 20 other servicemembers who were serving in active duty without court orders in violation of Section 537. J.A. 35-36.

Aristocrat moved to dismiss the case. It argued that the United States lacked standing to bring the suit because the United States suffered no injury and was not statutorily authorized to sue on behalf of the servicemembers. J.A. 23. Aristocrat argued that, under Rule 17 of the Federal Rules of Civil Procedure, the aggrieved

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(…continued)

> 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.

servicemembers should have to sue on their own behalf. J.A. 23. Relying principally on this Court's decision in *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964), the district court ruled that the United States may sue to enforce the SCRA on behalf of servicemembers. J.A. 24-25. The district court concluded that under *Arlington County*, the United States has "a non-statutory right to sue under the SCRA" because of its "strong interest in the national defense." J.A. 25. The district court concluded further that "where Congress has enacted a statute in order to prevent servicemembers from being disrupted during their tours of duty, it would be incongruous to force these same servicemembers to engage in costly litigation to enforce these rights either while they are serving their country or upon returning from service." J.A. 25. Accordingly, the court ruled that "[t]he United States has not just the right, but also the duty, to protect the interests of servicemembers engaging in overseas battles." J.A. 25.

The district court next ruled on cross-motions for summary judgment. It denied Aristocrat's motion for summary judgment regarding damages, and granted the United States' motion for summary judgment on liability for monetary damages.[3] The court rejected Aristocrat's contentions that the United States had

[3] The district court also granted Aristocrat's motion for summary judgment as to injunctive relief, concluding "the United States has not demonstrated the need for injunctive relief at this stage," and granted summary judgment for Earnest A.

(continued…)

failed to establish the identities of the victims or the amount of the damages. The court held that "the United States has produced evidence and witness testimony concerning the identity of the victims, the auctioning of their cars, the active-duty status of these victims, and the prices at which most of the vehicles were sold." J.A. 45. And the court determined that "the United States submitted extensive proof of damages, including auction prices and loan values," as well as "the appraisal values of [the] vehicles." J.A. 45. The court also concluded that Section 537 imposes a strict liability standard. J.A. 49-52. Accordingly, "the undisputed facts" – that Aristocrat sold servicemembers' vehicles without a court order while the servicemembers were on active duty in the military – established that Aristocrat is liable for violations of the SCRA. J.A. 52.

Later, a different judge in the Eastern District of Virginia dismissed a lawsuit brought by an individual servicemember alleging a violation of Section 537 and seeking damages. See *Gordon* v. *Pete's Auto Serv. of Denbigh, Inc.*, 670 F. Supp. 2d 453 (E.D. Va. 2009). That judge concluded, *inter alia*, that Section 537 does not create a private cause of action for damages. *Id.* at 456-457. Pointing to *Gordon*, Aristocrat filed a motion for judgment on the pleadings, again arguing

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(…continued)
Cooper, Aristocrat's manager, determining that he was not liable under the SCRA. J.A. 34-35.

that Section 537 does not authorize the United States to sue for damages on behalf of servicemembers. J.A. 107-108.

The district court disposed of that motion by ruling for a second time that the United States has authority to enforce the SCRA. J.A. 115-116. The court held that the United States' authority to bring suit does not depend on whether servicemembers have a private cause of action. J.A. 115-116. The court concluded that the United States' authority to sue to enforce the SCRA was established because this Court "has clearly held * * * that the United States may bring suit to enforce 'a congressionally authorized program relating to national defense.'" J.A. 113 (quoting *United States* v. *Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977)). It recognized that *Solomon* reaffirmed this Court's earlier holding in *United States* v. *Arlington County*, 326 F.2d 929, 932-933 (4th Cir. 1964), "that 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 action." J.A. 113. The court held that a suit to enforce Section 537 fits squarely within the authority recognized in those cases. J.A. 114. Moreover, the court said the United States' interest is "compelling": "[t]he government, in its use of members of the services – especially those deployed to combat zones – is entitled to personnel who are unfettered by the problems of the

loss or disappearance of a substantial asset and are able to concentrate on the difficulties encountered in a war zone by those fighting a war." J.A. 114-115.

The district court also determined that its ruling "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and that "[a]n immediate appeal * * * will materially advance the ultimate termination of th[e] litigation." J.A. 116. It therefore certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). This Court has accepted the appeal. J.A. 119.

SUMMARY OF ARGUMENT

A. This Court's holding in *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964), is controlling in this case. In *Arlington County*, this Court held that the United States had inherent authority to sue on behalf of servicemembers under the SSCRA – the SCRA's predecessor – because of its interest in the national defense. In *United States* v. *Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977), this Court explicitly reaffirmed the inherent authority recognized in *Arlington County*. The district court in this case correctly determined that *Arlington County*, as reaffirmed in *Solomon*, controls and, therefore, that the United States has inherent authority to enforce the SCRA on behalf of its servicemembers.

B. Aristocrat chose in its opening brief to ignore the controlling language in *Arlington County* and *Solomon*'s reaffirmation of the same. This allowed Aristocrat to paint the district court's decision as an unprecedented expansion of the concept of inherent authority. On the contrary, the district court's decision is a straightforward application of *Arlington County*. Because Aristocrat's brief fails to acknowledge the language in *Arlington County* and *Solomon* that the district court considered controlling, it never engages the central basis for the district court's ruling.

The arguments Aristocrat does make fail on their own terms as well.

1. Aristocrat argues that the United States may not seek damages because the United States did not seek damages in *Arlington County*. But the United States did not seek damages in *Arlington County* because the servicemembers on whose behalf the United States was suing had not yet sustained damages. No rule prevents the United States from seeking damages in a case brought under its inherent authority. In the inherent authority context, as in other contexts, if a cause of action exists, courts must presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. The SCRA exhibits no Congressional intent to exclude damages awards, so damages awards should be allowed. Indeed, if damages are not available, servicemembers will often be left without viable means to redress violations of their SCRA rights. Moreover,

Supreme Court precedent forecloses the notion that a damages remedy is inconsistent with the United States' inherent authority.

2. Aristocrat argues that the United States lacks inherent authority to civilly enforce the SCRA because legislation now pending would make the United States' SCRA enforcement authority express. Legislative history indicates, however, that this pending legislation is intended to clarify the United States' enforcement authority, not change it. The Supreme Court and this Court have warned that a proposed amendment to a law generally carries no significance for interpreting the current law. The most that can reasonably be inferred from the proposed SCRA amendment is that some members of Congress would like to make the United States' SCRA enforcement authority explicit.

3. Aristocrat asks this Court to decide whether Section 537 creates an implied private cause of action. That issue is presented in another case pending before this Court but, as the district court correctly ruled, it is not presented in this case. The implied private cause of action and inherent authority analyses do not intersect – a fact this Court recognized in *Solomon*. Moreover, *Arlington County* contradicts Aristocrat's unsupported claim that the United States cannot recover on servicemembers' behalf unless the servicemembers can also obtain the same relief for themselves.

STANDARD OF REVIEW

This appeal presents an issue of law that this Court reviews *de novo*. See *United States* v. *Madrigal-Valadez*, 561 F.3d 370, 374 (4th Cir. 2009).

ARGUMENT

THE UNITED STATES HAS INHERENT AUTHORITY TO ENFORCE 50 U.S.C. APP. 537, SECTION 307 OF THE SCRA, AND SEEK DAMAGES FOR AGGRIEVED SERVICEMEMBERS

A. Controlling Precedent Establishes The United States' Inherent Authority To Enforce The SCRA

Under the established precedent of this Court, the United States has inherent authority to sue to enforce the SCRA. In *United States* v. *Arlington County*, 326 F.2d 929, 930-931 (4th Cir. 1964), the United States sued Arlington County, Virginia, to restrain the collection of taxes assessed against servicemembers in contravention of the SSCRA – the predecessor of the SCRA. Considering the question whether the United States had authority to sue, this Court held "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 action." *Id.* at 932-933; see also *United States* v. *Champaign County, Illinois*, 525 F.2d 374, 376 (7th Cir. 1975) (holding that it was "entirely appropriate for the United States" to sue to enforce the same SSCRA provision).

In *United States* v. *Solomon*, 563 F.2d 1121 (4th Cir. 1977), this Court reaffirmed the *Arlington County* holding. *Solomon* accepted – citing *Arlington County* – that "the United States may sue to enforce * * * a congressionally

authorized program relating to national defense." *Id.* at 1127. That, this Court determined, is one clear application of the line of cases recognizing the United States' inherent authority to sue in particular circumstances. Indeed, after *Solomon*, this Court cited *Arlington County* for the proposition that "[t]he United States can sue to enforce its policies and laws, even when it has no pecuniary interest in the controversy." *United States* v. *County of Arlington*, 669 F.2d 925, 929 (4th Cir. 1982) (holding that the United States could sue for a declaratory judgment preventing the county from taxing the property of the German Government). Of course, as *Solomon* ruled, the United States' inherent authority to sue is not unlimited. See 563 F.2d at 1128-1129. But just as plainly, *Arlington County* remains good law; so, whatever the limits are, the United States clearly has inherent authority to enforce the SCRA. *Id.* at 1127; see also *United States* v. *Maryland*, 488 F. Supp. 347, 364 (D. Md. 1980) ("The *Solomon* decision rather clearly warns that the *Debs* decision not be applied over-broadly. However, *Solomon* itself also indicates that *Arlington County* is still good law in this Circuit.").

This Court explained in *Solomon*, 563 F.2d at 1126, that the United States' inherent authority to sue was recognized in a series of Supreme Court cases decided in the 1800s, particularly *In re Debs*, 158 U.S. 564 (1895). This Court found the "exact contours" of the United States' inherent authority under *In re Debs* difficult to define. 563 F.2d at 1127. It determined that *In re Debs* had sometimes been interpreted too expansively – as in *United States* v. *Brand*

Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970). 563 F.2d at 1127-1128. And it concluded that *In re Debs* did not provide a permissible basis for the United States to sue to assert the constitutional rights of institutionalized, mentally-disabled citizens. *Id.* at 1129.

Solomon did not try to define the outer limits of the United States' inherent authority under *In re Debs*. But it did define several categories of suit that clearly fit within that authority. One of these recognized categories – suits "to enforce * * * a congressionally authorized program relating to national defense" – applies here. See 563 F.2d at 1127 (citing *Arlington County*, 326 F.2d at 932-933); cf. *United States* v. *Marchetti*, 466 F.2d 1309, 1313 & n.3 (4th Cir.) (citing *In re Debs* to conclude that, even without specific statutory authorization, "[s]tanding arises from the government's interest in protecting the national security"), cert. denied, 409 U.S. 1063 (1972).

The Supreme Court and other courts of appeals have also relied on the *In re Debs* line of cases when assessing the United States' inherent authority to sue. See, *e.g.*, *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967) (citing *In re Debs* and other cases in that line to conclude "[o]ur decisions have established * * * the general rule that the *United States* may sue to protect its interests," which, in that case, included obtaining a damages award) (emphasis added); *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978) (citing *In re Debs* for the proposition "that the United States may sometimes sue without statutory authority or a pecuniary interest"); *United States* v. *Mattson*, 600 F.2d 1295, 1298

(9th Cir. 1979) (concluding, based on the *In re Debs* line of cases and following the reasoning of this Court's decision in *Solomon*, that "[e]ven if there is no express provision, the government can sue if it has some interest that can be construed to warrant an implicit grant of authority").[4]

Not only are *Arlington County* and *Solomon* binding precedent, the rule they articulate – that the United States has inherent authority to enforce the SCRA and other statutes related to the national defense – is the correct one. The purpose of the SCRA is "to provide for, strengthen, and expedite the national defense" by giving servicemembers protections to enable them to "devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. 502(1). Thus, while the statute certainly protects individual servicemembers, the United States itself is perhaps its principal beneficiary. As the district court said, "[t]he government, in its use of members of the services – especially those deployed to combat zones – is entitled to personnel who are unfettered by the problems of the loss or disappearance of a

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[4] Aristocrat claims (Br. 23) that "an expansive reading of *Debs* was rejected by the Third Circuit Court of Appeals in [*United States* v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980)]." This is not correct. In fact, the precedential panel opinion in *City of Philadelphia* failed even to cite *In re Debs*. The four judges who dissented from the court's denial of rehearing *en banc* did, however, cite *In re Debs* and other cases in that line. *City of Philadelphia*, 644 F.2d at 213-220. Those judges concluded that the panel opinion "is inconsistent with a long line of authority in the Supreme Court respecting the authority of the Department of Justice to conduct litigation in the public interest." *Id.* at 207. Because it failed to apply the *In re Debs* line of cases, the reasoning of the panel decision in *City of Philadelphia* is also fundamentally at odds with that of this Court's decision in *Solomon*.

substantial asset and are able to concentrate on the difficulties encountered in a war zone by those fighting a war." J.A. 114-115; see also J.A. 25 ("The United States has not just the right, but also the duty, to protect the interests of servicemembers engaging in overseas battles."). If any interests implicate the United States' inherent authority to sue, the interest in an effective military must surely be among them. In *Arlington County* and *Solomon*, this Court correctly recognized that fact.

The necessity for this rule is particularly apparent in the context of this case. Some of the servicemembers victimized by Aristocrat may lack the resources required to bring a private suit for damages. If Aristocrat had enforced a lien on a servicemember's vehicle in court and the servicemember learned of the suit, the servicemember might have been able to seek a stay or ask the court to adjust the obligation.[5] See 50 U.S.C. App. 537(b). But if Aristocrat sells the car to someone else without bothering to get a court order, as in the situations at issue here, servicemembers have no federal remedy unless they can afford to file suit for damages. And even then, servicemembers risk having their suits rejected by a district judge who mistakenly concludes that a private suit for damages to enforce

[5] Indeed, if Aristocrat had gone to court, as Section 537 requires, the servicemembers would also have benefitted from the protection against default judgments in Section 521. That provision of the SCRA requires a plaintiff in a civil action in which the defendant does not make an appearance to file an affidavit "stating whether or not the defendant is in military service and showing necessary facts to support the affidavit," or that the defendant's military status could not be determined. 50 U.S.C. App. 521. If the defendant's military status cannot be determined, the court may require the plaintiff to post a bond to indemnify the defendant. 50 U.S.C. App. 521(b)(3).

the SCRA is impermissible. See *Gordon* v. *Pete's Auto Serv. of Denbigh, Inc.*, 670 F. Supp. 2d 453 (E.D. Va. 2009), appeal pending, No. 09-2393 (4th Cir.).

Under these circumstances, as the district court correctly pointed out, "lienholders have a perverse incentive to sell servciemembers' property quickly" and thereby gain from their wrongdoing while, at the same time, insulating themselves from liability. See J.A. 115; cf. *Marin* v. *Armstrong*, No. 3:97-cv-02784-BF, 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" debtor protection provisions of the SSCRA because otherwise creditors could "simply ignore" the requirements of those provisions and suffer little or no repercussion); *Moll* v. *Ford Consumer Fin. Co.*, No. 97-cv-05044, 1998 WL 142411, at *4 (N.D. Ill. Mar. 23, 1998) (concluding that "if no private cause of action is implied [to enforce the SSCRA's maximum interest rate provision], creditors could simply ignore" the SSCRA's mandate). The ability of the United States to obtain damages on behalf of aggrieved servicemembers at least greatly diminishes this perverse incentive. And in cases such as this one, where many servicemembers have sustained damages, a suit by the United States may be the only way the violation will be fully redressed.

Moreover, the United States has sued to enforce the SSCRA many times and no court has ever held that it lacks the authority to do so. See, *e.g.*, *Sullivan* v. *United States*, 395 U.S. 169 (1969); *United States* v. *Commonwealth of Puerto Rico*, 478 F.2d 451 (1st Cir. 1973); *United States* v. *Arlington County*, 326 F.2d

929 (4th Cir. 1964); *United States* v. *Onslow County Bd. of Educ.*, 728 F.2d 628 (4th Cir. 1984); *United States* v. *Champaign County, Illinois*, 525 F.2d 374 (7th Cir. 1975); *United States* v. *Kansas*, 810 F.2d 935 (10th Cir. 1987); *United States* v. *Minnesota*, 97 F. Supp. 2d 973 (D. Minn. 2000); *United States* v. *City of Highwood*, 712 F. Supp. 138 (N.D. Ill. 1989).[6]

The district court correctly applied *Arlington County* and *Solomon* in concluding that "the United States possesses a *non-statutory* cause of action [*i.e.*, has inherent authority] to enforce §537 through a civil action for damages." J.A. 112. This Court should affirm the district court's correct application of its decisions. Indeed, the application of binding precedent in this case could hardly be clearer. The same statute that *Arlington County* held the United States has inherent authority to enforce is at issue here. See 326 F.2d at 932-933. And the statutory provision at issue here, though different than the one at issue in *Arlington County*, implicates precisely the interest this Court has identified as giving rise to the United States' inherent authority. See *ibid.*; *Solomon*, 563 F.2d at 1127. As the district court correctly pointed out, the United States' interest applies with

[6] While it is technically correct that this is the first SCRA lawsuit filed by the Civil Rights Division (see Br. 2), the reason for this is – as the press release cited in Aristocrat's brief states – that the Civil Rights Division did not receive enforcement authority over the SCRA until 2006. Before that, enforcement was handled by another Division within the Department of Justice. The same press release also notes that the Division has been able to resolve numerous SCRA complaints without the need for litigation. See Department of Justice Press Release, http://www.justice.gov/crt/housing/documents/bc_press_12-10-08.pdf (last visited June 25, 2010).

particular force in the Section 537 context – an automobile may be among a servicemember's most significant assets, and thus its loss a potentially serious distraction from essential duties. J.A. 114.

B. Aristocrat's Arguments To The Contrary Lack Merit

Aristocrat attempts to cast the district court's decision as a controversial and overly expansive application of *In re Debs*. See Br. 18-19, 21-24. Nothing could be further from the truth. The district court did not interpret *In re Debs* at all. It merely determined that this case fits squarely into a narrow category of cases within which this Court has made clear that *In re Debs* applies. Aristocrat simply ignores the controlling language in *Arlington County* and *Solomon*. See *Arlington County*, 326 F.2d at 932-933 ("Here we find that 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 action."); *Solomon*, 563 F.2d at 1127 (recognizing that, under *In re Debs*, "the United States may sue to enforce * * * a congressionally authorized program relating to national defense"). In so doing, Aristocrat fails to come to grips with the reason for the district court's ruling; that is, it fails to come to grips with the controlling precedent of this Court.

Without dealing with the controlling language of *Arlington County* and *Solomon*, Aristocrat does make essentially three arguments that the United States

lacks authority to enforce Section 537 and seek damages for aggrieved servicemembers. Each argument is devoid of merit.

1. Aristocrat argues that the United States may not seek damages for aggrieved servicemembers because, in *Arlington County*, the United States sought injunctive relief, not damages. Br. 20-21. But Aristocrat does not explain why this fact means the United States cannot seek damages here.

The reason the United States did not seek damages in *Arlington County* is that no damages had yet been incurred by any servicemembers because the challenged tax assessment had not yet been collected. 326 F.2d at 930-931. If the circumstances of the case had been different, and damages had been sustained, the United States presumably would have sought damages. There is simply no reason to think that the United States' inherent authority to "sue to enforce * * * a congressionally authorized program relating to national defense" is limited to suits seeking equitable relief. See *Solomon*, 563 F.2d at 1127. Neither *Arlington County* nor *Solomon* suggests such a limitation. Instead, there is every reason to conclude that the United States may seek damages where, as here, they are appropriate.

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), the Supreme Court reaffirmed the "longstanding rule" that courts must "presume the availability of all appropriate remedies unless Congress has expressly indicated

otherwise." See also *Barnes* v. *Gorman*, 536 U.S. 181, 185, 189 (2002) (same). That rule applies here. In *Franklin*, the Court addressed the question what remedies are available to enforce an already recognized implied private cause of action. To be sure, the analyses for determining whether a statute creates an implied private cause of action and whether the United States has an inherent cause of action are distinct. See pp. 27-32, *infra*. But the test for determining the remedies available once a cause of action exists – whether inherent or implied – is the same. This is because the *Franklin* rule is founded upon "the federal courts' power to award appropriate relief so long as a cause of action exist[s]." 503 U.S. at 66. Thus, "if a right of action exists to enforce a federal right" – no matter what kind of right it is, whether express, implied, or inherent, the rule applies – "a federal court may order any appropriate relief." *Id.* at 69.

Under *Franklin*, damages are available to remedy violations of the SCRA. 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 [of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*]." 503 U.S. 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. *Id.* at 66; see also *Hurley* v. *Deutsche Bank Trust Co. Americas*, No. 1:08-cv-361, 2009 WL 701006,

at *10 (W.D. Mich. Mar. 13, 2009) ("Because there is no indication in the [SCRA] that Congress intended to exclude punitive damages as a remedy, the Court finds no basis to conclude that such damages are unavailable."); *Linscott* v. *Vector Aerospace*, No. 3:05-cv-00682-HU, 2006 WL 240529, at *7 (D. Or. Jan. 31, 2006) (concluding "that damages are consistent with the underlying purposes of" Section 537).

Indeed, damages are not merely consistent with the purposes of the SCRA, they are indispensable. As the district court explained, if damages are not an available remedy under Section 537 and the only available remedy is prospective equitable relief to prevent a violation, "lienholders have a perverse incentive to sell servicemembers' property quickly." J.A. 115. Once the property is resold, a suit for damages is the only viable means of redressing the injury.

Moreover, the Court in *Franklin* directly confronted and rejected an argument that only equitable relief, not damages, should be allowed under Title IX's implied private cause of action. 503 U.S. at 75. The Court concluded that the claim that only equitable relief is available "diverg[es] from our traditional approach to deciding what remedies are available for violation of a federal right" and "conflicts with sound logic." *Ibid.* The Court noted further that the suggested equitable remedies were "clearly inadequate" to redress the petitioner's injuries and, indeed, "would leave petitioner remediless." *Id.* at 76.

The Supreme Court's decision in *Wyandotte* offers still more support for the United States' ability to seek damages. *Wyandotte* relied on the concept of inherent authority to rule that the United States may sue for damages in the absence of explicit statutory authority. 389 U.S. at 201 ("Our decisions have established * * * the general rule that the United States may sue to protect its interests."); *id.* at 204 (concluding that the United States' inherent authority in the case included the ability to bring "a civil action [to recover] the Government's expenses"). *Wyandotte* thus forecloses the notion that a remedy of damages is inconsistent with the United States' inherent authority.

2. Aristocrat also argues that the existence of pending legislation making the United States' authority to enforce the SCRA explicit means that, under the current law, the United States lacks enforcement authority. Br. 27 (citing H.R. Rep. No. 324, 111th Cong., 1st Sess. (2009)).[7] The argument is meritless.

The pendency of this legislation does not suggest that the United States lacks the inherent authority to enforce the current SCRA – authority *Arlington County* and *Solomon* have already established. Rather, legislative history indicates that H.R. 3949 is intended, among other goals, to *clarify* the relief that the SCRA

[7] On November 3, 2009, the House of Representatives passed this bill by a margin of 382 to 2. See Final Vote Results for Roll Call 835, http://clerk.house.gov/evs/2009/roll835.xml (last visited June 25, 2010). The Senate has not voted on the bill.

already allows. One of the bill's sponsors explained on the House floor that H.R. 3949 "makes very clear" that servicemembers "can do something about" an SCRA violation, specifically "[t]hey can bring their own lawsuit" and "[t]he Attorney General can bring a lawsuit." 155 Cong. Rec. H12,159 (daily ed. Nov. 2, 2009) (Statement of Rep. Miller). Representative Miller stated further that "[t]his legislation *now makes very clear* that the rights under SCRA are real rights" – *i.e.*, that they are enforceable. *Ibid.* (emphasis added); see also *id.* at H12,157 (Statement of Rep. Stearns) ("Unfortunately, courts sometimes fail to recognize the individual right of action that is implicit in the Servicemembers Civil Relief Act.").

In an analogous case, this Court concluded "we can infer little from congressional inaction alone." *United States* v. *Blue Cross & Blue Shield of Maryland, Inc. (BCBS)*, 989 F.2d 718, 727 (4th Cir.), cert. denied, 510 U.S. 914 (1993). *BCBS* required this Court to determine whether the term "health-plan contract" in 38 U.S.C.1729 – a statute governing the United States' ability to recover certain veterans' medical costs – included a particular kind of insurance policy. *Ibid.* The appellant argued that it did not because efforts to amend the law to explicitly include this type of policy were unsuccessful. *Ibid.* This Court rejected appellant's argument in part because "the legislative history suggest[ed] that Congress's intent in trying to pass the amendments was merely to clarify the definition of health-plan contract and not to broaden it." *Ibid.* Likewise, in this

case, legislative history suggests the proposed amendment to the SCRA was intended to clarify the relief available under the statute, not to change it.

The Supreme Court has also repeatedly warned that legislative inaction is poor measure of Congressional intent. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600 (1983) ("Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation."); *City of Milwaukee* v. *Illinois and Michigan*, 451 U.S. 304, 332 n.24 (1981) (quoting *Red Lion Broad. Co.* v. *F.C.C.*, 395 U.S. 367, 381-382 n.11 (1969), for the proposition that "unsuccessful attempts at legislation are not the best of guides to legislative intent"); see also *N.A.A.C.P.* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992) ("[T]he Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance.") (citing cases), cert. denied, 508 U.S. 907 (1993).

Solomon is not to the contrary. As Aristocrat points out (Br. 27), *Solomon* noted the pendency of legislation that would have explicitly authorized the Attorney General to bring the suit at issue in that case. But the relevant legislative history in *Solomon* was the 20 years of unsuccessful attempts "to enact legislation empowering the Attorney General to bring the type of action represented by the instant case." 563 F.2d at 1125 n.4. Nothing remotely similar is present here. Congress has never rejected legislation giving the Attorney General the explicit

authority to sue to enforce the SCRA; it just has not yet passed such legislation. The pendency of H.R. 3949 indicates only that some members of Congress would like to make the Attorney General's authority to sue under the SCRA explicit. It does not – by any reasonable inference – indicate that Congress believes the Attorney General currently lacks authority to sue.

Aristocrat relatedly points out the fact that some statutes make the United States' enforcement authority explicit, and argues that the United States should accordingly not be able to enforce a statute that lacks an explicit grant of enforcement authority. Br. 24-26. But this amounts to an argument that the *In re Debs* line of cases should be overruled and the concept of inherent authority abolished. That might be fodder for a law review article; this Court has made clear, however, that the doctrine of inherent authority still applies, at least in limited categories of cases. See *Arlington County*, 326 F.2d at 932-933; *Solomon*, 563 F.2d at 1127. As we have stressed, this case plainly fits within one of those recognized categories. See pp. 13-20, *supra*.

3. Finally, Aristocrat spends a significant portion of its brief arguing that Section 537 does not create an implied private cause of action for damages. Br. 8-18.[8] The United States disagrees, and has argued that Section 537 creates a private

[8] Aristocrat's argument that Section 537 does not create a private cause of action is at cross-purposes with its suggestion that allowing the United States to

(continued…)

cause of action. See Brief for the United States as Amicus Curiae, *Gordon* v. *Pete's Auto Serv. of Denbigh, Inc.*, No. 09-2393 (4th Cir.) (appeal pending). As the district court correctly held, however, the private cause of action issue does not need to be resolved in order to decide whether the United States has inherent authority to enforce Section 537.

The analyses for determining whether the United States can enforce a statute under its inherent authority and whether a statute creates an implied private cause of action do not intersect. As explained, pp. 14-16, *supra*, the inherent authority question is controlled by the *In re Debs* line of cases. In this Court, *Solomon* provides authoritative guidance for interpreting that body of caselaw. This Court will reject a claim of inherent authority that attempts to give *In re Debs* "its most expansive possible meaning." *Solomon*, 563 F.2d at 1127. On the other hand, *Solomon* defined discrete categories of cases within which the concept of inherent

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(…continued)
sue will create the potential for double recovery. Compare Br. 8-18 with Br. 26. In any event, a servicemember would not be allowed to recover damages in a suit brought by the United States and then recover again for the same harm in a private suit. See *General Tel. Co.* v. *E.E.O.C.*, 446 U.S. 318, 333 (1980) (discussing the concurrent authority under Title VII that allows the EEOC to bring suit and for private causes of action, and explaining that "[i]t * * * goes without saying that the courts can and should preclude double recovery by an individual"); see also *E.E.O.C.* v. *Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (citing with approval a court of appeals decision holding that "individuals who litigated their own claims were precluded by *res judicata* from obtaining individual relief in a subsequent EEOC action based on the same claims").

authority remains viable. *Id.* at 1127-1128. Between these two points, the proper application of the *In re Debs* line of cases remains somewhat murky. This case, however, falls squarely within one of *Solomon*'s defined discrete categories. See pp. 13-20, *supra*.

A different test and body of caselaw applies when the question is whether a statute creates an implied private cause of action. As discussed more fully in the Brief for the United States as Amicus Curiae, *Gordon* v. *Pete's Auto Service of Denbigh, Inc.*, No. 09-2393 (4th Cir.) (appeal pending), the traditional rule, which "prevailed throughout most of our history," was that when "a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-375 (1982). Denial of a remedy for persons with a statutory right was "the exception." *Ibid.* The Supreme Court called this "the *Rigsby* approach," referencing an emblematic case. *Ibid.* (citing *Texas & Pac. Railway Co.* v. *Rigsby*, 241 U.S. 33 (1916)). The rule began to change in the mid-1970s. Now a private cause of action may be implied only with evidence of congressional intent to create both a private right and a private remedy. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). This change in the law governing implied private rights of action – the *Rigsby* line of cases – does not, however, affect the

law governing the inherent authority of the United States – the *In re Debs* line of cases.

Solomon made the independence and distinctness of these different types of claims clear. This Court first considered whether the United States was impliedly authorized to sue, and concluded it was not. Then, after disposing of the implied cause of action issue, this Court reached the distinct question whether the United States had inherent authority to sue. See *Solomon*, 563 F.2d at 1126 ("Since we find no statute which expressly or impliedly authorizes the filing of this suit, we consider whether the case is one within the line of authorities permitting the United States to sue even when not authorized by statute.").

The district court followed the clear path laid out in *Solomon*. It explained that "[t]he Fourth Circuit has clearly distinguished between the question of whether a statute 'expressly or impliedly authorizes the filing of [a] suit,' and the question of whether a 'case is one within the line of authorities permitting the United States to sue even when not authorized by statute.'" J.A. 115 (quoting *Solomon*, 563 F.2d at 1126). The district court thus correctly concluded that it did not have to decide whether the SCRA creates a private cause of action.

Aristocrat argues that "[i]t is axiomatic that if the servicemembers have no private remedy to recover monetary damages under § 537, then the United States, as a 'guardian,' has no cause of action under § 537." Br. 19. But the United States

has never claimed to be acting as the servicemembers' guardian. The United States relies not on the concept of guardianship, but rather on the precedent of this Court establishing its inherent authority to enforce the SCRA. True, the district court briefly analogized the United States' right to bring suit to that of a guardian. J.A. 115. It is incorrect, however, to suggest – as Aristocrat appears to do (Br. 19) – that this was the basis for the district court's ruling. The district court's ruling was plainly based, not on an analogy to the concept of guardianship, but on its correct conclusion that this Court's precedent has established the United States' inherent authority to sue to enforce the SCRA.

Finally, this Court's decision in *Arlington County* supports our contention that the United States' inherent authority to enforce the SCRA exists without regard to whether an individual servicemember may enforce the SCRA through a private cause of action. In *Arlington County*, the suit was filed both by the United States and by an individual servicemember. 326 F.2d at 930. The servicemember suffered an incapacity, not explained in the opinion, that prevented him from maintaining the suit. *Id.* at 933. This Court held that "the incapacity of the individual plaintiff to maintain his action is immaterial since he may find shelter under the Government's umbrella." *Ibid.* Under *Arlington County*, therefore, the United States can obtain relief for servicemembers even when they cannot obtain that relief themselves. This is also true in other contexts. See, *e.g.*, *Molski* v. *M.J.*

Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007) (explaining that the Attorney General can obtain monetary relief on behalf of aggrieved individuals under Title III of the Americans With Disabilities Act (ADA), but that "[m]onetary damages are not available in private suits under Title III of the ADA").

CONCLUSION

This Court should affirm the district court's order denying Artistocrat's motion for judgment on the pleadings, and remand the case for further proceedings to determine damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE UNITED STATES AS APPELLEE complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7). This brief was prepared using Word 2007 and contains 7659 words of proportionately spaced text. The typeface is Times New Roman, 14-point font.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

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Dated: June 25, 2010

CERTIFICATE OF SERVICE

I certify that on June 25, 2010, an electronic copy of the BRIEF FOR THE UNITED STATES AS APPELLEE was transmitted to the Court by means of the appellate CM/ECF system and that eight hard copies of the same were sent by first class mail.

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