

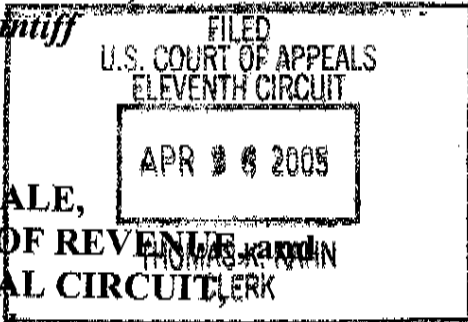
No. 05-10668-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL S. GOGOLA,
Appellant/Plaintiff

v.

JAMES ZINGALE,
FLORIDA DEPARTMENT OF REVENUE
TWENTIETH JUDICIAL CIRCUIT
Appellee/Defendants,



On Appeal from the United States District Court
For the Middle District of Florida, Fort Myers Division
Case No. 2:2004-CV-00417

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Appellant's lawsuit was a general (facial) and an as applied challenge to the constitutionality of the Florida alimony statute (§ 61.08) as a federal question and declaratory judgment action under 28 U.S.C. 1331 and 28 U.S.C. 2201. The only relief sought was declaratory judgment relief. The complaint alleged the Florida alimony statute impermissibly infringed federal and state liberty interest, federal (14th Amendment) and state (Fla. Con. Article I Section 23) fundamental right to privacy, and the federal 13th amendment ban on involuntary servitude inter alia.

The District Court Dismissed with prejudice the action finding the Appellant lacked standing to make a general (facial) constitutional challenge and the as applied claims were dismissed under the Rooker-Feldman doctrine.

The Appellant appealed the dismissal with prejudice that he had standing to make the facial challenge pursuant to *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483-86, 103 S. Ct. 1303, 1315-17 (1983), and that Rooker Feldman was inapplicable because the focus of the lawsuit was the enforcement proceedings based on the challenged statute and not the final judgment order.

Appellees answer that dismissal was proper because the Appellant lacked standing to make the facial statutory challenge pursuant to *Doe v Pryor*, 344 F. 3d 1282, 1286-1287 (11th Cir. 2003) and Rooker Feldman was properly applied as the

lawsuit was inextricably intertwined with the state court judgment. The Appellees also argue abstention was proper pursuant to *Ankenbrandt v. Richards*, 504 U.S. 689, 704-05 (1992) and that the merits of the claims failed; right to privacy because dissolution of marriage does not invoke the right to privacy, equal protection fails because the alimony statute is gender neutral and the 13th Amendment claims fails because the possibility exists an ex-spouse has to work to pay the court ordered payments does not remotely invoke the 13th Amendment. Finally, Appelles' brief argues that the State's police power does not contravene Constitutional assurances.

APPELLEES' ARGUMENTS

Standing for facial constitutional challenge

Appellees' brief mistakenly relies, as did the District Court, on this Court's words in *Doe v Pryor*, 344 F. 3d 1282, 1286-87 (11th Cir. 2003). The brief argues at page 8,

"...a plaintiff lacks standing to advance a general challenge against the Constitutionality of a state statute in federal court, unless the federal court has the authority to bind the state courts in its determination as to the Constitutionality of the Statute"

This assertion, if correct, would invalidate a plethora of facial challenges this court as well as district courts across the country have entertained and entertain today. If this assertion is correct only state statutes

subject to Congressional authorization for federal courts to adjudicate their constitutionality would survive this test.

Federal courts, including this, have opened their doors to innumerable declaratory judgment constitutional challenges to state statutes cases . This occurs even where the federal court decision can be viewed as having no binding authority on state courts in its determination as to the constitutionality of the state statute. See for example, *Kirkpatrick v. Shaw*, 70 F.3d 100, 102 (11th Cir.1995) ("The district court correctly determined that it had subject matter jurisdiction only over [plaintiff's] facial challenge to the constitutionality of Florida's general rules and procedures governing admission to the bar[.]"); *Vincent and Doe v Broward County*, 200 F.3d 1325 (11th Cir 2000) (facial challenge to a Florida county ordinance); *Bailey v. Pryor*, 240 F.3d 944 (11th Cir. 2001) ("In this case, by contrast, the plaintiffs have presented a fundamental rights facial challenge to the Alabama statute.") inter alia.

This court's determination can be used in state court non judicial proceedings as when enforcement of the statute may occur in the future. The Appellant has had prior enforcement proceedings instituted against him in state court and it is likely that he will again in the future. Further, Florida courts are replete with vast number of valid and invalid enforcement proceedings over the alimony statute. The likelihood that the Appellant or other Floridians will have

ministerial court enforcement proceedings against them in the future creates the supplemental criteria coupled with the past criteria established in the complaint to give the Appellant standing to make a facial constitutional challenge to the state statute. See *Executive Arts Studio, Inc. v City of Grand Rapids*, 391 F.3d 783, (6th Cir. December 2004)

If the criteria for standing to make a general constitutional state statutory challenge was a requirement the federal court decision must bind the state court, then no one would have standing to make an as applied challenge either. In essence there can be no federal constitutional challenges to state statutes in federal courts (except the U.S. Supreme Court) unless the U.S. Congress authorizes binding on a state court. This simply is not the case across federal District and Circuit Courts.

Although states are free to allocate decision making authority among their own tribunals as they please, they are not free to prefer their processes to those of the federal courts and to decline to respect federal judgments. *In re Cook*, 49 F.3d 263, 266 (7th Cir. 1995)

Because the state of Florida is a party to this action when this court rules the Florida alimony statute impermissibly infringes federal liberty interest and Right of Privacy this ruling will have a preclusive effect in any future Florida state court enforcement proceedings between the parties, and other Floridians. Though not

"binding" precedent this court's ruling will be preclusive as res judicata and as law of the case.

Comity

The Appellees wish to cloak themselves in comity when it works to their advantage but discard it as irrelevant when it works to their detriment. Their brief is replete with Rooker-Feldman jurisdictional and Younger abstention arguments which are exceptions to federal court jurisdiction predicated on comity with state courts. They wish this court to rule in their favor based on these exceptions.

When comity would work against them, as when a state court should give comity to a federal court ruling that a state statute is unconstitutional they argue a tight and narrow rule, i.e the federal court ruling is not binding on the state court. See *People v Nance*, 189 Ill.2d 142, 724 NE2d 889, 244 Ill. (Illinois 2000)

The Appellees argue both sides of comity, each side in the instance to benefit them. They lack consistency when they wish this court to consider comity.

Family law is a matter uniquely of state law

The Appellees' brief mistakenly relies on the concept family law is a matter uniquely of state law pursuant to *Ohio ex rel. Popvivi v. Agler*, 280 U.S. 379, 383, (1930) and *Ankenbrandt* at 504. The federal court avoidance of family law under *Ankenbrandt* is specific to granting a divorce decree, alimony award, or child custody award. None of these were relief requested (Complaint R-11 # 15). This

lawsuit requests only declaratory judgment relief as a constitutional challenge of the Florida alimony statute as infringing federal liberty interest and fundamental constitutional rights all of which, as federal question under 28 U.S.C. 1331, federal courts have been granted original jurisdiction by the U.S. Congress.

Federal courts deal with many family law matters similar to this lawsuit, i.e. constitutional challenges to state statutes effecting family matters such as marriage, parenting and contraception. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-685 (1977); *Parenthood v. Casey*, 505 U.S. 833, (1992); *Zablocki v. Redhail*, 434 US 374 (1978); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) inter alia.

Rooker-Feldman

The Appellees' brief Rooker-Feldman argument is now outdated.

The expansive scope of the Rooker Feldman doctrine created by District Courts has been narrowed in *Exxon Mobil Corp, et al v Saudi Basic Industries Corp.*, USSC No. 03-1696 (March 30, 2005).

"Since *Feldman*, this Court has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction. However, the lower federal courts have variously interpreted the *Rooker-Feldman* doctrine to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law under 28 U.S.C. 81732 "

All prior concepts of the Rooker-Feldman doctrine are redefined within the narrow scope espoused in *Exxon Mobil*.

"Nor does §1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents an in-dependent claim, even one that denies a state court legal conclusion in a case to which the plaintiff was a party, there is jurisdiction and state law determines whether the defendant prevails under preclusion principles. Pp. 10 12."

Most importantly the succinct holding,

"The *Rooker-Feldman* doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments."

In this lawsuit the Appellant distinctly stated he was "not requesting that a state court judgment be overturned, altered, modified, or entered by this [District] Court." (Complaint R-11 #16)

Rooker-Feldman is inapplicable to any and all claims in this lawsuit.

Right to Privacy Infringement claim

Appellees brief inaccurately believes the Right to Privacy does not apply to Florida Chapter 61 "Dissolution of Marriage" statute containing the alimony section challenged. Appellees' brief believes the Privacy Protected Zone of "Personal decisions relating to marriage" only encompasses the right to marry

The Privacy Protected Zone of "personal decisions relating to marriage" does encompass dissolution of marriage (divorce.). See *Greenberg v Zingale*, Omnibus Order United States District Court Southern District of Florida Case 04-80443 (on appeal to this Court as *Greenberg v Zingale*, Case Number 05-10187-F). See also *LittleJohn v. Rose*, 768 F. 2d 765, 768 (6th Cir. 1985) citing (*Zablocki*, 434 U.S. at 385),

"Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., *Roe v. Wade*, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Zablocki v. Redhail*, 434 U.S. 374...

The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). Given the "associational interests that surround the establishment and dissolution of [the marital] relationship", such "adjustments" as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. See *Zablocki*, 434 U.S. at 385; *U.S. v. Kras*, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)."

As the alimony section (§61.08) is contained in the "Dissolution of Marriage" statute it infringes a federal liberty interest and a fundamental right of

privacy such that it is presumptively unconstitutional and requires a strict scrutiny analysis.

“The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny - that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).” *Planned Parenthood v. Casey* 505 at 929.

“It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’” *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *City of Mobile v. Bolden*, 466 U.S. 55, 76 (1980))

In the District Court the Appellees offered no state interest, let alone a compelling state interest minimally applied to validate the alimony statute. The Appellees silence on any interest indicates whatever interest they may now offer is not a compelling one.

The Appellees' brief here merely justifies the alimony statute as an exercise of the state's police power. This sadly fails the compelling state interest minimally applied test. (*Pacheco v Pacheco*, 246 So. 2d 778, 782 (Fla.))

Pacheco was superceded by the Florida Constitutional Right to Privacy Amendment (1980) and is antiquated law. Furthermore, the police power Appellees' brief cites was the Florida Supreme Court's argument to *not* grant alimony to an adulterous wife. It was not the rationale *for* an award of alimony

Whatever compelling state interest the state would have offered it must be consistent and it is not. Not all Florida marriages undergoing dissolution are examined for the interest only contested marriages and in fact only marriages that plead for alimony will be reviewed for it.

The Appellees argue that alimony is proper in given instances and required by equity. Equity is not a compelling state interest minimally applied to infringe liberty interest, fundamental rights of privacy and property.

Equal Protection Infringement claim

The Appellees brief raises gender as the equal protection claim. It states that because the alimony statute is gender neutral there is no equal protection claim.

This lawsuit never pled or argued a gender discrimination claim. This lawsuit alleged that similarly situated divorcing spouses are treated differently ...based on economic need, wealth and earning power. Further that married spouses are treated differently than divorcing spouses as to the support one is to receive based on lifestyle spending.

Marital status has reached the level of a suspect class worth of strict scrutiny analysis of any statute which treats similarly situated Floridians differently based on their marital status. See The Florida Commission on Human Relations ... dedicated to eliminating discrimination on the basis of race, color, religion, sex, national origin, age, handicap, marital status or familial status

[<http://fchr.state.fl.us/>]; Florida statutes which prohibit discrimination based on marital status F.S. § 175-333. Discrimination in benefit formula prohibited; restrictions regarding designation of joint annuitants ;F.S. § 185-341.

Discrimination in benefit formula prohibited; restrictions regarding designation of joint annuitants; F.S. § 725-07. Discrimination on the basis of sex, marital status, or race forbidden; F.S. § 760-01. Purposes; construction; title (Florida Civil Rights Act); § 760-05. Functions of the commission F.S. § 760-10. Unlawful employment practices; § 760-60. Discriminatory practices of certain clubs prohibited; remedies; F.S. § 1000.05. Discrimination against students and employees in the Florida K-20 public education system prohibited' equality of access required.

13th Amendment claim

The Appellee's brief supports the Appellant's argument on this point. They concede that an ex-spouse must work to pay court ordered payments. This is the core of the definition of involuntary servitude as defined in *United States v. Kozminski*, 487 U.S. 931, 942 (1998),

“...we hold that, for purposes of criminal prosecution under 241 or 1584, the term ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.” *Kozminski* 487 at 952

In the case before the court the only way the Appellant is forced to forever work for the former spouse is by use and threat of coercion through law (F.S. §61.08 alimony and F.S. §61.14 enforcement) and the legal process. The only way the former spouse could force the Appellant to work to maintain her in the lifestyle of the marriage (*Canakaris v. Canakaris* , 382 So. 2d 1197 (Fla. 1980)) is to use the law, §61.08, and then use the coercive force of the law, § 61.14. She did just that. The alimony section itself is violative of the 13th amendment involuntary servitude provision. The Appellant is also subject to litigation over the former spouse's use of F.S. § 61.08 and F.S. § 61.14 to deprive the Appellant of his property and freedom, i.e. to subject him to “involuntary servitude.”

“The primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, *but the Amendment was not limited to that purpose;*” (Emphasis added) citing *Butler v. Perry*, 240 U.S. 328, 332 (1916). *Kozminski* 487 at 942

The 13th amendment projected an expansive freedom.

“While the general spirit of the phrase ‘involuntary servitude’ is easily comprehended, the exact range of conditions it prohibits is harder to define. The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law.” *Id* at 943.

“Looking behind the broad statements of purpose to the actual holdings, we find that in every case in which this Court has found a

condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.” Id at 943

The Appellant must work or face legal sanction because of the alimony statute and its enforcing ancillary.(F.S. §61.08 and § 61.14)

“A court may impute income to a spouse who is earning less than she could with the use of her best efforts.” *Ritter v. Ritter*, 690 So. 2d 1372, 1374 (Fla. 2d DCA 1997).

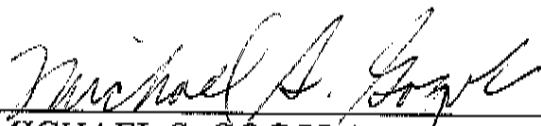
“To impute income to a former spouse, the trial court must find that the unemployment is voluntary, and resulted from either the spouse’s pursuit of his or her own interests, or a less than diligent and bona fide effort to find employment paying at a level equal to that formerly enjoyed.” *Ensley v. Ensley*, 578 So. 2d 497(Fla. 5 DCA 1991),

“...[e]ven at the age of 65 or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty.” *Pimm v. Pimm*, 601 So. 2d 534, 536 (Fla. 1992)

CONCLUSION

For the foregoing reasons the Appellant has standing to make a general (facial) constitutional challenge to the Florida alimony statute, that the Rooker Feldman and any abstention doctrine are inapplicable to all claims and that the Florida alimony statutes impermissibly infringe federal liberty interest, Right to Privacy, Equal Protection and the 13th Amendment

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

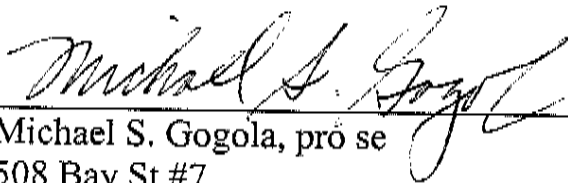
1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in Times New Roman, 14 pt.

CERTIFICATE OF SERVICE

This is to certify that on this 25rd day of April, 2005 a true and correct copy of the foregoing Initial Appellant's Brief has been served via U.S. mail to

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