No. 08-1134

IN THE

Supreme Court of the United States

UNITED STATES AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF SUPPORTING RESPONDENT OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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INTEREST OF AMICUS CURIAE[*]

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed amicus curiae briefs in various courts seeking to protect the rights of consumer bankruptcy debtors.

NACBA and its membership have a vital interest in the outcome of this appeal, as member attorneys represent individuals in a large portion of all chapter 13 cases filed. Debtors and their attorneys must be able to rely on the finality of confirmation orders. The hard work that debtors put into keeping

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[*] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or other Amici or Amicis' counsel made such a monetary contribution.

up with obligations under their plans will be undercut if years later, even after the debtor has faithfully carried out all plan terms, the entire process can be reversed. If Petitioner's arguments challenging the finality of chapter 13 plan confirmation orders prevail, chapter 13 debtors and the attorneys representing them will face uncertainties over what will be expected of them in the long term future, including the potential for unforeseen costs that struggling debtors can ill afford.

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INTRODUCTION

This appeal arises from a dispute over a relatively small amount of money, approximately $4,500 in interest and penalties that were part of a student loan debt. Petitioner's arguments, however, have far reaching implications. Petitioner raises a fundamental challenge to the rule of finality that applies to all court judgments and that applies with particular force to bankruptcy court orders confirming reorganization plans. The mutual understandings and expectations of a multitude of stakeholders are embodied in a final bankruptcy court order that confirms a plan. This appeal raises the question of whether those shared understandings and expectations can be undone with relative ease years later by a single creditor who belatedly decides to challenge a plan. The answer will have a direct impact upon the hundreds of thousands of individuals, including small business owners, who seek chapter 13 relief, family farmers reorganizing under chapter 12, and all businesses that seek a new start in chapter 11.

The implications of Petitioner's arguments extend well beyond bankruptcy and commercial law. Petitioner challenges some of the fundamental doctrines that permit a judicial system to function effectively. These include the finality of judgments, *res judicata*, the enforceability of default judgments, and adherence to time deadlines.

SUMMARY OF ARGUMENT

Petitioner USAF filed an objection to confirmation of Mr. Espinosa's chapter 13 plan ten years after the bankruptcy court entered an order confirming the plan as in compliance with the Bankruptcy Code. Although the confirmation order had become final a decade earlier and Mr. Espinosa had paid the full loan principal as his plan required, USAF contended in its belated objection that a term of the plan was inconsistent with a bankruptcy rule. Before the bankruptcy court approved the plan, USAF had notice of the plan term in question and had the opportunity to argue the rule's applicability. USAF's untimely objection flies in the face of two bedrock principles of finality, one statutory and the other judicially created.

Bankruptcy Code sections 1327(a), 1329 and 1330(a) embody a strong Congressional policy mandating finality of chapter 13 plan confirmation orders, creating a finality rule that is broader than the *res judicata* standard the courts apply outside of bankruptcy. USAF directly attacks the plan confirmation order here under F.R. Civ. P. 60(b), claiming that the order was "void." Pursuant to 11 U.S.C. § 1330(a), an action to revoke a chapter 13 plan confirmation order may be brought only on the basis of fraud. USAF has never alleged fraud in connection with the confirmation of Mr. Espinosa's plan. Section 1330(a) and F.R. Bankr. P. 9024 require that an action to revoke a plan confirmation order be commenced within 180 days of the order's date of entry. USAF's motion clearly failed to meet this require-

ment. If approved, USAF's use of Rule 60(b) would effectively repeal chapter 13's core finality provisions, sections 1327(a) and 1330(a). Such a ruling would also eviscerate the almost identical provisions applicable in chapters 11 and 12.

Substantial precedent from this Court and the Courts of Appeals recognizes that a bankruptcy court's plan confirmation order has the same preclusive effect as any final judgment of a federal court. This Court's rulings apply *res judicata* to bar attacks on the finality of a plan confirmation order when the challenge raises a claim that the bankruptcy court acted without subject matter jurisdiction when it approved a plan. If *res judicata* precludes an untimely challenge raising lack of subject matter jurisdiction, it certainly bars one raising non-compliance with a court rule.

Because finality and *res judicata* clearly precluded USAF's untimely challenge to the confirmation order here, USAF sought to avoid these barriers by focusing on the issue of notice. However, there are significant gaps and inconsistencies in USAF's notice arguments. USAF has not alleged that Mr. Espinosa's plan confused its litigation staff when they received it. USAF suffered no concrete prejudice from the lack of an adversary proceeding filing. Instead, USAF's notice arguments are based solely on conjecture about how a hypothetical student loan creditor could possibly be confused by inclusion of the discharge term in a plan and therefore might neglect to protect its rights.

The briefs of USAF and other guaranty agencies indicate that they do not read chapter 13 plans they receive from debtors and the courts. In effect, the agencies create their own notice problem. This practice is contrary to Department of Education regulations, which require that the agencies review plans and object when appropriate. Taxpayers, creditors, and debtors will be better served if guaranty agencies do the jobs for which they are paid and review bankruptcy plans with due care.

The Fourth, Sixth, and Seventh circuits erroneously held that there is a constitutional right to enforce federal bankruptcy rules. The bankruptcy rules are indeed enforceable, but requests to enforce them must be made at the appropriate time and place. For USAF, the time and place to argue its point was at the plan confirmation hearing in 1993, not in a motion filed in 2003.

In connection with its appeals USAF has raised a number of issues that this Court simply need not address at this time. These include the question of whether F.R.Bankr. P. 7001(6) mandates an adversary proceeding for student loan discharge determinations and whether Code section 1328(a)(2) precludes discharge of student loan debt through the terms of a chapter 13 plan. These issues were never litigated in the proceedings below. They should be addressed on the basis of a record where parties have properly raised and argued the issues.

ARGUMENT

I. USAF'S CHALLENGE TO THE FINALITY OF PLAN CONFIRMATION ORDERS THREATENS THE STABILITY OF ALL REORGANIZATION BANKRUPTCIES

A. Statutory Finality – Provisions of the Bankruptcy Code Embody a Strong Policy Against Vacating a Plan Confirmation Order

Subject to limited exceptions, bankruptcy courts must confirm chapter 13 plans that meet the nine criteria listed in Bankruptcy Code section 1325(a). Subsection (1) of section 1325(a) requires that the court find "the plan complies with the provisions of this chapter and with the other applicable provisions of this title." Subsection (3) of section 1325(a) requires that the court find "the plan has been proposed in good faith and not by any means forbidden by law." In the instant case the bankruptcy court found that these and the remaining criteria were met. It confirmed Mr. Espinosa's chapter 13 plan in 1993. In that plan he sought and received discharge of a portion of interest and penalties due on his student loan debt. He paid the loan principal in full under the terms of his plan.

In 2003, a decade after confirmation of the plan and well after Mr. Espinosa had embarked upon the "fresh start" that is a cornerstone of bankruptcy law, USAF filed a motion with the same bankruptcy court asking that the court revoke its

1993 confirmation order. USAF asserted for the first time that it believed the plan did not comply with chapter 13 and other Code provisions, contending that the plan had been proposed by means forbidden by law. USAF raised these claims even though, prior to confirmation in 1993, it had received timely notice of all terms of Mr. Espinosa's proposed plan and of its right to object to confirmation. At that time, USAF could have requested a hearing and brought its objection to the court's attention. USAF chose to refrain from objecting and allowed the bankruptcy court to confirm the plan. All claims USAF raised for the first time in 2003 fell squarely within the scope of objections the bankruptcy court could have ruled upon under section 1325(a) ten years earlier when it entered the confirmation order.

USAF brought its proceeding to revoke plan confirmation not only long after the bankruptcy court's order had become final, but also well after the terms of the five-year plan had been fully performed. To ensure that bankruptcy reorganizations are not disrupted in this way Congress enacted three statutory provisions securing the finality of chapter 13 plan confirmation orders.

First, Bankruptcy Code section 1327(a) declares the finality of a plan confirmation order on the debtor and every creditor, including any creditor who did not object to confirmation:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is pro-

> vided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Second, section 1329 defines the circumstances under which a confirmed plan may be modified during the period of plan performance. 11 U.S.C. § 1329. This section permits modification only for limited reasons, primarily to adjust payment levels under the terms of the confirmed plan. The allowable grounds for modification do not include general claims of non compliance with the Bankruptcy Code, which must be addressed at the time of confirmation under section 1325(a). Only changed circumstances occurring after the plan confirmation can support modification, and modification cannot occur after the completion of plan payments. *In re Storey*, 392 B.R. 266 (B.A.P. 6th Cir. 2008).

Third, section 1330 defines when a creditor may seek to revoke a plan confirmation order once it has become final, setting stringent substantive and temporal limits upon such a challenge:

> On request of a party in interest at a time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

USAF did not allege fraud as a basis to revoke the 1993 confirmation order. Nor did it commence a pro-

ceeding to revoke the confirmation order within 180 days after the date of the order's entry. Thus, in 2003, USAF was barred from bringing any proceeding seeking revocation of the 1993 order of plan confirmation in Mr. Espinosa's case on the ground that the plan had not complied with the Bankruptcy Code.

Section 1330(a) and F. R. Bankr. P. 9024[1] impose substantial limits on the use of Rule 60(b)-type motions to attack plan confirmation orders. USAF cannot evade section 1330(a)'s substantive and temporal limits by labeling its proceeding a motion under Rule 60(b) to declare a confirmation order "void." *In re Fesq*, 153 F.3d 113 (3d Cir. 1998), *cert denied* 526 U.S. 108 (1999); *In re Valenti*, 310 B.R. 138, 147 (B.A.P. 9th Cir. 2004); 8 *Collier on Bankruptcy* ¶ 1330.01[2] (Alan A. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009); 3 Keith M. Lundin, *Chapter 13 Bankruptcy* § 223.1 (3d ed. 2006). A contrary rule would render section 1330 meaningless. Finally, F.R. Bankr. P. 7001(5) defines a proceeding to revoke plan confirmation as an "adversary proceeding." Ironically, USAF's Brief did not note its own failure to follow Rule 7001 in its filing.

[1] F.R. Bankr. P. 9024 provides: "Rule 60 F.R. Civ. P. applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330." Rule 60 itself is not directly applicable in bankruptcy cases. Fed. R. Bankr. P. 1001.

B. *Res Judicata* – The Overwhelming Weight of Judicial Precedent Supports Enforcement Of An Order Confirming A Bankruptcy Reorganization Plan Regardless Of Clear Error In Granting the Order

The Congressional policy mandating finality, embodied in Bankruptcy Code sections 1327(a), 1329, and 1330(a) is nothing new. While these statutory provisions bar direct attacks upon orders confirming bankruptcy reorganization plans, courts impose their own limits on indirect or collateral attacks upon these orders under the judicially created doctrine of *res judicata*.

1. The Supreme Court's *Res Judicata* Precedent

USAF seeks to set aside seventy years of precedent upholding the finality of bankruptcy court orders confirming reorganization plans. *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2205-06 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). In each of these cases parties raised claims that the bankruptcy courts had erred in confirming the plans. The alleged errors were fundamental, going to whether the bankruptcy courts had subject matter jurisdiction to enter the orders. In each case litigants sought to proceed with collateral actions that were barred by the bankruptcy court orders. They argued that the orders were invalid because the

bankruptcy courts had acted without authority. In each instance this Court, applying the doctrine of *res judicata*, held that the plan confirmation orders were final judgments of the federal courts, and barred the collateral attacks.

In upholding the finality of the bankruptcy court confirmation order in *Stoll v. Gottlieb*, the Court assumed that the complaining creditors were correct and that "the Bankruptcy Court did not have jurisdiction over the subject matter of the order" (the release of a noncreditor guarantor). 305 U.S. at 171. Nevertheless, the Court held that the bankruptcy court did have authority to determine its jurisdiction over the subject matter and the parties, and once the order became final, *res judicata* precluded any further inquiry into jurisdictional errors. *Id.* at 171-72.

Most recently, in *Travelers Indemnity Co. v. Bailey*, several parties sought to pursue claims in 2004 that were precluded by a Chapter 11 plan confirmation order entered in 1986. In rejecting the challenge to the bankruptcy court's jurisdiction to approve the plan, the Court stated, "whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us." 129 S. Ct. at 2203. The same is true here. The question of whether the bankruptcy court had authority to confirm Mr. Espinosa's plan in 1993 was not properly before the Court of Appeals for the Ninth Circuit in 2008, and it is not properly before this Court now.

The *Travelers* decision defined the *res judicata* doctrine in its standard form - to preclude claims that were actually raised in the earlier proceeding, as well as claims that could have been raised then, but were not. As this Court stated, the plan confirmation order was final, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose.*" *Travelers*, 129 S. Ct. at 2205 (emphasis added) (quoting *Nevada v. United States*, 463 U.S. 110, 130 (1983), quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). *Res judicata* serves an essential pragmatic purpose in declaring a clear end to litigation. "[T]he need for finality forbids a court called up to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo'. . . . If the law were otherwise, and 'courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of *res judicata* . . . would be entirely short-circuited.'" *Id.* at 2206, quoting *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1307-08 (5th Cir. 2005).

2. The Courts of Appeals Have Repeatedly Given *Res Judicata* Effect To Final Plan Confirmation Orders, Notwithstanding Legal Error

In *Travelers,* this Court saw the terms of the earlier plan confirmation order as clear and unambiguous and refused to assume any role in reinterpret-

ing the order. "Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." *Travelers,* 129 S. Ct. at 2204 n.4. The appellate courts have consistently applied the doctrine of *res judicata* to bankruptcy plan confirmation orders in both chapter 13 and chapter 11 cases.[2] The finality provisions applicable to chapter 11 and chapter 13 bankruptcy plans are essentially the same. *See* 11 U.S.C. §§1141(a), 1144.

The law is firmly established that legal error in the prior proceeding does not alter the *res judicata* effect of a final order. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 714 (1982); C. Wright, A. Miller and E. Cooper, 18 *Federal Practice and Procedure Juris. 2d* § 4403 n.15 (collecting cases). Bankruptcy treatises are replete with citations to cases in which courts refused to set aside terms of confirmed reorganization plans despite claims of fundamental legal error in approving the plans. 8

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[2] *See e.g. In re Jones*, 530 F.3d 1284, 1291 (10th Cir. 2008) (chapter 13); *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000) (chapter 13); *Corbett v. MacDonald Moving Services, Inc.,* 124 F.3d 82, 91 (2d Cir. 1997) (chapter 11); *In re Ivory*, 70 F.3d 73 (9th Cir. 1995) (chapter 13); *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988) (chapter 11); *In re Chattanooga Wholesale Antiques Inc.*, 930 F.2d 458, 463 (6th Cir. 1991) (chapter 11); *In re Szostek*, 886 F.2d 1405, 1414 (3d Cir. 1989) (chapter 13); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987) (chapter 11). *See also In re Fili*, 257 B.R. 370, 373 (B.A.P. 1st Cir. 2001) (chapter 13); *In re Simpson,* 240 B.R. 559, 562 (B.A.P. 8th Cir. 1999) (chapter 13).

Collier on Bankruptcy, supra, ¶ 1327.02[1][b] at 1327-4, 5; 3 Keith M. Lundin, *Chapter 13 Bankruptcy, supra.* ¶ 229.1 pp. 229-7 to 229-15. Cases following this rule include numerous instances in which creditors raised reasonable and sympathetic claims that the bankruptcy courts had confirmed plans that severely impaired their rights, and the orders were blatantly wrong as a matter of law.[3] In addressing these concerns the courts uniformly hold that the need for finality and an orderly administration of the bankruptcy system must take priority over remedying past defects.

C. Reorganization Bankruptcies Are Collaborative Proceedings In Which All Parties Rely Upon The Finality Of A Plan Approved By The Court

Mr. Espinosa's bankruptcy case involved only one creditor – USAF. This fact makes the case highly unusual. Typical chapter 13 cases involve dozens, sometimes hundreds of creditors. In a chapter 11 reorganization case a plan confirmation order can have a significant effect on thousands of creditors,

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[3] *See e.g. Ruhl v. HSBC Mortgage Services, Inc*., 399 B.R. 49, 58 (E.D. Wis. 2008) (debtor may not correct overpayment of interest in mortgage claim provided for in confirmed plan); *In re Thaxton*, 335 B.R. 372, 374-75 (Bankr, N.D. Ohio 2005) (mortgagee bound by claim bifurcation provision of plan despite claim of illegality); *In re Sosnowski*, 314 B.R. 23, 26 (Bankr. D. Del. 2004) (mortgagee precluded from challenging plan's designation of its claim as unsecured).

and the fates of the debtor and a myriad of creditors are inextricably intertwined.

In Mr. Espinosa's case, revoking the confirmation order would affect the rights of the debtor and the single creditor. USAF minimizes the effect of the revocation of plan confirmation and the rescission of a fully performed plan when it asserts, "[i]f an order purporting to discharge a nondischargeable debt is void as to that debt, there is no material consequence. The nondischargeable debt simply remains undischarged, leaving other creditors unaffected." USAF Brief p. 42 n.7. It is certainly true that *in this case,* no other creditors would be affected by the confirmation order's revocation.

For the overwhelming majority of reorganization bankruptcies, however, revoking the plan confirmation order would have far reaching consequences. As many decisions note, confirmed plans are analogous to contractual arrangements or consent decrees negotiated among all creditors and a debtor. *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000). Creditors may freely agree to be treated differently under a plan than strict compliance with the Code might otherwise require. *In re Walker*, 128 B.R. 465, 468 (Bankr. D. Idaho 1991). The plan confirmation process encourages creditors to compromise their rights after taking into account the relative strength of the claims of other creditors.

An increase in money distributed to one creditor always means less money goes to other creditors. If debts can be adjusted or reclassified from unse-

cured to secured, nonpriority to priority, or dischargeable to nondischargeable after confirmation of a plan, shifts in payments will inevitably occur. In chapter 11 cases businesses are bought and sold and millions of dollars change hands, based on a few sentences in a confirmed plan. For example, in *Travelers* the 1986 plan confirmation order included the challenged term under which the Travelers Indemnity Company paid $80 million in return for the release of liability from thousands of asbestos-related personal injury claims. *Travelers,* 129 S. Ct. at 2219.

In reorganization bankruptcies, creditors consent or object to plans based upon their assessment of the debtor's future income and obligations. For example, in deciding whether to object to the terms of a chapter 13 plan proposing to cure a default on a long term home mortgage obligation, the mortgagee must consider the debtor's ability to pay during the three to five-year plan period as well as for the full repayment period remaining on the note. The mortgagee will certainly take into account the existence of long term nondischargeable debt obligations that may impair the debtor's ability to reinstate the defaulted mortgage and maintain future payments. Similarly, many chapter 13 debtors run small businesses in which they buy and sell assets based on plan terms that have been worked out among a group of creditors. The revival of a discharged debt after plan confirmation can wreak havoc upon the operation of the reorganized business. Even more severe consequences ensue when, years after a plan has been fully performed, a creditor decides to resurrect a debt that all plan participants understood to

have been discharged. In considering the importance of finality, even when a plan was confirmed based on an error of law, the Third Circuit noted:

> [T]he purpose of bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganization if they could not feel that the plan was final, and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

In re Szostek, 886 F.2d 1405, 1409 (3d Cir. 1989) (quoting *In re Penn Central Transportation Co.,* 771 F.2d 762, 767 (3d Cir.1985)). The *Szostek* court appropriately described the interdependence of interests of all creditors and debtors in a reorganization bankruptcy. Arguing for a contrary view, USAF would focus this Court's attention on what it refers to in its Brief as the "no material consequences" to other creditors that would flow from the revocation of confirmation in the rare bankruptcy case involving only one creditor.

D. The Student Loan Guaranty Agencies' Practice Of Not Reading Chapter 13 Plans Does Not Merit Special Protections

USAF warns that affirming the Ninth Circuit's ruling will require guaranty agencies to hire "an armada of lawyers" to read student loan debtors' chapter 13 plans. USAF Brief at p. 48. The agencies would be "forced to hire the lawyers and expend the resources to scrutinize every such plan." *Id.* at 50. In a similar vein, the National Council of Higher Education Loan Programs ("National Council") predicts in its Amicus Brief that leaving the Ninth Circuit's ruling intact "would force guaranty agencies to hire additional staff to scrutinize every chapter 13 plan for language which has no foundation under the Bankruptcy Code." National Council Brief at *3.

The clear implication of the guaranty agencies' characterization of their current practices is that they do not review chapter 13 plans. They do not check to see whether plans contain "illegal language" which "has no foundation under the Bankruptcy Code." National Council Brief at *3. This being the case, they are obviously not reviewing plans to see whether they comply with section 1325 and other key provisions of the Bankruptcy Code. USAF, quoting from the decision in *In re Ruehle*, 412 F.3d 679, 684 (6th Cir. 2005), apparently deems notice of adversary proceedings to be worthy of attention by guaranty agencies, but notice of the terms of the plans to be merely the "deafening legal background noise" that the agencies can decide to tune out.

USAF Brief. pp. 39-40. This characterization of chapter 13 plans is a view that the guaranty agencies now ask this Court to endorse.

The view that chapter 13 plans are not legal documents they are required to "notice" is at the heart of the guaranty agencies' arguments in this appeal. The National Council, speaking on behalf of all the student loan guaranty agencies, speaks approvingly of USAF's handling of Mr. Espinosa's bankruptcy case, "In response to the notice of Espinosa's chapter 13 plan, USA Funds did the only thing it was required to do: it filed a proof of claim." National Council Amicus Brief * 32. This encapsulates the guaranty agencies' view of the appropriate response to the filing of a chapter 13 case. Other than file a proof of claim, the agencies should do nothing. Despite the fact that the Code permits a debtor's plan to affect the rights of the holder of a nondischargeable debt, the guaranty agencies argue otherwise: "Nothing in the Bankruptcy Code or Rules can be fairly read to impose a duty to read a chapter 13 plan on a creditor holding a nondischargeable claim." National Council Amicus Brief at *33. This position is flatly wrong. The Code places the important duty of protecting their own interests upon *all* creditors. 11 U.S.C. §§ 1322, 1325, 1327, 1330.

E. The Ninth Circuit's Ruling Is Consistent With Student Loan Guaranty Agencies' Regulatory Obligation To Review Chapter 13 Plans And Object When Appropriate

Petitioner USAF is a guaranty agency that administers the collection of federally guaranteed student loans pursuant to regulations promulgated by the U.S. Department of Education ("DOE"). *See e.g.* 34 C.F.R. § 682.200, *et seq*. (FFEL loan regulations); 34 C.F.R. § 674.33, *et seq*. (Perkins loan regulations).

The guaranty agencies' practices, as they describe them in their briefs, are in stark contrast with their obligations set out in DOE regulations. For example, USAF is the largest guaranty agency under the Federal Family Education Loan ("FFEL") program. USAF Brief. pp. 2-3. DOE regulations applicable to FFEL loans require that guaranty agencies participate actively in bankruptcy cases. According to the regulations, in chapter 13 cases the guaranty agency:

> . . . shall determine, based on a review of its own records and documents filed by the debtor in the bankruptcy proceeding -
>
> (A) What part of the loan obligation will be discharged under the plan as proposed;

> (B) Whether the plan itself or the classification of the loan under the plan meets the requirements of 11 U.S.C. § 1129, 1225, or 1325; and
>
> (C) Whether grounds exist under 11 U.S.C. § 1112, 1208, or 1307, as applicable, to move for conversion or dismissal of the case.

34 C.F.R. § 682.402(i)(2)(ii)

Unlike the guaranty agencies' stated practices, the federal regulations *require* that they review all plans filed by chapter 13 debtors and determine whether the plans comply with the provisions of the Bankruptcy Code. This obligation includes reviewing plans for compliance with Code section 1325.

The federal regulations go on to describe actions a guaranty agency may take based upon its review of a chapter 13 plan. Notably, the agency "shall, as appropriate, object to the plan or move to dismiss the case." 34 C.F.R. § 682.402(i)(2)(iii). The regulations define circumstances in which objections are appropriate. These include when:

> (A) The costs of litigation are not reasonably expected to exceed one-third of the amount of the loan to be discharged under the plan; and
>
> (B) With respect to an objection under 11 U.S.C. § 1325, the additional

> amount that may be recovered under the plan if an objection is successful can reasonably be expected to equal or exceed the cost of litigating the objections

34 C.F.R. § 682.402(i)(2)(iii).

In his plan Mr. Espinosa proposed to pay $13,250 toward a debt USAF claimed was $17,832. The disparity between the proposed plan payment amount and USAF's claim was $4,582, less than one-third of the total debt. In such cases the DOE regulation requires that the guaranty agency decide whether the likely litigation costs will exceed the amount to be discharged. Under any objective standard, and certainly under the express guidance of the DOE regulation, allowing Mr. Espinosa's plan to be confirmed would be a reasonable action for a guaranty agency to take.

F. USAF's Arguments Ignore The Role Of Other Federal Options For Discharge And Restructuring Of Student Loan Debt

USAF states that because guaranty agencies have such powerful debt collection tools at their disposal "[t]here is no reason for a creditor to go along with a plan that proposes only partial payment of a student loan debt and discharge of the balance[.]" USAF Brief p. 35. To the contrary, the statutes and regulations for the direct and guaranteed student loan programs authorize discharge of student loan

debts on a number of grounds independent of the "undue hardship" test of Bankruptcy Code § 523(a)(8). The DOE has authority to approve discharge and forgiveness of student loan debt based upon the debtor's disability,[4] school closure[5], improperly certified schools[6] and unpaid tuition refunds.[7] Recent legislation authorizes a presumptive discharge for disabled veterans[8] and forgiveness of student loan indebtedness in return for public service work.[9] When a debtor likely qualifies for one of these discharges, it makes no sense for the creditor to demand a lawsuit to have a bankruptcy court apply the "undue hardship" standard under § 523(a)(8).[10]

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[4] 20 U.S.C. § 1087(a); 34 C.F.R. § 674.61 (Perkins loans), § 682.402(c) (FFEL), § 685.213 (Direct Loan).

[5] 20 U.S.C. §1087(c); 34 C.F.R. § 682.402(d) (FFEL); 34 C.F.R. § 685.214 (Direct); 34 C.F.R. § 674.33(g) (Perkins).

[6] 20 U.S.C. § 1087(c); 34 C.F.R. § 682.402(e) (FFEL); 34 C.F.R. § 685.215 (Direct).

[7] 20 U.S.C. §1087(c); 34 C.F.R. § 682.402(l) (FFEL); 34 C.F.R. § 685.216 (Direct).

[8] The Higher Education Opportunity Act of 2008 (H.R. 4137).

[9] The College Cost Reduction and Access Act of 2007 Pub. L. No. 110-84, 121 Stat. 784.

[10] USAF's Brief states that "guaranteed student loan discharge will cost taxpayers more than $1.5 billion during fiscal 2009." USAF Brief pp. 19-20. In its context, this statement is misleading. The figure in the DOE Budget Report includes nonbankruptcy discharges. http://www.whitehouse.gov /omb/budget/fy2010/assets/edu.pdf. (DOE Budget Report at p. 386).

For low income borrowers in the Direct Loan Program, the regulations provide a number of options involving little or no payment for extended periods of time. Under the Income Contingent Repayment Plan ("ICRP") program that is applicable to many federally guaranteed student loans, the borrower pays a reduced amount, or nothing at all, for up to 25 years, based on a formula for determining affordable payments. 20 U.S.C. § 1078(e); 34 C.F.R. § 685.209(c). At the end of 25 years, even though in some cases no further payments have been made, the loan is discharged. The bankruptcy courts often balance the effect of these ICRP plans against the merits of an undue hardship bankruptcy discharge. *In re Barrett*, 487 F.3d 353, 363-64 (6th Cir. 2007); *In re Ford*, 269 B.R. 673, 677 (B.A.P. 8th Cir. 2001). In the case of a low income or older debtor who proposes to make some payments under a five-year chapter 13 plan with the remaining obligation to be discharged, such a proposal may be more favorable to the creditor than the alternative of a long term zero payment plan under an ICRP followed by a discharge many years later. *See e.g. In re Durrani*, 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd* 320 B.R. 357 (N.D. Ill. 2005) (contrasting $0.00 payment plan under ICRP and bankruptcy discharge).

In many cases the filing of an adversary proceeding should be unnecessary *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am Bankr. L.J. 179, 184 (Winter 2009) (finding that 57% of undue hardship adversary proceedings litigated in

one federal district resulted in allowance of some discharge, with the average discharge writing off 72% of the student's total loan debt). Through his confirmed plan Mr. Espinosa discharged about 25% of his student loan indebtedness. He paid the other 75% under his plan. The benefits to USAF from litigating a full scale dischargeability adversary action instead of consenting to a plan like his seem tenuous at best. An adversary proceeding delays the disbursements of the debtor's payments to all creditors for many months, possibly for years. 11 U.S.C. § 1326(a)(2) (trustee may not distribute payments to creditors until the court has confirmed a plan). A procedure that resolves student loan disputes with a minimum of litigation benefits all creditors, debtors, and the courts.

G. Informed, Active Participation In Chapter 13 Cases Benefits Creditors, The Courts, And All Parties.

This Amicus is convinced that a ruling that encourages creditors to read chapter 13 plans will be a good thing, not the nightmare that the guaranty agencies foresee. A chapter 13 filing can produce significant benefits for creditors who participate actively and prudently in the proceedings. Because chapter 13 cases involve individuals with regular income who come voluntarily into a court offering to pay money to creditors under close judicial scrutiny, most creditors want to participate in this process. They review the terms of chapter 13 plans and sche-

dules to see how their debts are treated in relation to those of other creditors.

There are several ways in which a chapter 13 plan can be structured to work for the benefit of student loan creditors. Chapter 13 plans can promote prompt repayment of the debt rather than delays that lead to accrual of more interest and penalties that only make full repayment less likely. Many courts allow student loan debts to be classified as a separate claim and paid at a significantly higher rate than other unsecured debts. *In re Webb,* 370 B.R. 418 (Bankr. N.D. Ga. 2007) (approving plan paying 1% of indebtedness to general unsecured creditors and full payments to student loan creditor); *In re Pora*, 353 B.R. 247 (Bankr. N.D. Cal. 2006) (discussing claim classification issues related to student loan debt); 8 *Collier on Bankruptcy* ¶ 1322.05[2][a]. Other courts allow chapter 13 debtors to cure a default in student loan payments under 11 U.S.C. § 1322(b)(5), again favoring the student loan creditor with a level of payment much higher than what other creditors receive. *In re Machado*, 378 B.R. 14 (Bankr. D. Mass. 2007). This option promotes full compliance with the original note obligation. Plans paying substantial student loan debt out of otherwise exempt income have been approved by the courts. *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008). Rather than ignoring what chapter 13 plans say, student loan creditors should be actively encouraging these types of debt repayment plans.

The guaranty agencies also need to look at how other debts are classified in a plan. For exam-

ple, any form of misclassification or overpayment of a secured or priority debt can be corrected to produce more disposable income available to pay the student loan debt. In certain cases a review of the plan may show that the best outcome for a guaranty agency may be to ask that the case be dismissed or converted to another chapter.

H. There Is No Statutory Basis For Special Treatment Of Large Creditors, And There Are Sound Policy Reasons For Rejecting Such An Exception

The guaranty agencies contend that they merit special treatment due to the size of their operations. A few courts have accepted these arguments and essentially found that guaranty agencies are entitled to special constitutional protections. *See In re Ruehle, supra,* 412 F.3d at 684 (noting that guaranty agencies receive "tidal waves of mail" and may have trouble deciding which notices from the bankruptcy courts are important). The deference that some courts have shown to student loan guaranty agencies stands in sharp contrast to the courts' rejection of similar arguments made by other large institutional creditors, including those collecting nondischargeable debts. For example, the courts have emphasized that, unless the Bankruptcy Code expressly provides otherwise, all Code provisions apply to the Internal Revenue Service in the same way they do to all other creditors. *In re Chateauguay*, 94 F 3d 772, 780-81 (2d Cir. 1996) (citing *U. S. v. Whiting Pools*, 462 U.S.

198, 209 (1983)); *In re Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1556 (11th Cir. 1996). Many bankruptcy courts have echoed the refrain that the "size and complexity" of the Internal Revenue Service does not excuse it from complying with the automatic stay upon notice of a bankruptcy filing, just as other creditors must do.[11] The same is true for other large government bureaucracies. *In re University Medical Center*, 973 F.2d 1065, 1076-77 (3d Cir. 1992) (HHS and Medicare program).

Large private corporations do not fare any better when they point to the quantity of bankruptcy-related data they must review. Bankruptcy courts routinely reject claims of major nongovernmental creditors that bankruptcy paperwork overwhelms their offices. *See In re Crawford*, 388 B.R. 506, 520 (Bankr. S.D. N.Y. 2008) (organizational structure of mortgage lender HSBC not relevant to obligations under Code); *In re Perviz*, 302 B.R. 357, 367 (Bankr. N.D. Ohio 2003) (size and complexity of Ocwen's mortgage servicing activities not a factor in assessing compliance with Code obligations); *In re Vazquez*, 221 B.R. 222, 228 (Bankr. N.D Ill. 1998 ("Sears' size and the complexity of its corporate structure does not excuse its disregard of the discharge injunction or the reaffirmation process in a matter to which it was a party, any more than the

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[11] *In re Solis*, 137 B.R. 121, 133 (Bankr. S. D.N.Y. 1992); *In re Price*, 103 B.R. 989, 993 (Bankr. N.D. Ill. 1989); *In re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641, 643 (Bankr. N.D. Fla. 1987). *In re Stucka*, 77 B.R. 777, 783 (Bankr. C.D. Cal. 1987).

size or complexity of the Internal Revenue Service excused its violation of the automatic stay"); *In re Withrow*, 93 B.R. 436, 439 (Bankr. W.D. N.C. 1988) (same, as to Citibank's credit card collection work).

II. THE *WHELTON* AND *MERSMANN* COURTS MISINTERPRETED SEVERAL CODE PROVISIONS TO CREATE UNAUTHORIZED EXCEPTIONS TO § 1327 AND § 1330 AND TO THE *RES JUDICATA* DOCTRINE

Relying solely on statutory grounds, two courts of appeals have held that courts may revoke final orders that confirmed chapter 13 plans providing for the discharge of student loan debts. *Mersmann v. USAF Funds, Inc., (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007); *Whelton v. Educational Credit Management Corp. (In re Whelton)*, 432 F.3d 150 (2d Cir. 2005). Because of the similarities in the reasoning of the *Mersmann* and *Whelton* decisions, the errors in both can be addressed together.

1. Inaccurate reading of the Hood decision. Focusing upon language found in *Tennessee Student Assistance Corp v. Hood,* 541 U.S. 440 (2004), the *Mersmann* Court held that a ruling in an adversary action was necessary to overcome the "presumptively nondischargeable" and "self-executing" nature of the discharge exception for student loans. *Mersmann,* 505 F.3d at 1047-48 (quoting *Hood,* 541 U.S. at 450). This reading goes far beyond anything the *Hood* decision said. The Ninth Circuit's

ruling in *Espinosa*, on the other hand, is consistent with *Hood's* reference to student loan debts as "presumptively nondischargeable." It is consistent with treatment of the student loan discharge exception as "self-executing." The Ninth Circuit did not do away with adversary proceedings in which debtors can be required to establish the elements of undue hardship under § 523(a)(8). It did not alter the burden of proof in a dischargeability adversary proceeding. The ruling merely acknowledged that student loan creditors can waive the adversary proceeding if they do not object to plan terms that propose to discharge the student loan debt without the adversary proceeding.

In Mr. Espinosa's case the status quo of nondischargeability was not altered by unilateral action of the debtor who "declared" his debt discharged. The status quo changed when the court issued an order changing it. In *Hood* this Court expressly noted that the filing of an adversary proceeding was not a necessary prerequisite to suspension of the "self-executing" nature of the student loan discharge exception. *Id* at 454.

The Ninth Circuit's ruling is also consistent with *Hood's* indication that student loan creditors are "entitled to greater procedural protections" than creditors whose debts are automatically discharged. *Id.* at 451. In the chapter 13 plan confirmation process, notice, a hearing, and the requirement for a court order approving the discharge of the student loan debt are "greater procedural protections" than creditors with presumptively dischargeable debts receive.

2. Section 1328(a)(2) does not trump § 523(a)(8). The *Mersmann* and *Whelton* courts saw a conflict between the language of § 1327(a), which mandates finality to plan confirmation orders, and language in § 1328(a)(2), which states that student loan debts are excepted from the discharge in chapter 13 cases. *See Mersmann* at 1048. The two courts resolved this conflict by reading § 1328(a)(2) to take precedence over § 1327(a) and to preclude discharge of the student loans. Contrary to this interpretation, the statutes can and must be read consistently. Section 1328(a)(2) of the Bankruptcy Code lists the types of debts that are generally excepted from discharge in a chapter 13 case. Section 1328(a)(2) does not override the language of section 523(a)(8). By its plain language, section 523(a)(8) *does* allow the discharge of student loan debts in some cases. There is nothing "illegal" about a bankruptcy court entering an order discharging a student loan debt.

Student loan debts are unique among those listed as exceptions to discharge in the various subsections of section 523(a). Other debts, such as debts for child support, for criminal fines and restitution, for certain taxes, and for drunk driving liabilities are always nondischargeable. The bankruptcy courts do not have discretion to discharge them. 11 U.S.C. § 523(a)(1), (5),(7),(9),(13). Debts incurred through fraud, willful and malicious injury to persons, and fraud and defalcation while acting in a fiduciary capacity are always *dischargeable* "unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt

to be excepted from discharge" 11 U.S.C. § 523(a)(c)(1) (referring to the categories of debts described in subsections (2), (4), and (6) of section 523(a)).[12] If, through an appropriate proceeding in the bankruptcy court, a debt is found to have been incurred through fraud, willful and malicious injury or breach of fiduciary duty, then that debt is not dischargeable. Again, if the debt meets the statutory definition, a court does not have discretion to discharge it.

Unlike the exceptions to discharge described above, under section 523(a)(8) a bankruptcy court has discretion to *allow* the discharge of student loan debt. Bankruptcy courts may determine on a case by case basis whether such a discharge should be granted. *ECMC v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004) (courts exercise discretion in applying *Brunner* "undue hardship" standard under § 523(a)(8)); *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003) (court may exercise "inherent discretion" under "totality of circumstances" test for student loan dischargeability under § 523(a)(8)). *See also Nash v. Connecticut Student Loan Foundation*, 330 B.R. 323, 326 (D. Mass. 2005); *In re Durrani*, *supra*, 311 B.R. at 501; 4 *Collier on Bankruptcy, supra,* ¶ 523.14[2].

Because bankruptcy courts have inherent authority under § 523(a)(8) to order discharge of student loan debts, the general language of § 1328(a)(2) cannot be construed in such a way that it effectively

[12] Section 523(a)(6) does not apply in chapter 13 except when the debtor receives a hardship discharge under section 1328(b).

revokes that authority. The *Mersmann* and *Whelton* courts' interpretations of § 1328(a) erroneously do precisely that. In any event, this argument, too, is one that should have been raised as an objection to confirmation under section 1325(a)(1).

3. The plan confirmation process was established to address questions of compliance with § 1325(a) and other provisions of the Code, making plan confirmation orders conclusive on those issues. The *Mersmann* court overturned the finality of two plan confirmation orders because, in its view, the orders did not comply with section 1325(a). *Mersmann,* 505 F.3d at 1048-49. As discussed above, section 1325(a) provides that a bankruptcy court "shall confirm a plan" if it meets certain criteria, including that the plan "complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1). In the view of the *Mersmann* court, the debtors' plans did not comply with Bankruptcy Rule 7001(6), which states that proceedings to determine the dischargeability of a debt are "adversary proceedings." Therefore, according to the court, because the plans did not comply with this Rule, the bankruptcy courts should not have confirmed them.

There are many problems with this line of reasoning. First and foremost, noncompliance with the Bankruptcy Code is a ground for objecting to confirmation of a plan. Under the *Mersmann* court's reasoning, *any* assertion of non-compliance with *any* section of the Bankruptcy Code and *any* bankruptcy rule could be the basis for a proceeding to revoke a

confirmation order. Such objections could be filed by any creditor years after plans were fully performed, even though the creditors were aware of the grounds for objection before the court confirmed the plan. If this were deemed permissible, then several other sections of the Bankruptcy Code would rendered meaningless. Section 1327(a) would be meaningless because plans would never be binding on anyone. Section 1329 would be meaningless because creditors would be given standing to modify plans after confirmation for a vastly expanded set of reasons. Finally, section 1330 would be meaningless because, rather than limiting plan revocation actions to the ground of fraud and subject to a 180 day filing deadline, creditors and debtors could raise any statutory ground they wished at any time in the future to revoke a plan confirmation order. The consequences would be the same in chapter 11, where parallel provisions exist.

Adherence to the Code's finality provisions will be eroded if proceedings to revoke plan confirmation orders can simply be given other names and used to do the same thing. Section 1330, read together with F.R. Bankr. P. 9024, bars what USAF labels a Rule 60(b) motion to "void" a judgment. The *Whelton* Court referred briefly to section 1330 and its 180 day time limit for actions to revoke plan confirmation orders. *Whelton*, 432 F.3d at 156 n.2. The Court then rejected the application of section 1330, stating, "This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*." The difference between revoking a court order and

declaring it "void *ab initio*" is a distinction without a difference. If twenty different creditors filed untimely actions to declare twenty different provisions of a confirmed plan void, this would presumably not be subject to the limits on an action to revoke confirmation under the *Whelton* court's reasoning. This amounts to judicial repeal of sections 1327 and 1330.

4. The "notice" and "opportunity to fully litigate" elements of res judicata were satisfied. In *Whelton* and *Mersmann*, as well as in the instant case, the student loan creditors had notice of the proposed plan terms and were aware of the procedures they needed to follow to object. There were no allegations that the debtors and the courts did not follow the appropriate procedures under the Code and rules for serving plans and conducting hearings on plan confirmation. As discussed in more detail below in addressing the due process claim, the creditors' arguments based on inadequate notice are meritless, and rely heavily on their professed business practices of not reading chapter 13 plans.

The *Whelton and Mersmann* courts ignored the basic element of *res judicata* which gives finality to proceedings in which the parties *could have* litigated the issue in question. USAF does not deny that it could have raised the absence of an adversary proceeding as an objection to confirmation of Mr. Espinosa's plan. Had the objection been timely raised, the court considering confirmation would have fully and fairly considered this question. USAF could have appealed a decision it did not like. This is all that is required to satisfy the requirements for *res*

judicata. Travelers Indemnity Co. v. Bailey, 129 S.Ct. at 2205 .

III. USAF'S DUE PROCESS ARGUMENT ELEVATES A BAD BUSINESS PRACTICE TO THE LEVEL OF A CONSTITUTIONAL RIGHT

USAF does not dispute that it received a complete copy of Mr. Espinosa's chapter 13 plan several months before the deadline to file objections to plan confirmation. The plan fully and accurately described how USAF's debt would be treated unless USAF objected. This more than complied with the requirements for notice of a plan filing under F.R. Bankr. P. 2002(b). Notice did in fact "come to the lender's door" as USAF contends due process requires. USAF Brief. P. 39. USAF admits that it time-stamped the document and logged it in at its litigation office. USAF's due process contention boils down to the assertion that it receives "tidal waves of mail" and cannot reasonably be expected to read all the notices it receives from the bankruptcy court. *Id*.

Under their stated practice, the guaranty agencies routinely ignore most notices from the bankruptcy courts. This ensures that they do not see bankruptcy plans. When they are harmed by the content of a plan, they claim that they have been deceived. Consistent with this view, whatever bankruptcy procedures allowed such a plan to be confirmed must be defective, and the debtors and their attorneys who used these procedures must be engag-

ing in a deceptive practice. Circular reasoning plays a big role in the agencies' due process argument, as does the liberal use of metaphors. The creditors find themselves besieged by a "cornucopia" of plans, "tidal waves of mail" and "deafening legal background noise." They are subject to "ambush" by debtors.

Putting aside the metaphors, there is simply no legal support for the guaranty agencies' due process argument. They refer repeatedly to two Supreme Court decisions, *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) and *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953). Both cases held that notice by newspaper advertisement did not meet due process standards when sending notice by first class mail to the affected party was an alternative. *City of New York* involved a governmental creditor to which constitutional due process protections did not apply. *U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1090 (6th Cir. 1990) ("*City of New York* was not decided upon due process grounds.")[13] The *Mullane* court specifically found that regular mail addressed to a record address was a form of notice that reasonably prudent individuals would rely upon to transmit important information. 339 U.S. at 319-20. The *Mullane* court had no need to consider the due process "rights" of those who hold the notices in their hands and choose not to read them.

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[13] Many defaulted student loans are held by the U.S Department of Education and state and local government entities. These entities cannot claim due process protections.

The guaranty agencies' engage in conjecture about the delays and perils of mail service. *See e.g.* National Council Brief * 18-19. This discussion is largely irrelevant to contemporary bankruptcy practice. Electronic filing and electronic access to all documents filed in bankruptcy courts are the norm in nearly every jurisdiction in the country. Debtors do not pick the addresses to which bankruptcy court clerks mail notices of their plans. Large institutional creditors such as the guaranty agencies give addresses to a Bankruptcy Noticing Center. [14] These addresses supersede those provided by debtors on their own schedules. Through electronic filing systems creditors receive instantaneous notice of filings of all documents. Creditors can access the complete text of all filed documents, including chapter 13 plans, on line through the courts' PACER system the moment they are filed. A creditor can review a chapter 13 plan instantly upon its filing and respond electronically with a timely objection.

There can be no serious question that the bankruptcy court acted within its authority when it confirmed Mr. Espinosa's plan. USAF had filed a claim in Mr. Espinosa's bankruptcy case. In doing so USAF submitted to the jurisdiction of the bankruptcy court with respect to the subject matter of its claim. *Langenkamp v. Culp,* 498 U.S. 42, 44 (1990); *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 58-59 n. 14 (1989); *Ketchum v. Landy,* 382 U.S. 323, 329 (1966). The bankruptcy court had the authority to

[14] www.ebnuscourts.com/documents/edi.adp

declare the student loan debt dischargeable. The procedures applicable to both adversary proceedings and plan confirmation proceedings provide ample notice and an opportunity to be heard. Because USAF had actual notice of the proceedings and an opportunity to be heard, any error in the form of proceeding was harmless and waivable. *In re Cannonsburg Environmental Assoc. Ltd*., 72 F.3d 1260, 1264 (6th Cir. 1996); *In re Copper King Inn, Inc.*, 918 F.2d 1404, 1407 (9th Cir. 1990)(contrasting the time frames for responding to an adversary proceeding and for objecting to a plan, noting that "[t]he difference between twenty-five and thirty days notice is trivial."); *In re Valente*, 360 F.3d 256, 265 (1st Cir. 2004) (failure to proceed as adversary proceeding was harmless error under F.R. Bankr. P. 9005 and Fed. R. Civ. P. 61); *See also In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990) (debtor waived Rule 7001's applicability to creditor's proceeding to vacate plan confirmation brought as motion rather than as adversary proceeding required by Rule 7001(5)).

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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