No. 08-1134

In The
# Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

*Petitioner,*

v.

FRANCISCO J. ESPINOSA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* PROFESSOR RAFAEL I. PARDO IN SUPPORT OF NEITHER PARTY

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September 3, 2009

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

*Amicus curiae* Rafael I. Pardo respectfully moves under Supreme Court Rule 37.3(b) for leave to file the accompanying brief in support of neither party in the above-captioned case, *United Student Aid Funds, Inc. v. Espinosa*, which is before the Court on a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Pursuant to Supreme Court Rule 37.3(a), consent of the parties to the filing of the brief was sought, in writing, through counsel. Despite acknowledging the request, neither counsel for the petitioner nor counsel for the respondent provided an answer to the request.

*Amicus curiae* is a law professor who teaches and writes in the area of bankruptcy law. The discharge of student loans in bankruptcy is a subject in which *amicus* has a special academic interest. His scholarship on this subject has highlighted, among other things, the nonuniform treatment of similarly situated debtors who seek financial relief from their student loans through bankruptcy.[1]

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[1] *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (2005); Rafael I. Pardo, *Illness and Inability to Repay:*

(Continued on following page)

While *amicus* strongly supports the uniform treatment of student-loan debtors in bankruptcy, he believes that, for one dispositive reason, this case does not present an appropriate opportunity for the Court to establish such uniformity: The Court lacks subject-matter jurisdiction to consider Petitioner's claim for relief.

Because subject-matter jurisdiction goes to the heart of the Court's power to decide the case, and because neither party has presented the argument to the Court, *amicus* believes that the accompanying brief will assist the Court in its decision of the appeal. Accordingly, *amicus* respectfully submits that good cause exists for the Court to grant the motion seeking leave to file the accompanying brief.

Respectfully submitted,

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*The Role of Debtor Health in the Discharge of Educational Debt*, 35 Fla. St. U. L. Rev. 505 (2008).

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## INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is fully set forth in the accompanying motion for leave to file this brief.[1]

## SUMMARY OF ARGUMENT

*Amicus* files this brief to point out crucial legal authority that is relevant to the Court's decision of the appeal and that the parties failed to bring to the Court's attention in its review on writ of certiorari. Proper consideration of this authority will reveal that this case should not be before the Court due to lack of subject-matter jurisdiction. Accordingly, the Court should vacate the judgment below and remand the case with instructions to dismiss for lack of subject-matter jurisdiction.

*Amicus* contends that the failure of United Student Aid Funds, Inc. ("USAF") to file its counter-motion for relief from the bankruptcy court's confirmation order within the time limit prescribed by the Bankruptcy Code deprived the bankruptcy court

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party. *Amicus* did not receive any monetary contribution for the preparation or submission of this brief apart from the financial support of Seattle University School of Law to defray the costs of printing the brief. The opinions expressed in this brief are those of *amicus* and do not necessarily reflect the views of his academic institution.

of subject-matter jurisdiction to consider USAF's countermotion.[2] The countermotion constituted a request for the bankruptcy court to revoke its confirmation order to the extent that the order approved discharge of USAF's claim against the debtor by declaration. The Bankruptcy Code authorizes a court to revoke a confirmation order only if the moving party requests the relief within 180 days of the date that the order was entered. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") also incorporate this time limit through direct reference to the Bankruptcy Code. USAF did not file its countermotion until approximately ten years after the bankruptcy court entered the confirmation order in the debtor's Chapter 13 case. Given this Court's decisions emphasizing the jurisdictional nature of statutory time limits, USAF's untimely filing of the countermotion resulted in a jurisdictional defect that cannot be waived or forfeited. Accordingly, the countermotion is non-justiciable and must be dismissed. Dismissal will not only produce the statutorily and doctrinally correct result in this case, it will also give proper effect to Congress's intent to accord accelerated finality to confirmation orders.



[2] All references in this brief to the term "Bankruptcy Code" refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended primarily at 11 U.S.C. §§ 101-1532).

## ARGUMENT

A court's lack of subject-matter jurisdiction may be raised "at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Although the parties did not raise the issue of subject-matter jurisdiction in the proceedings below, the Court has an affirmative duty to determine the existence of subject-matter jurisdiction. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991). This jurisdictional defect cannot be forfeited or waived. *Arbaugh*, 546 U.S. at 514; *see also Freytag*, 501 U.S. at 896-97 ("Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i.e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself."). In this case, the Court must decide whether the bankruptcy court had jurisdiction to entertain USAF's countermotion for relief from the bankruptcy court's confirmation order, which USAF filed after the statutory time period set forth in the Bankruptcy Code. For the reasons set forth below, the bankruptcy court did not have such jurisdiction.

As this Court has observed, "[t]he jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

The Judicial Code grants federal district courts original but not exclusive jurisdiction over all civil proceedings that, *inter alia*, arise under the Bankruptcy Code.[3] 28 U.S.C. § 1334(b) (2006). A proceeding arises under the Bankruptcy Code if "it is a cause of action created by the Bankruptcy Code, without existence outside the context of bankruptcy, and otherwise unknown to the law." *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896 (B.A.P. 9th Cir. 1999); *see also Celotex*, 514 U.S. at 325 n.13 (Stevens, J., dissenting) ("'[W]hen a cause of action is one which is created by title 11, then that civil proceeding is one "arising under title 11."'" (alteration in original) (quoting 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][c][iii], at 3-26 (15th ed. 1994))); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987) (holding that core proceeding is one that "invokes a substantive right provided by [the Bankruptcy Code] or . . . that could arise only in the context of a bankruptcy case"). A district court may refer to the bankruptcy court a case under the Bankruptcy Code as well as proceedings that, *inter alia*, arise under the Bankruptcy Code. 28 U.S.C. § 157(a). A bankruptcy court may hear and determine (i.e., enter final judgment in) all core proceedings that arise under the Bankruptcy Code. 28 U.S.C. § 157(b)(1); *see also Marshall v. Marshall*, 547 U.S. 293, 303 (2006) ("A bankruptcy court may exercise plenary power only over 'core

[3] All references in this brief to the term "Judicial Code" refer to Title 28 of the United States Code.

proceedings.' In noncore matters, a bankruptcy court may not enter final judgment[.]" (citation and footnote omitted)). A proceeding to revoke a Chapter 13 confirmation order is considered to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), and (O). *Midlantic Nat'l Bank v. Kouterick (In re Kouterick)*, 161 B.R. 755, 756 (Bankr. D.N.J. 1993). Accordingly, a bankruptcy court generally has jurisdiction to hear and determine a proceeding to revoke a Chapter 13 confirmation order. However, for reasons that will be discussed below and that are relevant to the disposition of this appeal, such jurisdiction will be lacking if the proceeding is not brought within the time limit prescribed by the Bankruptcy Code.

Bankruptcy Code § 1330(a) provides that, "[o]n request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of [the Bankruptcy Code], and after notice and a hearing, the court may revoke such order if such order was procured by fraud." 11 U.S.C. § 1330(a) (2006).[4] Furthermore, Rule 60 of the Federal Rules of Civil Procedure (the "Federal Rules") applies to bankruptcy cases by virtue of Bankruptcy Rule 9024. Importantly, however, Bankruptcy Rule 9024 specifies that a complaint to revoke a confirmation order must be filed within

[4] Bankruptcy Code § 1330(b) addresses the consequences of the revocation of a Chapter 13 confirmation order. *See* 11 U.S.C. § 1330(b) (2006).

the time limits set forth in the Bankruptcy Code. *See* FED. R. BANKR. P. 9024(3) (stating that Federal Rule 60 "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*" (emphasis added)).[5] An attempt to seek relief from a bankruptcy court's confirmation order via Rule 60(b) constitutes an attempt to revoke such an order. *See Mason v. Young (In re Young)*, 237 B.R. 791, 802 (B.A.P. 10th Cir. 1999) ("When a party brings a motion under [Federal Rule] 60(b), the party is basically requesting revocation of the confirmed plan.").[6] In these two provisions, one witnesses that

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[5] Bankruptcy Code §§ 1144 and 1230 address the revocation of Chapter 11 and Chapter 12 confirmation orders and the consequences thereof. *See id.* §§ 1144, 1230.

[6] It should be noted that, in a single footnote to one of its opinions, the Second Circuit has characterized a request for relief from a Chapter 13 confirmation order as "an action . . . to declare one of the provisions of a confirmed plan void *ab initio*," rather than an action to revoke a confirmation order. *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). Pursuant to this characterization, the Second Circuit has concluded that such a request for declaratory relief is subject only to "the 'reasonable time' limitations of Rule 60(b)(4)" and not the Bankruptcy Code's 180-day time limit for seeking revocation of a confirmation order. *Id.* The Second Circuit's approach thus provides an end-run around the strict time limits set forth in Bankruptcy Code § 1330(a) and incorporated by reference in Bankruptcy Rule 9024. The premise of this approach is that a request for declaratory relief from a confirmation order is a request to vacate the order, not revoke it.

*Amicus* contends that the Second Circuit's analysis fails in its attempt to establish a distinction between vacating a

(Continued on following page)

Congress – through its enactment of the Bankruptcy Code – and this Court – through its authority to promulgate the Bankruptcy Rules, *see* 28 U.S.C. § 2075 – have clearly set forth a 180-day time limit within which a party may seek to revoke a confirmation order.

The Court must decide whether Bankruptcy Code § 1330(a)'s timely-filing requirement is jurisdictional or simply an element of the cause of action to revoke a confirmation order. If it is jurisdictional, then the

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confirmation order (whether in whole or in part) and revoking a confirmation order (whether in whole or in part). Courts have routinely treated vacating a confirmation order and revoking a confirmation order as equivalents. *See, e.g., Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq),* 153 F.3d 113, 115 (3d Cir. 1998); *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987) (stating that "[m]otions to revoke or vacate a Chapter 13 confirmation order are governed by the requirements of [Bankruptcy Code § 1330(a)]"), *aff'd sub nom. United States v. Hochman (In re Hochman),* 853 F.2d 1547 (11th Cir. 1988) (per curiam); *In re Swanson,* 312 B.R. 153, 158 (Bankr. N.D. Ill. 2004) ("A confirmation order may be revoked or vacated only for fraud. . . ."); *cf. First Nat'l Bank of Jeffersonville v. Goetz (In re Goetz)*, 2009 WL 1148580, at *3 (Bankr. S.D. Tex. Apr. 24, 2009) (analyzing plaintiff's complaint to vacate Chapter 11 confirmation order as a request for revocation of the order). The general definitions of the words "revoke" and "vacate," both of which are undefined by the Bankruptcy Code and the Bankruptcy Rules, *see* 11 U.S.C. § 101; FED. R. BANKR. P. 9001, justify this approach. *Compare* BLACK'S LAW DICTIONARY 1435 (9th ed. 2009) (listing "revoke" as verb form of the noun "revocation," which is defined as "[a]n annulment, cancellation, or reversal, [usually] of an act or power"), *with id.* at 1688 (defining "vacate" as "[t]o nullify or cancel; make void; invalidate").

requirement circumscribes subject-matter jurisdiction, thus requiring dismissal of USAF's countermotion; if, on the other hand, the requirement is a substantive element (i.e., an essential ingredient) of the cause of action, then dismissal would be inappropriate since (1) failure to state a claim is the appropriate basis for dismissal when a threshold fact has not been established and (2) such dismissal cannot occur post-trial. *See generally Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (explicating "subject-matter jurisdction/ingredient-of-the-claim-for-relief dichotomy" and appropriate ground for relief depending on which is implicated). *Amicus* contends that adherence to the Court's decisions in *Kontrick v. Ryan,* 540 U.S. 443 (2004), and *Bowles v. Russell*, 127 S. Ct. 2360 (2007), requires construing Bankruptcy Code § 1330(a)'s timely-filing requirement as jurisdictional.

In *Kontrick*, this Court held that a party's failure to comply with the Bankruptcy Rule deadline for objecting to a debtor's Chapter 7 discharge did not deprive the bankruptcy court of subject-matter jurisdiction. *Kontrick*, 540 U.S. at 447. The Court reasoned that court-prescribed procedural rules are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate." *Id.* at 454. In reaching its conclusion, the Court distinguished claim-processing time deadlines from those imposed by statute. In the Court's view, a statutory time constraint *could* limit subject-matter jurisdiction given Congress's authority to delineate

the classes of cases that fall within a court's adjudicatory authority. *See id.* at 452-53. But since there was no statutory time limit in *Kontrick*, subject-matter jurisdiction was not lacking.

The Court further clarified the jurisdictional nature of statutory time constraints in its decision in *Bowles*. In that case, a party failed to file an appeal within the fourteen-day period set forth in both 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6). *Bowles*, 127 S. Ct. at 2362. Although the party filed the appeal within the seventeen-day time limit set forth by the district court in its order reopening the time for appeal, the Court held that the party's filing was nonetheless untimely and deprived the court of appeals of subject-matter jurisdiction. *Id.* at 2362. In reaching its holding, the Court affirmed the jurisdictional nature of statutory time limits. *Id.* at 2364 ("Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute."). The Court also distinguished its holding from the decision it issued in *Kontrick*, observing that "[c]ritical to [the *Kontrick* Court's] analysis was the fact that 'no statute . . . specifies a time limit for filing a complaint objecting to a debtor's discharge.'" *Bowles*, 127 S. Ct. at 2364

(omission in original) (quoting *Kontrick*, 540 U.S. at 448). Central to the Court's holding was the fact that 28 U.S.C. § 2107(c) underpinned the deadline set forth in Federal Rule of Appellate Procedure 4(a)(6) and that the rule merely carried the statutory time limit into practice. *Bowles*, 127 S. Ct. at 2366 ("[T]he limit on how long a district court may reopen th[e] period [for filing a notice of appeal] is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), the limitation is more than a simple 'claim-processing rule.'"); *id.* at 2363 (noting that Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice).

Explaining the rationale for the "[j]urisdictional treatment of statutory time limits," *Bowles*, 127 S. Ct. at 2365, the Court observed the following:

> Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. . . . *[I]t is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment*.

*Bowles*, 127 S. Ct. at 2365-66 (emphasis added) (citation omitted). Thus, *Bowles* not only stands for

the proposition that statutory time limits are jurisdictional, but also for the proposition that filing deadlines in court-prescribed procedural rules can be jurisdictional if those rules incorporate a federal statutory deadline.

It must be noted that a split of authority has emerged over whether Bankruptcy Code § 1330(a) establishes procurement of a confirmation order through fraud as the only ground for obtaining relief from an order confirming a Chapter 13 plan (the "procurement-by-fraud" ground) or whether relief from such an order can also be sought pursuant to the grounds enumerated in Federal Rule 60 (by virtue of Bankruptcy Rule 9024).[7] For purposes of deciding whether the bankruptcy court lacked jurisdiction to hear USAF's countermotion for relief, however, the Court need not decide which view is correct.

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[7] For the argument that Bankruptcy Code § 1330(a) provides the sole basis for revoking a Chapter 13 confirmation order, see, for example, *Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq)*, 153 F.3d 113 (3d Cir. 1998); *Duplessis v. Valenti (In re Valenti),* 310 B.R. 138, 145-48 (B.A.P. 9th Cir. 2004); *Mason v. Young (In re Young)*, 237 B.R. 791, 800-03 (B.A.P. 10th Cir. 1999), *aff'd on other grounds,* 237 F.3d 1168 (10th Cir. 2001); *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987), *aff'd sub nom. United States v. Hochman (In re Hochman),* 853 F.2d 1547 (11th Cir. 1988) (per curiam). For the argument that Bankruptcy Rule 9024 provides additional grounds for revoking a Chapter 13 confirmation order, see, for example, *In re Swanson,* 312 B.R. 153, 158 (Bankr. N.D. Ill. 2004); *In re Abrams,* 305 B.R. 920, 922-24 (Bankr. S.D. Ala. 2002); *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich. 2001).

Regardless of the *basis* for the revocation request, that request must be made within 180 days of the entry of the confirmation order. *Cf. Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 145 (B.A.P. 9th Cir. 2004) (stating that complaint to revoke Chapter 13 confirmation order cannot be brought after expiration of 180-day time limit set forth in Bankruptcy Code § 1330(a), even if confirmation order was procured by fraud that was concealed and that remained undiscovered until after the time limit expired) (citing *Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)*, 961 F.2d 1445 (9th Cir. 1992)).[8] If Bankruptcy Code

[8] Courts that have relieved a party from a Chapter 13 confirmation order on the basis of Federal Rule 60 (via Bankruptcy Rule 9024) have generally done so when notice of the order was constitutionally inadequate. *See supra* note 7. But those courts have not squarely addressed whether Bankruptcy Code § 1330(a)'s 180-day time limit would bar the request for relief even in the context of constitutionally defective notice. *See Swanson*, 312 B.R. at 155, 157 (noting that (1) Chapter 13 confirmation order was entered on August 25, 2003, (2) Chapter 13 trustee objected to IRS secured claim on November 21, 2003, and (3) IRS responded to trustee's objection by filing a countermotion to vacate or revoke the bankruptcy court's confirmation order; but failing to (i) specify date of IRS's countermotion and (ii) discuss Bankruptcy Rule 9024(3) and its incorporation of Bankruptcy Code § 1330(a)'s time limit); *Abrams*, 305 B.R. at 922-23 (allowing Bankruptcy Rule 9024 relief seven months after entry of Chapter 13 confirmation order, notwithstanding that creditor's relief motion was filed outside Bankruptcy Code § 1330(a)'s 180-day window; but failing to discuss Bankruptcy Rule 9024(3) and its incorporation of Bankruptcy Code § 1330(a)'s time limit); *Hudson*, 260 B.R. at 444, 445 (failing to discuss Bankruptcy Rule 9024(3) and its

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§ 1330(a) provides the sole basis for relief, then failure to comply with the statute's 180-day limit deprives the bankruptcy court of subject-matter jurisdiction to entertain USAF's countermotion for relief. If Bankruptcy Rule 9024 provides additional grounds for relief, such that it was permissible for USAF to seek relief from the confirmation order on the basis of Federal Rule 60(b)(4), USAF's failure to seek such relief within the 180-day limit equally constitutes a jurisdictional defect. Although Bankruptcy Rule 9024 is a court-prescribed procedural rule, it nonetheless incorporates the statutory deadline in Bankruptcy Code § 1330. In this regard, the situation before the Court is

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incorporation of Bankruptcy Code § 1330(a)'s time limit, and noting that creditor did not seek relief from Chapter 13 confirmation order under either Bankruptcy Code § 1330(a) or Bankruptcy Rule 9024).

The dissenting opinion in *Fesq*, however, which argued that Federal Rule 60 (via Bankruptcy Rule 9024) provides additional grounds for relief from a Chapter 13 confirmation order, 153 F.3d at 120-24 (Stapleton, J., dissenting), acknowledged that the 180-day limit for revoking a Chapter 13 confirmation order cannot be circumvented via Rule 60(b), *see id.* at 123 (Stapleton, J. dissenting) ("While my reading of the Code and Rules would permit claims of a limited variety, other than fraud, to be filed during that period, *it would not extend the date upon which a confirmation order becomes unchallengeable*." (emphasis added)). In further support of this point, see, for example, FED. R. BANKR. P. 9024 advisory committee note ("Clauses (2) and (3) of this rule make it clear that the time periods established by §§ 727(e), 1144, and 1330 of the Code may not be circumvented by the invocation of F.R. Civ. P. 60(b)."); *Valenti,* 310 B.R. at 147 ("[W]e follow other courts that have held that Rule 60(b) cannot be used to evade the 180-day time limit in Section 1330(a).").

like *Bowles* – that is, a time deadline in a court-prescribed procedural rule that is underpinned by a statutory deadline – and unlike *Kontrick* – that is, a time deadline in a court-prescribed procedural rule that is *not* underpinned by a statutory deadline. Therefore, in light of the Court's emphasis on the "jurisdictional significance of the fact that a time limit is set forth in a statute," *Bowles*, 127 S. Ct. at 2364 n.2, *amicus* contends that the statutory time limit set forth in Bankruptcy Code § 1330(a), and incorporated by reference in Bankruptcy Rule 9024, eliminates subject-matter jurisdiction in this case.[9]

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[9] *Amicus* recognizes the possibility that one could narrowly interpret the Court's holding in *Bowles* to mean that, while statutory time limits may be jurisdictional, not all such time limits need be jurisdictional. Indeed, one might choose to characterize some statutory time limits as mandatory but nonjurisdictional (and thus subject to forfeiture or waiver if not timely invoked by the party for whose benefit the time limit exists). *Cf. Eberhart v. United States*, 546 U.S. 12, 15-19 (2005) (per curiam) (discussing mandatory but nonjurisdictional nature of claim-processing rules and their susceptibility to forfeiture). Even under this view, however, *amicus* contends that *Bowles* can be read broadly for the proposition that, in the interests of finality, statutory time limits for direct attacks on final judgments (such as the appeal involved in *Bowles*) are jurisdictional. On this reading of *Bowles*, it is consistent to interpret the time limit set forth in Bankruptcy Code § 1330(a) as jurisdictional given that revocation of a confirmation order constitutes a direct attack on a final judgment of the bankruptcy court. *See infra* note 10.

It also matters not that the general statutory provisions conferring jurisdiction to the federal district courts (and, by reference, to the federal bankruptcy courts) over proceedings

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In this case, USAF failed to comply with Bankruptcy Code § 1330(a) as well as Bankruptcy Rule 9024, both of which set a filing deadline for commencing an action to revoke a Chapter 13 confirmation order. Bankruptcy Code § 1330(a) provides that such relief must be sought "[o]n request of a party in interest *at any time within 180 days after the date of the entry of an order of confirmation*," 11 U.S.C. § 1330(a) (emphasis added), and Bankruptcy Rule 9024 provides that, while Federal Rule 60 applies in bankruptcy cases, "a complaint to revoke an order confirming a plan may be filed *only within the time allowed by . . . § 1330*," FED. R. BANKR. P. 9024(3) (emphasis added). It is abundantly clear that USAF sought revocation of the bankruptcy court's confirmation order well after the 180-day time limit had expired. The bankruptcy court entered the confirmation order in 1993. Pet. for Writ of Cert. at 4. In 2003, the debtor filed a motion to enforce the discharge injunction in his bankruptcy case. Br. for Pet'r at 9. USAF responded in 2004 – more than ten years after entry of the confirmation order – by filing a countermotion under Rule 60(b)(4) for relief from

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that arise under the Bankruptcy Code do not contain a timeliness condition for proceedings that seek to revoke a confirmation order. As this Court has observed, "'[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants.'" *Bowles*, 127 S. Ct. at 2364 (alteration in original) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)).

the bankruptcy court's confirmation order.[10] Br. for Pet'r at 9. Because USAF failed to file its countermotion in a timely manner, the bankruptcy

[10] USAF's countermotion constituted a direct attack on a final judgment of the bankruptcy court. *See Celli v. First Nat'l Bank of Northern N.Y. (In re Layo)*, 460 F.3d 289, 294 (2d Cir. 2006) (concluding that Chapter 13 confirmation order constitutes a final judgment on the merits); 18 MOORE'S FEDERAL PRACTICE § 131.02[1][a], at 131-13 (3d ed. 2009) (defining direct attack on a judicial proceeding as "an attempt to have it corrected, annulled, reversed, vacated, or declared void" and noting that Federal Rule 60 is one method of directly attacking a judgment); *see also Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916, 932-35 (B.A.P. 9th Cir. 1998) (Klein, J., concurring in part and dissenting in part) (arguing that Rule 60(b)(4) motion for relief from a confirmation order should be construed as a direct attack on a final judgment), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). The characterization of USAF's countermotion as a direct attack on a final judgment has significance for purposes of ascertaining the applicability of *res judicata* principles in this case. Because such principles are inapplicable to direct attacks on judgments, *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985); 18 MOORE'S FEDERAL PRACTICE, *supra*, § 131.02[1][a], at 131-13 n.1 (citing *Watts* for proposition that "*res judicata* does not apply to direct attacks on judgments"), *amicus* urges the Court to disregard any arguments by the parties premised on such principles. For the argument that a Rule 60(b)(4) motion for relief from a confirmation order, like the one brought by USAF in this case, is not subject to *res judicata* principles, see *Pardee*, 218 B.R. at 932-35 (Klein, J., concurring in part and dissenting in part). It should be noted that USAF has made this argument in its brief on the merits. *See* Br. for Pet'r at 36.

court lacked jurisdiction to consider USAF's claim for relief.[11]

## CONCLUSION

As this Court has observed, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000)). Although dismissal for lack of

[11] USAF cannot rely on its use of ersatz procedure (i.e., seeking relief by motion rather than by complaint) as a basis for evading the timely-filing requirement for bringing an action to revoke a Chapter 13 confirmation order. While true that the Bankruptcy Rules provide that a proceeding to revoke confirmation of a Chapter 13 plan is an adversary proceeding, FED. R. BANKR. P. 7001(5), and that such a proceeding must be commenced by the filing of a complaint, FED. R. BANKR. P. 7003, authority exists for the proposition that, if revocation is sought by motion, the procedural fault may be waived if the debtor fails to object, *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990). In this case, the debtor did not object to USAF proceeding by motion to revoke the confirmation order. Accordingly, the substantive rules governing revocation of a confirmation order apply notwithstanding that USAF did not follow proper procedure. It is quite ironic that, in a case where USAF accuses the debtor of using improper procedure to discharge his student loans (i.e., by declaration rather than by adversary proceeding), *see, e.g.,* Br. for Pet'r at 16, 24-26, USAF itself failed to initiate an adversary proceeding when procedurally required to do so.

subject-matter jurisdiction may be perceived to lead to a harsh result in this case, it certainly does not lead to an absurd result. Rather, the result would give effect to Congress's policy to give confirmation orders an accelerated degree of finality – to wit, authorizing a court to revoke a confirmation order only if the relief is requested within 180 days of the date of entry of the order. *See Fesq*, 153 F.3d at 120 ("Revoking a confirmation order is a measure that upsets the legitimate expectations of both debtors and creditors. Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases." (footnote omitted)); *Educ. Credit Mgmt. Corp. v. Robinson (In re Robinson)*, 293 B.R. 59, 65 (Bankr. D. Or. 2002) ("In the final analysis, § 1330(a) must be construed as Congress' acknowledgement that confirmation orders are indeed different than other orders. 'Any other result does harm to the finality normally accorded confirmation orders and specifically provided for by Congress in § 1327(a).'" (quoting *In re Ritacco*, 210 B.R. 595, 599 (Bankr. D. Or. 1997))); *cf. Taylor v. Freeland & Kronz*, 503 U.S. 638, 744 (1992) ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.").

This is not to say that USAF will be unable to obtain relief from the bankruptcy court's confirmation order. As mentioned before, this is a case involving direct attack, *see supra* note 10, an avenue of relief that has been foreclosed. Nonetheless, the possibility still may exist for collateral attack of the bankruptcy

court's confirmation order in subsequent proceedings. Whether such attack would be allowed depends on the applicability of *res judicata* principles.[12] USAF alleges that it did not receive constitutionally adequate notice of the treatment of its claim provided for by the debtor's Chapter 13 plan. Br. for Pet'r at 51-58. If this proves to be true, this could be a basis for denying the confirmation order preclusive effect in subsequent litigation between USAF and the debtor. *See Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 162 (4th Cir. 1993); *cf. Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2207 (2009) ("Nor do we decide whether any particular respondent is bound by the 1986 Orders [i.e., a Chapter 11 confirmation order and an insurance settlement order, which was incorporated by reference into the confirmation order]. We have assumed that respondents are bound, but the Court of Appeals did not consider this question. Chubb [Indemnity Insurance Company] . . . has maintained that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope. The District Court rejected this argument, but the Court of Appeals did not reach it. On remand, the Court of Appeals can take up this objection and any others that respondents have preserved." (citations omitted)).

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[12] For an explanation of why *res judicata* principles are inapplicable to the matter before the Court, see *supra* note 10.

For the foregoing reasons, the Court should vacate the judgment below and remand the case with instructions to dismiss, for lack of subject-matter jurisdiction, USAF's countermotion.[13]

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[13] If the Court disagrees that it lacks subject-matter jurisdiction in this case and decides to consider the questions presented to the Court by the parties, *amicus* urges the Court to recognize that its decision of the appeal could be interpreted as implicitly validating those decisions that have recognized Federal Rule 60 as an appropriate basis for relief from a confirmation order. As previously mentioned, a split of authority exists over this issue. *See supra* note 7 and accompanying text. Because the issue does not fall within the questions presented on which certiorari was granted, and because the Court ordinarily does not decide in the first instance an issue that was not decided below, *see NCAA v. Smith*, 525 U.S. 459, 470 (1999); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981), the writ of certiorari should be dismissed as improvidently granted if the Court decides not to dismiss the case on the basis of lack of subject-matter jurisdiction.