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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

BRIEF IN SUPPORT OF RESPONDENT FOR AMICI CURIAE PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, KENNETH N. KLEE, GEORGE W. KUNEY, JONATHAN C. LIPSON, LOIS LUPICA, RALPH R. MABEY, C. SCOTT PRYOR, MICHAEL D. SOUSA, AND ROBERT M. ZINMAN

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Dated: October 16, 2009

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] They are deeply interested in the outcome of this appeal, not only for its effect on debt restructuring cases under chapter 13 of the Bankruptcy Code,[3] but also because of its potential impact on cases for reorganization under chapters 9, 11 and 12 of the Bankruptcy Code. The *Amici* file this brief in order to underscore the fundamental importance for both debtors and the creditor body to uphold the finality of confirmation orders under chapters 9, 11, 12, and 13, and to bar attacks upon such orders by creditors who choose not to object

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1 The *Amici* file this brief with the written consent of all parties. No counsel for a party has authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

2 The *Amici* are Richard Aaron, Professor of Law at University of Utah-S.J.Quinney College of Law; Jagdeep S. Bhandari, Professor of Law at Florida Coastal Law School; Susan Block-Lieb, Professor of Law at Fordham Law School; Robert D'Agostino, Professor of Law at John Marshall Law School; Kenneth N. Klee, Professor of Law at UCLA School of Law; George W. Kuney, Professor of Law at University of Tennessee College of Law; Jonathan C. Lipson, Professor of Law at Temple University-James E. Beasley School of Law; Lois Lupica, Professor of Law at University of Maine School of Law; Ralph R. Mabey, Professor of Law at University of Utah-S.J.Quinney College of Law; C. Scott Pryor, Professor of Law at Regent University School of Law; Michael D. Sousa, Professor of Law at University of Denver-Sturm College of Law; and Robert M. Zinman, Professor of Law at St. John's University School of Law.

3 Title 11 of the United States Code is hereinafter referred to as the Bankruptcy Code.

to them during proceedings for confirmation, whether the subsequent challenge to the confirmation order is based on subject matter jurisdictional or substantive bankruptcy law claims.

The *Amici* support the Respondent's analysis upholding the confirmation order and the Respondent's discharge of student loan debt, and offer additional grounds in support of that result. They urge that the Court's holding four months ago in *Travelers Indemnity Company v. Bailey*, ___ U.S. ___, 129 S.Ct. 2195, 2205 (2009), is controlling. There, the Court held that the doctrine of *res judicata* barred creditors in a subsequent proceeding in the same reorganization case from challenging an earlier confirmation order, and ruled that provisions of a confirmation order could not be later attacked, whether or not the order constituted a proper exercise of bankruptcy court jurisdiction or of its substantive bankruptcy law power. The *Amici* urge the Court to hold that a creditor who chooses to remain silent at the confirmation stage after receiving adequate notice that a proposed chapter 13 plan will discharge student loan debt, is barred by *res judicata* from challenging the confirmation order in a later proceeding in the same bankruptcy case.

SUMMARY OF ARGUMENT

The *Amici* urge two independent bases for upholding the confirmation order and discharge at issue:

First: A collateral attack on a confirmation order is barred by *res judicata* even if it is predicated either on a claimed lack of subject matter jurisdiction or of substantive power of the bankruptcy

court. Such a post-confirmation collateral challenge is barred, whether made in the same bankruptcy case or in another case. Moreover, the *Amici* urge that §§ 523(a)(8) and 1328(a)(2) of the Bankruptcy Code (the "Student Loan Provisions") and F. R. Bankr. P. 7001(6) are not jurisdictional in nature, and that the violation of or non-compliance with those provisions does not void an order.

Second: By reason of Bankruptcy Code § 1327(a), each creditor is bound by the discharge provision of a confirmation order to which it did not object after receiving adequate notice of the proposed plan and an opportunity to assert its objection to such provision.

1. *Summary of the res judicata argument*: The doctrine of *res judicata* applies in a subsequent proceeding in the same bankruptcy case. Each of the elements for applicability of the doctrine of *res judicata* is satisfied in this case. Petitioner was served with adequate notice of the confirmation proceeding and of the proposed plan's provision for the discharge of student loan debt, and thereby became a party to that proceeding. It had a full opportunity for a hearing on any objection to confirmation that it might interpose. Bankruptcy Code § 1324(a); F. R. Bankr. P. 2002(b). Moreover, Petitioner was expressly warned that its rights could be impaired by the proposed plan. Nevertheless, it failed to object to confirmation or to appeal from the order confirming the plan. As such, the confirmation order became final and binding on all parties under Bankruptcy Code § 1327(a). Petitioner was thus barred by *res judicata* from raising its claims in Respondent's post-confirmation proceeding to confirm his discharge.

Res judicata is a foundational doctrine of the law, designed to provide certainty for the parties and reliability for the judicial system. The doctrine is of prime importance not only in chapter 13 debt restructuring cases, but also in bankruptcy reorganization cases under chapters 9, 11 and 12. Once a plan has been confirmed, a creditor who receives adequate notice of the confirmation hearing but chooses not to object to confirmation or to appeal the confirmation order, is barred by *res judicata* from attacking the confirmation order on any ground, whether the challenge is based on an asserted lack of subject matter jurisdiction or substantive power of the bankruptcy court. These principles were made clear by the Court in *Travelers v. Bailey*, which the *Amici* urge is controlling. Under the Court's holding in that case, Petitioner's attack on the confirmation order must fail.

In *Travelers v. Bailey*, the Court held that a creditor was barred by *res judicata* from challenging a confirmation order in a post-confirmation proceeding in the same bankruptcy case. Although the doctrine of *res judicata* has long been applied to bar a subsequent challenge asserted in a different case, *Travelers v. Bailey* applied the doctrine to an attack on a confirmation order made in a proceeding in the same bankruptcy case in which the confirmation order had been issued. As ruled by *Travelers v. Bailey*, all attacks, whether made by a post-confirmation proceeding filed in the same bankruptcy case or in a different case in a non-bankruptcy court, constitute collateral attacks made impermissible by the doctrine of *res judicata*. The Court made clear in that case that the basic reason for the doctrine is to provide finality for confirmation orders.

Travelers v. Bailey, moreover, also makes clear that the doctrine of *res judicata* applies to bar all claims, whether based on an asserted lack of jurisdiction for a provision of the confirmation order or a lack of substantive power of the bankruptcy court. Thus, even if the Student Loan Provisions were viewed as jurisdictional or beyond the power of the bankruptcy court, which *Amici* believe they are not, *res judicata* precludes a challenge to a confirmation order based on them. Petitioner's fundamental position on this appeal never comes to grips with the impact of *res judicata*, and does not address or even cite the Court's decision in *Travelers v. Bailey.*

Petitioner also argues that the bankruptcy court lacked the jurisdiction to confirm a plan for discharge of student loan debt without an undue hardship determination made in an adversary proceeding pursuant to F. R. Bankr. P. 7001(6). That contention is likewise flawed because that provision cannot be viewed as jurisdictional in nature in light of decisions of this Court and F. R. Bankr. P. 9030.

2. *Summary of the argument based on § 1327(a).* Independent of the bar of *res judicata*, the *Amici* urge that a challenge to a discharge of a student loan debt provided for by a confirmed chapter 13 plan cannot be made because of § 1327(a) of the Bankruptcy Code. Section 1327(a), like its analogue in chapters 9, 11 and 12 (set forth in Bankruptcy Code §§ 944(a), 1141(a), and 1227(a)), states that, "the provisions of a confirmed plan . . . bind . . . each creditor, . . . whether or not such creditor has objected to . . . the plan." The plain text of § 1327(a) should be applied as written. Congress has been both clear and emphatic in the language it chose for § 1327(a) to make all provisions of a confirmed plan

binding on each creditor. To allow a creditor's post-confirmation attack on the confirmation order would require the Court to disregard that statute. That statute makes no exception for provisions of any type. Thus, no provision of a confirmed plan may be attacked by a creditor after confirmation if the creditor has not objected to the plan proposed for confirmation or appealed the confirmation order.

POINT I

PETITIONER'S CLAIM IS BARRED BY *RES JUDICATA*, WHICH PRECLUDES A CHALLENGE TO A CONFIRMATION ORDER IN A POST-CONFIRMATION PROCEEDING IN THE SAME BANKRUPTCY CASE

The doctrine of *res judicata* bars all post-confirmation objections to a confirmed plan. The Court left no doubt about the total bar of the doctrine of *res judicata* by its broad and unqualified language in *Travelers v. Bailey*, 129 S.Ct. 2195, decided scarcely four months ago. *Travelers v. Bailey* is controlling.

A. Travelers v. Bailey Bars Collateral Attack of Confirmation Orders in the Same Bankruptcy Case

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). A bankruptcy court's order confirming a plan of reorganization is a final order entitled to *res judicata* effect. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72

(1938). *Res judicata* precludes a collateral attack upon a confirmation order even when the bankruptcy court entering the order lacked subject matter jurisdiction to do so. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940).

The Court's prohibition on the collateral attack of confirmation orders has usually arisen in response to post-confirmation objections raised outside the debtor's bankruptcy case in an action brought in a non-bankruptcy court. *See e.g.*, *Stoll v. Gottlieb*, 305 U.S. 165 (applying *res judicata* to preclude collateral attack of confirmation order in Illinois state court action); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (applying *res judicata* to preclude collateral attack of confirmation order in United States district court). In *Travelers v. Bailey*, the Court held that *res judicata* also precludes collateral attack upon a confirmation order in a later proceeding in the *same* bankruptcy case. *Travelers v. Bailey*, 129 S.Ct. at 2206.

The circumstances in the present case regarding *res judicata* mirror those in *Travelers v. Bailey*. In *Travelers v. Bailey*, the Court granted *certiorari* to review whether the Court of Appeals had erroneously held, in a post-confirmation proceeding in the chapter 11 bankruptcy case of Johns-Manville Corporation, that the bankruptcy court did not have subject matter jurisdiction to issue a confirmation order enjoining the prosecution of claims against non-debtors that did not directly affect the *res* of the bankruptcy estate.

The Court, however, did not decide the issue for which it had granted *certiorari* in that case. *Travelers v. Bailey*, 129 S. Ct. at 2207. Instead, the Court determined the appeal on the basis of the paramount

importance of the doctrine of *res judicata*, holding that *res judicata* barred the post-confirmation attack in Manville's bankruptcy case on the injunction included in the confirmation order. In the present case, *certiorari* was granted to review whether a chapter 13 confirmation order erroneously confirmed a plan that provided for the discharge of student loan debt without a determination of undue hardship, and to consider a related notice issue. Here, as in *Travelers v. Bailey*, the attack on the confirmation order was made in a subsequent proceeding in the bankruptcy case. As in *Travelers v. Bailey*, the Court in the present case should not address the substantive issue it accepted for review, but instead should bar Petitioner's attack on the confirmation order on the basis of *res judicata*.

In *Travelers v. Bailey*, a plan of reorganization providing for the treatment of massive asbestos related personal injury claims, was confirmed. Years after confirmation of Manville's plan of reorganization, certain asbestos-injured claimants brought lawsuits in state courts across the country against Petitioner, who was Manville's insurer. Petitioner then brought a proceeding within Manville's bankruptcy case for an interpretation that the injunctive provision built into the confirmation order was intended to bar those lawsuits. The Court of Appeals for the Second Circuit held that the bankruptcy court lacked subject matter jurisdiction to grant the injunction.

The Court reversed. Under the Court's ruling, it did not matter whether or not the bankruptcy court lacked subject latter jurisdiction or power to issue the order, holding that under either circumstance the later attack on the order in the same bankruptcy

case was barred by *res judicata*. The Court made it crystal clear that *res judicata* bars all post-confirmation challenges to confirmation orders. As stated by the Court: "[O]nce the 1986 orders became final on direct review (*whether or not [they were] proper exercises of bankruptcy court jurisdiction and power*), they became *res judicata*," and the Court barred the assertion of any matter that could have been raised in the proceeding for confirmation in opposition to the provision in question. *Travelers v. Bailey*, 129 S. Ct at 2205 (emphasis added). The Court went on to state:

> So long as respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction [to issue the injunction incorporated into the confirmation order], they cannot challenge it now [in the subsequent proceeding for an interpretation of the scope of that provision] by resisting enforcement of the 1986 Orders.

Id. at 2206.

The Court's broad view of *res judicata* and its importance is unmistakably clear:

> The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with *res judicata* and the practical necessity served by that rule.

Id. at 2206 (citing, *inter alia*, *In re Optical Technologies*, *Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005) (barring collateral attack of confirmation order in later proceeding in same bankruptcy case and noting that if "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.")).

Like the unsuccessful respondents in *Travelers v. Bailey*, Petitioner in the present case seeks to attack a confirmation order in a subsequent proceeding in the same bankruptcy case, essentially claiming a lack of jurisdiction. Even if jurisdiction were lacking, *Travelers v. Bailey* is controlling to bar Petitioner's attack. *See Travelers v. Bailey*, *129* S. Ct. at 2206 ("[T]his sort of collateral attack cannot be squared with *res judicata* . . . .").

The fact that Respondent commenced the instant proceedings by reopening the chapter 13 case in order to bring his proceeding to reconfirm the discharge of his student loan debt does not change the impermissible nature of Petitioner's attack on the confirmation order. *See id.* at 2206 n.7 ("Respondents point out that it is *Travelers*, not they, who moved the Bankruptcy Court to enforce the 1986 Orders. But who began the present proceedings has no bearing on the application of *res judicata* . . . ."). Based on a straightforward application of *Travelers v. Bailey*, Petitioner's post-confirmation attack on the confirmation order is barred by the doctrine of *res judicata*.

B. The Finality of Confirmed Plans Ensures the Efficient Administration of the Bankruptcy Process

The finality of confirmed plans and the prohibition on their collateral attack reflects a strong policy in favor of bringing an end to litigation. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) ("[T]he practical concern with providing an end to litigation

justifies a rule preventing collateral attack on subject-matter jurisdiction"); *Stoll v. Gottlieb*, 305 U.S. at 172 ("It is just as important that there should be a place to end as that there should be a place to begin litigation."); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 401 (overturning Ninth Circuit anti-trust decision for failure to apply *res judicata* and noting that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . . .") (citing *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (internal quotation marks omitted)).

The finality of confirmed plans is just as important in chapter 13 cases as it is in epic asbestos cases like that at issue in *Travelers v. Bailey*. The sound administration of the bankruptcy law requires that the provisions of plans of reorganization and for debt adjustment be immune from challenge once the plan has been confirmed and the appeal period has expired. When such plans have been confirmed without objection, the debtor and creditors must be able to rely on their finality. Confirmation orders are at the heart of reorganization and debt adjustment bankruptcy cases, and the bankruptcy system could not function if a confirmation order could be upset in a later proceeding. Credit is extended to the reorganized debtor and other relationships are formed in reliance on the finality of confirmation orders. Parties to debt adjustment and reorganization cases must be confident that their conduct in reliance on court-ordered confirmation will not be undercut by later attacks on the confirmed plan.

POINT II

EVEN IF *RES JUDICATA* WERE HELD NOT TO BAR AN ATTACK ON A PROVISION OF A CONFIRMATION ORDER FOR LACK OF JURISDICTION OR SUBSTANTIVE POWER OF A BANKRUPTCY COURT, THE STUDENT LOAN PROVISIONS AND F. R. BANKR. P. 7001(6) ARE NON-JURISDICTIONAL AND DO NOT VOID THE ORDER. A CREDITOR FORFEITS NON-JURISDICTIONAL OBJECTIONS BY NOT RAISING THEM AT THE CONFIRMATION STAGE, AND THUS CANNOT RAISE THEM THEREAFTER

Petitioner contends that the order providing for the discharge of Respondent's student loan debt is void. Petr's Br. 31-32. To support its "voidness" claim, Petitioner asserts that the bankruptcy court lacked the power to enter a confirmation order with a provision for the discharge of student loan debt in contravention of §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6). As demonstrated in Point I, *res judicata* bars a challenge to a confirmation order for lack of subject matter jurisdiction or substantive power of the bankruptcy court. Because a confirmation order is made fully effective by the doctrine of *res judicata* despite a lack of subject matter jurisdiction, it obviously cannot be "void." Moreover, if a collateral attack upon a confirmation order cannot be based on a claimed lack of subject matter jurisdiction, then such an attack surely cannot be sustained on the basis of non-jurisdictional errors of law in the issuance of such an order. In that regard, §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6) are non-jurisdictional in nature. They are

substantive and procedural bankruptcy law provisions, noncompliance with which does not render an order void. It is fundamental that the remedy to correct an error of law is to object and appeal if necessary.

Title 28 of the United States Code provides the bankruptcy courts, by referral from the district courts, with jurisdiction to enter confirmation orders and grant discharges. 28 U.S.C. § 157(a) and § 1334(b). Sections 523(a)(8) and 1328(a)(2) do not limit the scope of the bankruptcy court's jurisdiction. Those statutes are not jurisdictional under the governing test provided by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). To be jurisdictional under the *Arbaugh* test, a statute must itself clearly manifest Congressional intent to implicate the subject matter jurisdiction of the court. Furthermore, F. R. Bankr. P. 7001(6) is a non-jurisdictional claims processing rule under the Court's decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004).

In the present case, the bankruptcy court had jurisdiction to enter a confirmation order, including its arguably erroneous provision for the discharge of student loan debt. Neither the Student Loan Provisions nor F. R. Bankr. P. 7001(6) abrogate that jurisdiction. Because the bankruptcy court had subject matter jurisdiction to issue the confirmation order, that order cannot be considered to be void, and thus is not subject to an attack predicated on F. R. Civ. P. 60(b)(4). Any interest Petitioner had in avoiding the provision for the discharge of its claim set forth in the confirmed plan is overridden by the need for finality and repose expressed in the doctrine of *res judicata*, as well as by § 1327 of the Bankruptcy

Code and the Court's decisions in *Kontrick v. Ryan* and *Arbaugh*.

A. The Student Loan Provisions of §§ 523(a)(8) and 1328(a)(2) Are Not Jurisdictional In Light of the "Readily Administrable Bright Line" Test Set Forth In *Arbaugh v. Y & H Corp.*, Requiring That To Be Jurisdictional A Statute Must, By Its Own Text, Clearly Evidence Congress' Intent To Implicate the Bankruptcy Court's Subject Matter Jurisdiction

Sections 523(a)(8) and 1328(a)(2) of the Bankruptcy Code are not jurisdictional under the test delineated by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. at 515-516, as applied by the Eleventh Circuit in *In re Trusted Net Media Holdings*, 550 F.3d 1035, 1039 (11th Cir. 2008). In determining the jurisdictional nature of a statute, the Court instructed the lower courts in the following manner:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.

Arbaugh, 546 U.S. 500, 515-516 (emphasis added) (citations omitted). The Court has called this approach a "readily administrable bright line" test. *Id.* at 516.

Petitioner's argument that the bankruptcy court lacked jurisdiction to confirm a plan for the discharge of student loan debt, is flawed. It is predi-

cated on Petitioner's erroneous reliance on cases which pre-date *Arbaugh*, except for one case, *In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007), which failed to apply or even cite *Arbaugh*. *See* Petr's Br. 31-32. Instead, under the "readily administrable bright line" test, the Student Loan Provisions are not jurisdictional because Congress did not "clearly state" that they were jurisdictional in nature.

A brief discussion of the jurisdiction of bankruptcy courts is warranted in order to fully understand the scope of their power. Similar to the other provisions in the Bankruptcy Code, §§ 523(a)(8) and 1328(a)(2) are substantive law provisions for bankruptcy cases. However, the subject matter jurisdiction of the bankruptcy courts is governed by 28 U.S.C. § 1334, not by the Bankruptcy Code codified by Title 11. *In re Trusted Net Media Holdings*, 550 F.3d at 1039 (citing *Kontrick v. Ryan*, 540 U.S. at 453). Title 28 provides that the "district courts shall have original and exclusive jurisdiction of all *cases* under title 11 [Bankruptcy Code]," and "original but not exclusive jurisdiction of all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b) (emphasis added)). Pursuant to §§ 151 and 157 of Title 28, bankruptcy court jurisdiction to adjudicate "core proceedings" exists by reference from the district courts to the bankruptcy judges for the district, including "core" jurisdiction for "confirmations of plans" and "objections to discharges." 28 U.S.C. § 157(b)(2)(J), (L). The Student Loan Provisions and F. R. Bankr. P. 7001(6), however, do not abrogate such jurisdiction of the bankruptcy courts because the "clearly states" requirement of *Arbaugh* is absent from those provisions. Indeed, those provisions contain *no* language suggesting that Congress

intended them to be jurisdictional. They thus are not jurisdictional in nature.

The issue in *Arbaugh* was whether Title VII's requirements that an employer have fifteen or more employees affected subject matter jurisdiction or, instead, related only to the substantive adequacy of a Title VII plaintiff's claim for relief, and thus could not be raised for the first time post-trial. *Arbaugh*, 546 U.S. at 503-04. The Court held that "the threshold number of employees for application of Title VII is an *element* of a plaintiff's claim for relief, not a jurisdictional issue." *Id.* at 515 (emphasis added). The Court reasoned that the "15-employee threshold" requirement did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 510 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Therefore, defendant forfeited his right to object on the basis of this defense and could not raise the issue after the entry of judgment. *Arbaugh*, 546 U.S. at 510.

Following the Supreme Court's decision in *Arbaugh*, the Eleventh Circuit, in *Trusted Net Media Holdings*, followed the "readily administrable bright line" test to determine whether provisions in the Bankruptcy Code are jurisdictional. The court in *In re Trusted Net Media Holdings* considered whether the number of creditors and the amounts of claims of creditors required to file an involuntary petition under § 303(b) was jurisdictional or were elements simply constituting " 'substantive matters which must be proved or waived for petitioning creditors to prevail in involuntary proceedings.' " *In re Trusted Net Media Holdings*, 550 F.3d at 1041 (quoting *Rubin v. Belo Broad. Corp.*, 769 F.2d 611, 614 n.

3 (9th Cir. 1985)). The Court held that § 303(b) is not jurisdictional because Congress did not include jurisdictional language in the statute and that there was no congressional intent to implicate the bankruptcy court's subject matter jurisdiction. *In re Trusted Net Media Holdings*, 550 F.3d at 1043. Further, § 303(b) never makes an explicit or implicit reference to its requirements being jurisdictional and never used the word "jurisdiction." *Id.* Rather, the Court explained that the Bankruptcy Code provision at issue merely states that a case "is commenced against a person by the filing with the bankruptcy court of a petition under chapter 7 or 11" by the requisite number of persons holding the requisite claims. *Id.*

In sum, under the reasoning set forth in *In re Trusted Net Media Holdings*, which applied the *Arbaugh* test, the Student Loan Provisions are not jurisdictional for a number of reasons. First, Congress did not "clearly state" any words constituting jurisdictional language in §§ 523(a)(8) and 1328(a)(2). Further, under *Trusted Net*'s analysis, the "undue hardship" requirement in the Student Loan Provisions is an *element* that merely relates to substantive matters which must be proved, and an objection based on a lack of such proof is forfeited by a failure to make it at the confirmation stage. *Id.* at 1041. The Bankruptcy Code creates the substantive rights and obligations of both debtors and creditors, and in this case, Petitioner *forfeited its rights* under the Student Loan Provisions. *See*, *e.g.*, *In re Trusted Net Media Holdings*, 550 F.3d at 1041; *see also* Point II. B *infra*.

Moreover, *In re Trusted Net Media Holdings* is not cited in Petitioner's brief even though it is a Cir-

cuit Court case that applies the Court's test in *Arbaugh*, and a leading treatise states that the "better view" is that Bankruptcy Code provisions are not jurisdictional. *See* 5 COLLIER ON BANKRUPTCY, ¶ 546.02[4] (Allen N. Resnick et al. 15th ed. rev. 2006) (stating that the "better view" is that § 546(a) is non-jurisdictional); 2 COLLIER ON BANKRUPTCY, ¶ 303.08[2] (stating that the better argument is that § 303(b) may be waived; and ¶ 303.02 (stating that § 109(a)'s requirements for a person to be a debtor under the Bankruptcy Code, may be waived) (Allen N. Resnick et al. 16th ed. (2009). Further, Petitioner's brief does not even mention *Arbaugh*.

In enacting the Student Loan Provisions, Congress merely indicated that in order for a student debt to be dischargeable, undue hardship should be proven, and that *a manner* in which it is demonstrated is by commencing an adversary proceeding. However, there is no language in the Bankruptcy Code which makes such a procedure jurisdictional and mandatory, nor anything which precludes a forfeiture of the right to object based on the failure to bring an adversary proceeding. *See* 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, § 346.1, at 346-33 (3d ed. 2000 & Supp. 2004) (citing *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004)).

It is clear that the Student Loan Provisions are not jurisdictional, and Petitioner forfeited its rights thereunder by not asserting them at the confirmation stage.

B. F. R. Bankr. P. 7001(6) is a Non-Jurisdictional Claims Processing Rule Under the Court's Decision in *Kontrick v. Ryan*

Nothing in F. R. Bankr. P. 7001(6) implicates the jurisdiction of the bankruptcy courts. Non-compli-

ance with Rule 7001(6) does not void a judgment or order. As discussed in Section II. A, Congress conferred jurisdiction on the bankruptcy courts over proceedings for confirmation of plans and discharges of debts under §§ 1334(b), 157(b)(1)(J),(L) of Title 28 of the United States Code. F. R. Bankr. P. 9030 prevents the Bankruptcy Rules from being construed to expand or limit the jurisdiction of the bankruptcy courts. The confirmation order for the discharge of Petitioner's student loan debt was not void because entry of the order was within the subject-matter jurisdiction of the bankruptcy court as prescribed by Congress.

The Court recently underscored the non-jurisdictional nature of the Bankruptcy Rules in *Kontrick v. Ryan*, 540 U.S. at 447. The Court there noted that courts have been "less than meticulous" in their characterization of rules as "jurisdictional," and reaffirmed that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452-53. Procedural rules promulgated by the Court for bankruptcy cases, on the other hand, are claims processing rules which "shall not be construed to extend or limit the jurisdiction of the courts." *Id.* at 453-54 (quoting F. R. Bankr. P. 9030). These claims processing rules, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, *Id.* at 444-45. The Court concluded that F. R. Bankr. P. 4004 was a non-jurisdictional claims-processing rule "adopted by the Court for the orderly transaction of its business . . . ." 540 U.S. at 447, 454; *see also Schacht v. United States*, 398 U.S. 58, 64 (1970) ("[T]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional").

Petitioner's argument that F. R. Bankr. P. 7001(6) requires an adversary proceeding to discharge student loans under § 523(a)(8) fails to account for the claims-processing nature of procedural rules. An adversary proceeding is not required by statute or the Constitution for discharge of student loan debts. *Hood*, 541 U.S. at 453-54. To hold that Rule 7001(6) is a jurisdictional requirement, would require the Court to ignore the scope of the authority conferred by Congress by 28 U.S.C. § 2075, which only authorizes the promulgation of rules of "practice and procedure" for bankruptcy cases. It would also require the Court to disregard the plain language of F. R. Bankr. P. 9030, which precludes interpreting Rule 7001(6) as a limitation on the jurisdiction of the bankruptcy courts.

Petitioner failed to object to Respondent's chapter 13 plan despite receiving notice of the plan confirmation hearing and notice of the treatment of its claim under the plan. Under *Kontrick v. Ryan*, by this failure to object, Petitioner forfeited its right to a determination of undue hardship in an adversary proceeding under F. R. Bankr. P. 7001(6). Because Rule 7001(6) is non-jurisdictional in nature, there is no basis for a claim that noncompliance with it voided the confirmation order and discharge.

C. Concepts of Finality and Repose Dictate that a Creditor Who Fails To Object Prior to Confirmation of a Chapter 13 Plan Forfeits Its Right To Later Object That the Plan Was Erroneously Confirmed

The Bankruptcy Code and Bankruptcy Rules governing objections to confirmation of a chapter 13 plan act as claims-processing limitations. *See*

Bankruptcy Code § 1324; F. R. Bankr. P. 2002(b), 3015(d), (f), 9014. Section 1324(a) provides that, "after notice, the court shall hold a hearing on confirmation of the plan." A creditor, as a party in interest under § 1324, may object to the confirmation. F. R. Bankr. P. 2002 requires that "the debtor, the trustee, all creditors and indenture trustees [receive] not less than 25 days notice by mail of the time fixed . . . for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." F. R. Bankr. P. 3015(d) provides that "[a]n objection to confirmation of a plan shall be filed . . . *before* confirmation of the plan." (emphasis added). F. R. Bankr. P. 2002(b) and 3015(f) are claims-processing rules. *See Kontrick v. Ryan*, 540 U.S. at 454 ("In short, the filing deadlines proscribed in [the] Bankruptcy Rules . . . are claims-processing rules.").

In the case at bar, compliance with this requirement was exceeded because Petitioner received more than the required 25 days notice that it had a right to be heard. Petitioner did not object before the confirmation of Respondent's plan, nor take an appeal from the confirmation order.

Petitioner forfeited its right to object to the confirmed plan once it was confirmed and the time to appeal from the confirmation order expired without an appeal having been taken. This Court has held that a creditor who fails to assert its rights within the time constraints prescribed by the Bankruptcy Rules forfeits its right to later argue that the bankruptcy court's decision was erroneous. *See Kontrick v. Ryan*, 540 U.S. at 459 ("Ordinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not [raised]."); *see also Eber-*

hart v. United States, 546 U.S. 12, 19 (2006) ("[C]laims-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."). Here, Petitioner failed to file any objection to the confirmation of Respondent's chapter 13 plan or to appeal the confirmation order. Therefore, Petitioner forfeited its objection that §§ 523(a)(8) and 1328(a)(2) prohibit a plan from discharging student loan debt without a determination of undue hardship. Petitioner likewise forfeited its rights under F. R. Bankr. P. 7001(6).

Finally, under the principle of repose, this Court should recognize the finality of confirmation of plans of reorganization and of debt adjustment. "Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation." *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U.S. 333, 343 (1860); CHARLES A. WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE, § 4403 (3d ed. 1998) ("Repose is the most important product of *res judicata*."). The time limitation provision found in F. R. Bankr. P. 2002 "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' " *Young v. United States*, 535 U.S. 42, 48 (2002); *see also El Paso Natural Gas Co. v. Neztsosie*, 541 U.S. 473, 481-82 (1999) ("[Statutes of limitations are] not there to penalize parties who fail to assert their rights, but [are] meant to protect institutional interests in the orderly functioning of the judicial system . . . and encouraging repose . . . ."). As stated by the Court, there is "historic wisdom in the value of

repose." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005).

POINT III

A PROVISION OF A CONFIRMED CHAPTER 13 PLAN THAT DISCHARGES STUDENT LOAN DEBT IS BINDING AND EFFECTIVE BY VIRTUE OF BANKRUPTCY CODE § 1327(a) WHERE THE CREDITOR HOLDING THE CLAIM (1) RECEIVED ADEQUATE NOTICE OF THE PROPOSED PLAN AND THE PROCEEDING FOR ITS CONFIRMATION, AND (2) CHOSE NOT TO OBJECT

Bankruptcy Code § 1327(a) provides that "[t]he provisions of a confirmed plan bind . . . *each creditor*, whether or not the claim of such creditor is provided for by the plan, and *whether or not such creditor has objected* to, has accepted, or has rejected the plan."[4] (emphasis added). The question is whether the binding effect given by Congress to a confirmation order will be applied as written, or instead, narrowed by implying an exception where the confirmed plan is not in accord with §§ 523(a)(8) and 1328(a)(2).

This Court has often stated 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." *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (cit-

[4] Similar provisions that bind creditors to confirmed plans are set forth in chapters 9, 11, and 12. *See* Bankruptcy Code §§ 944(a), 1141(a), 1227(a).

ing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

There is no room in the plain text of § 1327(a) to limit or restrict the binding effect of a confirmed chapter 13 plan by engrafting an exception for plans that discharge student loan obligations without a specific § 523(a)(8) undue hardship determination. Congress explicitly provided in § 1327(a) that confirmed plans would be binding on creditors, and the clear language of the statute bars post-confirmation objections to all provisions in a confirmed plan.[5]

Congress could not have intended § 1327(a) to be read other than in accordance with its plain text and to upset the finality of confirmation orders issued under any of the chapters of the Bankruptcy Code. In that provision, Congress made its intent clear and unmistakable that all provisions of a confirmed plan bind "each creditor," including creditors who have not "objected." Congress emphasized the extent of § 1327(a)'s binding effect on each creditor by providing that each is bound by the plan's provisions, even if the creditor has "rejected" the plan. Congress' purpose to preclude all post-confirmation attacks on provisions of confirmed plans, as unambiguously written into § 1327(a), could not be more clear.

No exception to the binding effect of all provisions of a confirmed plan was written into § 1327(a). The binding nature of confirmed chapter 13 plans follows the structure under Chapter XII of the former Bankruptcy Act, which also stated that a con-

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[5] Bankruptcy Code § 1330 authorizes a prompt motion to revoke confirmation, but only for fraud in procuring the confirmation order. No such motion or claim was made in this case.

firmed plan would be binding upon all creditors. *See* Pub. L. No. 696, ch. 575, § 657, 52 Stat. 840, 935 (1938) (repealed 1978) ("Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the plan or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed or are allowable."). Congress, however, strengthened the pre-Code provision by adding to § 1327(a) language that expressly makes a confirmed plan binding on creditors who have not "objected."

Congress could have provided an explicit exception in § 1327(a). It did not do so. The language found in other chapters of the Bankruptcy Code illuminates that Congress knew how to create an exception in § 1327(a) if it wished to do so for student loan debts. For example, § 1141(a) provides that a plan of confirmation shall bind all creditors "[e]xcept as provided in subsections (d)(2) and (d)(3) of this section." Section 1141(d)(2) explicitly states, "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title," which includes student loan debt where there has been no determination of undue hardship. Similarly, § 1227(a) binds creditors to the terms of a confirmed plan "[e]xcept as provided in section 1228(a) of this title." Section 1228(a) explicitly prohibits a debtor from discharging a "debt of the kind specified in section 523(a) of this title." Congress knew how to write exceptions into those statutes, but did not provide any exception in § 1327(a) for student loan claims. Such an exception should not be grafted onto § 1327(a).

The Court should not find an exception to the binding effect of a confirmed plan that provides for the discharge of student loan debt, because that would invite student loan creditors to defer objecting to a plan as not confirmable until after the creditor received the benefit of the payments provided for by the plan, as the Petitioner did in this case. Creditors cannot have it both ways. They should not be allowed to accept the benefits of a plan only to attack its validity thereafter. Moreover, if the Court allows such post-confirmation attacks on chapter 13 plans, creditors would be encouraged to collect payments under a chapter 9, 11, or 12 plan and allowed to upset confirmed plans later on the basis of claimed legal errors in granting confirmation. Congress could not have intended § 1327(a) to be benign. *See* 8 COLLIER ON BANKRUPTCY, ¶ 1327.02[1][c], at 1327-8 (Allen N. Resnick et al. eds., 15th ed. rev. 2006) ("[Reading an exception for section 523 violations into section 1327(a)] would render any chapter 9, 11, 12 or 13 plan subject to attack after confirmation, and even after completion, for a violation of notice or service rules, in contravention of section 1327(a)."). A creditor should not be allowed to wait until an otherwise non-confirmable plan has been completed by payment, and then for the first time to pursue collection efforts and also to bring proceedings to undo confirmation.

To permit post-confirmation attacks on confirmation orders could result in voiding confirmation orders containing a variety of provisions that may be at odds with the Bankruptcy Code, but which are nevertheless found in plans of reorganization confirmed in cases under chapters 9, 11 and 12. *See e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005) (upholding a confirmed chapter 11

plan that enjoined suits against third parties, which violated § 524(e)); *In re American Preferred Prescriptions*, *Inc*., 255 F.3d 87, 94-95 (2d Cir. 2001) (sustaining the post-confirmation appointment of a chapter 11 trustee, although § 1104(a) authorizes such appointment only before confirmation of a plan); *In re Penn-Dixie Industries*, *Inc*., 32 B.R. 173, 177-79 (Bankr. S.D.N.Y. 1983) (upholding a chapter 11 plan that failed to properly classify tax debts, as required by § 1129(a)(9)); *In re County of Orange*, 219 B.R. 543, 566-67 (Bankr. C.D. Cal. 1997) (upholding a chapter 9 plan which subordinated a creditor's claim, in violation of § 1123(a)(4) as incorporated into chapter 9 by § 901(a)); *In re Watkins*, 240 B.R. 735 (Bankr. C.D. Ill. 1999) (upholding a chapter 12 plan that treated a junior lien holder's claim only as an unsecured claim, in violation of § 1225(a)(5)).

The sound administration of bankruptcy cases requires that provisions of plans of reorganization and of debt adjustment under the various chapters not be subject to attack by a creditor who has not objected to confirmation of the plan or appealed the confirmation order. The debtor and creditors must be able to rely on the confirmed plan and be confident that their post-confirmation conduct will not be undercut by post-confirmation attacks on the confirmed plan. Credit is extended to the reorganized debtor and other relationships are entered into in reliance of the finality of confirmation orders. Such orders are at the heart of reorganization and debt relief cases, and the bankruptcy laws could not function if they could be upset in a later proceeding, whether initiated in another proceeding in a different court, or in a later proceeding in the same bankruptcy case. Section 1327(a) should be applied

as written, rather than interpreting it in a way that could undercut reorganization under all of the chapters of the Bankruptcy Code.

The interest of the debtor and creditors in finality of confirmed plans is paramount. *See Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *In re Chicago*, *Milwaukee*, *St. Paul & Pac. R.R. Co.*, 891 F.2d 159, 162 (7th Cir. 1989) (citing cases). Finality is an essential element of any successful reorganization under the Bankruptcy Code, as evidenced by provisions in all chapters that a plan of reorganization is binding on all creditors.[6] Without finality, confirmation is meaningless. Indeed, in chapter 11 cases, in which confirmation is put to a vote, creditors would be unlikely to accept a plan, knowing that it could be undone later.

The binding nature of § 1327(a) is further supported by the fundamental policy of equitable mootness. When a party fails or neglects to diligently pursue its available remedies, the doctrine of equitable mootness precludes a party from obtaining

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[6] Bankruptcy Code §§ 944(a)(3), 1141(a), 1227(a), 1327(a). *See* Bankruptcy Code § 944(a)(3) ("The provisions of a confirmed plan bind the debtor and any creditor, whether or not . . . such creditor has accepted the plan"); Bankruptcy Code § 1141(a) (with exceptions, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . has accepted the plan"); Bankruptcy Code § 1227(a) ("the provisions of a confirmed plan bind the debtor [and] each creditor. . . whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor . . . has accepted, or has rejected the plan"); Bankruptcy Code § 1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.").

appellate review. *See*, *e.g.*, *In re Continental Airlines*, 91 F.3d 553, 559 n.1 (3d Cir. 1996); *In re Public Serv. Co.*, 963 F.2d 469, 472 (1st Cir. 1992); *In re Roberts Farms*, 652 F.2d 793, 798 (9th Cir. 1981). The passage of time and changes in parties' positions after a confirmation order has been issued are basic considerations that preclude efforts to overturn such an order. For these reasons, the doctrine of equitable mootness has developed in bankruptcy cases to dismiss appeals where relief could still be fashioned after substantial consummation of a plan of reorganization, but where it would be inequitable to do so. Several factors are considered in deciding whether an order has become equitably moot, including "the public policy of affording finality to bankruptcy judgments." *In re Continental Airlines, Inc.*, 91 F.3d at 560. As stated by a commentator, who is one of the *Amici* professors on this brief, the doctrine of equitable mootness promotes "finality and reliance upon the orders of a bankruptcy court regarding matters such as . . . plan confirmation." George W. Kuney, *Slipping Into Mootness*, 2007 ANN. SURV. BANKR. LAW, ART 9, 267 at 279-80. Analogous to this long-standing doctrine, § 1327(a) binds parties who do not exercise their rights to object to confirmation or appeal a confirmation order.

CONCLUSION

For the foregoing reasons, the Court should sustain the confirmation order and discharge in this case, either on the basis of the doctrine of *res judicata*, or by ruling that § 1327(a) should be applied as written. The *Amici* thus urge the Court to affirm the order below.

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Dated: October 16, 2009