No. 16-1013

In the Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

IRAIN LAZARO GONZALEZ,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE STATES OF NEW HAMPSHIRE, OHIO, HAWAII, MAINE, MICHIGAN, IDAHO, MISSISSIPPI, TENNESSEE, MONTANA, TEXAS, NORTH DAKOTA, ALABAMA, SOUTH DAKOTA, LOUISIANA, NEW MEXICO, SOUTH CAROLINA, AND ARIZONA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title IV-D agencies may continue their federally mandated child support collection actions under Title IV-D, notwithstanding the confirmation of a debtor's Chapter 13 plan?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Legislative Materials

Other Authorities

INTEREST OF *AMICI CURIAE*

This case presents the best vehicle for addressing issues of great public importance that directly affect the intersection of child support enforcement law and bankruptcy law–specifically, the continued collection of child support obligations pursuant to the mandates of Title IV-D of the Social Security Act, after the obligor parent has filed for bankruptcy protection under Chapter 13 of Title 11 and has obtained confirmation of a Chapter 13 wage earners debt repayment plan.

The Amici States are concerned that requiring mandated Title IV-D activities to stop in thousands of bankruptcy cases simply because a debtor has presented a plan that promises to pay child support arrearages at some time in the future will harm families in immediate need of those child support arrearage payments. Effectively, the trial court's ruling enjoined the mandated Title IV-D income withholding and tax intercept provisions, which provide immediate relief for affected families, based solely on an uncertain promise to pay without having met the requirements for such an injunction. Moreover, it did so by treating bankruptcy debt repayment plans as automatically barring those mandated enforcement efforts under Title IV-D, even though those plans are bereft of terms that would unambiguously preclude such actions.

The Eleventh Circuit's decision upholding the trial court's ruling places an obstacle before Title IV-D agencies in performing their duties to enforce the collection of support obligations. Society places a high degree of importance on parental responsibilities

to provide support for their children. Congress has made an unmistakable effort to ensure that bankruptcy proceedings of a debtor obligor do not interfere with the ability of the family to recover what it is due, using the efforts of Title IV-D agencies. The Amici have an interest in an interpretation of the bankruptcy laws that does not place an unnecessary obstacle to the performance of their obligations to enforce the collection and payment of that familial support and which is consistent with the progress that Congress intended. The Amici are particularly concerned that debtors should not be able to use bankruptcy to override congressionally mandated actions without giving clear and unambiguous notice to the state agencies of that intent.

STATEMENT OF THE CASE

The factual issues in this case are neither complex nor disputed. Petitioner ("Florida"), as a Title IV-D agency, noticed the federal government of a child support arrearage owed by respondent ("Gonzalez"). That notice set in motion certain mandated collection actions. In this case, certain one-time income payable to Mr. Gonzalez from the federal government was scheduled to be withheld for payment of the support obligation as permitted, even after a bankruptcy filing, by the plain language of section 362(b)(2)(C) of Title 11.

The payment in question was to be received after confirmation of Gonzalez's Chapter 13 plan. The plan, as required, included a provision for payment of the child support arrearage over the approximately 4-year term of the plan. However, the

provisions of section 362(b)(2)(C), which permitted Florida to recover arrearages from Gonzalez's anticipated income, were not addressed by the plan or the order confirming the plan. Both the plan and the bankruptcy court's order confirming it were completely silent on whether there was any intent to bar or limit Florida's Title IV-D enforcement obligations.

Gonzalez objected to Florida's withholding of income by filing a motion for contempt and sanctions with the bankruptcy court. Gonzalez alleged that Florida violated bankruptcy's automatic stay and also alleged that Florida was in contempt of the confirmed plan and the bankruptcy court's confirmation order based on the provisions of Bankruptcy Code section 1327(a), which provides that the terms of a confirmed plan are binding on all parties, including creditors.

The bankruptcy court, the district court, and the Eleventh Circuit panel all found that the State had not violated the stay, based on the exceptions contained in Section 362(b)(2). However, they further concluded that the general provisions of section 1327(a), which binds creditors to the terms of a plan, were controlling over the more recently enacted and very specific provisions of section 362(b)(2)(C). The Eleventh Circuit stated that the Chapter 13 plan's *silence* was sufficient to preclude the collection activity that was expressly *permitted* by section 362(b)(2)(C). Pet. App.17. A request for rehearing *en banc* was denied.

REASON FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Causes Inconsistency in the Performance of Federally Mandated Activities and Hurts Children and Families Dependent on IV-D Services.

Bankruptcy has always posed a vexing problem for child support enforcement. With the filing of a bankruptcy petition by a noncustodial parent there arises a tension of societal priorities – on the one hand the provisions of necessaries and equity for financially distressed children of the debtor set against, on the other hand, the equitable and orderly distribution of the debtor's income to all creditors and the successful rehabilitation of the individual debtor. Family support (i.e., "domestic support obligation or "DSO") creditors have a unique situation in that they are "involuntary creditors" for which delay in payment may cause them to "suffer serious consequences." *Final Report, National Bankruptcy Review Commission* (October 20, 1997) (*reprinted in* L. King, COLLIER ON BANKRUPTCY, App. G, pt. 44 at 44-212 (15th ed. rev.)).

This Court itself has recognized that a DSO creditor's right to payment is greater than a debtor's right to a fresh start. *See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). In amending the Bankruptcy Code in 2005 to elevate DSO creditors to the first priority, *see* 11 U.S.C. § 507(a)(1), Congress made clear that DSO creditors are the most important of creditors in the case. Moreover, DSO claims are excepted from the reach of the discharge under sections 523(a)(5) and 1328(a)(2) of Title 11.

Through Title IV-D of the Social Security Act, States were charged with conforming to set standards of enforcement activity to ensure that children and families received support in a consistent manner throughout the United States and its territories. Those standards have been amended consistently to strengthen those obligations so as to better protect those children and families. The provisions of Title IV-D now mandate income withholding and tax intercepts in almost all support cases. *See* 42 U.S.C. § 666.

In amending the Bankruptcy Code in 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 23, (BAPCPA), Congress identified several Title IV-D provisions as exceptions to bankruptcy's automatic stay. *See* 11 U.S.C. § 362(b)(2)(C)-(G) (referencing various provisions of Title IV-D as the basis for the exceptions enumerated).

In addition to the plain language of these exceptions containing specific reference to Title IV-D, Congress added section 362(b)(2)(C). While without specific reference to Title IV-D, section 362(b)(2)(C) addresses one of Title IV-D's most effective collection tools – income withholding. Congress specified in section 362(b)(2)(C) that withholding was available pursuant to any court order, administrative order or a statute from property of the debtor or property of the bankruptcy estate. In effect, Congress did not limit the withholding only to those actions mandated by Title IV-D. However in the event there was some ambiguity as to its relationship to Title IV-D, Congress noted that it was drafted to bring the

Bankruptcy Code into compliance with the provisions of Title IV-D. *See* 146 Cong. Rec. S11683, S11706 (daily ed. Dec. 7, 2000).

In light of the plain language of section 362(b)(2)(C)–(G), a noted treatise observes that "[t]he revision of section 362(b)(2) clarifies the principle that bankruptcy should not interfere with domestic relations disputes that do not have an adverse impact on the bankruptcy case." A. Resnick, H. Sommer, COLLIER ON BANKRUPTCY ¶ 362.05[2] (16th ed. 2016). This observation is consistent with this Court's long-standing jurisprudence expressed in the case of *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904) ("Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.")

The primary goal of the Title IV-D program since its inception in 1975 has been the enforcement of child support obligations. In fact, the first sentence of the first section of Part D authorizes Federal funding "[f]or the purpose of enforcing the support obligations owed by noncustodial parents to their children..." *See* 42 U.S.C. § 651. In the Bankruptcy Code Congress specifically identified IV-D mandates as exceptions to bankruptcy's automatic stay thereby providing that bankruptcy not interfere with the work of the IV-D agencies.

The agencies charged with IV-D enforcement in the Amici states, have acted in reliance on the

clear directives of Congress in the BAPCPA to fulfill their obligations under IV-D in a consistent manner – even during the pendency of a bankruptcy case. This consistency allowed for uninterrupted benefits to the children and families served by the agencies.

With the decision below, however, the law has become unsettled. After confirmation of a Chapter 13 plan in a bankruptcy court in the Eleventh Circuit, IV-D agencies are enjoined from fulfilling their mandated responsibilities to ensure that all statutorily mandated sources of recovery are utilized to meet the debtor's DSO obligations. However, in the First Circuit, those same mandates are not enjoined. *New Hampshire v. McGrahan*, 459 B.R. 869 (B.A.P. 1st Cir. 2011).

In bankruptcy courts operating in other jurisdictions throughout the country, IV-D agencies remain without direction. Each agency is required to act inconsistently depending solely on the jurisdictional forum chosen by a noncustodial parent – and, under the liberal venue rules of the Bankruptcy Code, the debtor may choose that forum simply by where he chooses to reside at the time of his filing. This inconsistent interpretation of the Bankruptcy Code's impact on DSOs leads to disparate treatment of the children and families served by the IV-D agencies contrary to the policy of having uniform enforcement throughout the United States. Without a decision by this Court, IV-D agencies may be precluded in many areas from acting to prevent the very harm to the children and families served that Congress intended to prevent.

This Court should grant certiorari, to resolve the conflict created by the decisions below and to ensure that there is a proper reconciliation of the mandates of Title IV-D and Chapter 13 of the Bankruptcy Code that will allow benefits to be provided to the children and families served by Title IV-D programs in the most consistent and beneficial manner.

II. The Eleventh Circuit's Decision Was Not Required By *Espinosa* and Misused Principles of *Res Judicata.*

Mr. Gonzalez' debt repayment plan and the bankruptcy court's order confirming it did not include language that directly addressed Florida's Title IV-D enforcement right. This type of plan and confirmation is the norm in the thousands of cases around the United States involving such debt repayment plans.

In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), the Court addressed the binding effect of Chapter 13 plans that include terms that were alleged to be in violation of the Bankruptcy Code and Rules and the creditor's due process rights. *Espinosa*, 559 U.S. at 263. In its decision the Court held that a bankruptcy court judgment confirming a Chapter 13 plan was a final judgment, which would normally be entitled to have *res judicata* effect with respect to subsequent challenges. *Id.* at 269. The Court also found that the creditor had "actual notice of the filing of Espinoa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan." *Id.* at 275. It held that the creditor "forfeited its [due process] arguments" concerning the validity

of service or the Bankruptcy Court's confirmation procedures "by failing to raise a timely objection in that court" when it had received a plan that spelled out what the debtor intended to do. *Id.*

Notably, however, the Court disagreed with the Court of Appeals which had held that Bankruptcy Courts *must* enter final student loan dischargeability judgments without following the procedures prescribed in the Rules if the creditor failed to object, observing "This, we think, was a step too far." *Id.* at 276. The procedures were in place, and were meant to be followed and the creditor's objections would unquestionably have been granted if they had been timely raised. Even in their absence, a bankruptcy court was entitled – *and obligated* – to deny confirmation if it noticed the offending provisions. *Id.* at 277.

It was only where a plan both clearly stated its intentions to violate the Code *and* neither the creditor nor the court raised an issue that the plan would be given binding effect to do so. In the absence of such a clear statement, the creditor could not be expected to have known that it must anticipate and object to a potentially unlawful interpretation of the language in the plan. *Id.* at 272-73. The distinction is the same as that relied upon by this Court in *Schwab v. Reilly*, 560 U.S. 770, 788-94 (2010), when it held that the trustee was not required to seek out the debtor's "unstated premises" with respect to his or her listed exemption if the debtor did not clearly state an intent to claim an amount beyond that allowed by law. The trustee is entitled to clear notice of the debtor's intent before being forced to act or else forfeit his objection. *Id.* at 793-94.

Similarly, the Eleventh Circuit's decision in this case is another "step too far." It implicitly authorizes debtors and the Bankruptcy Courts to ambush Title IV-D agencies with the effects of confirmation through plans that are silent on the effect the debtor intends concerning a proposed injunction of the exercise of Title IV-D enforcement rights otherwise explicitly allowed under the Code. Like the student loan creditor in *Espinosa* and the trustee in *Schwab*, Florida in this case, and the many Title IV-D agencies around the United States, are precluded by a judgment that was too broad for its purposes. Unlike *Espinosa*, but like *Schwab*, Florida in this case did not have "actual notice" of the debtor's intent to preclude Florida from exercising its Title IV-D rights because both the plan and the confirmation order were wholly silent in this respect.

To be sure, section 1327 of the Bankruptcy Code embodies the *res judicata* effect of confirmation orders. *See Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938) (confirmation order has *res judicata* effect); *Eastgate v. Dorsey (In re Dorsey)*, 505 F.3d 395, 398 (5th Cir. 2007) (courts have uniformly read section 1327(a) to be a codification of the doctrine of *res judicata*).

Even in the Eleventh Circuit, however, for *res judicata* to have effect in a given instance the issue must be properly presented in the plan and confirmation order so the affected parties are put on notice of the need to object if they disagree. *Russo v. Seidler (In re Seidler)*, 44 F.3d 945, 948 (11th Cir. 1995) (§ 1327(a) binds only with respect to issues properly in scope of confirmation and mature for decision in plan and order). An issue cannot properly

be in the scope and ripe for decision if the plan is silent on it. Yet this is precisely what the Eleventh Circuit's holding does. It allows a plan and confirmation order to have *res judicata* effect without giving the creditor "actual notice" of the contents of the plan by relying on the silent and implicit effect of section 1327. Because section 1327 embodies *res judicata*, its application must be consistent with well-established principles and common law of the doctrine. The debtor may not rest on an "unstated premise" that his plan overrides the right of the Title IV-D agencies to use mechanisms that Congress has specifically allowed, any more than the debtor in *Schwab* could impliedly claim the right to exempt an entire asset, rather than a specific dollar value, without so stating explicitly

Title IV-D agencies should not be precluded in their responsibilities to protect families and children by the silent treatment that was given to Florida in this case, a treatment which improperly allows bankruptcy to provide the in-arrears child support obligor a wind fall, and forces his dependents to wait along with all of his other creditors. Those agencies already have an overwhelming burden to manage their case load for the children they work for. Making that work load worse by requiring them to try to guess what a debtor intends goes far beyond what *Espinosa* requires.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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