No. 18-2952

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re TYEANE HALBERT,
Debtor.

ILLINOIS DEPARTMENT OF HUMAN SERVICES,
Appellant,
– v. –
TYEANE HALBERT,
Appellee.

On Appeal from the United States Bankruptcy Court for the Northern District of Illinois, Nos. 16-ap-00479

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE DECISION BELOW

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March 26, 2019

CIRCUIT RULE 26.1 & DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Consumer Bankruptcy Rights Center
National Association of Consumer Bankruptcy Attorneys

(2) The names of all law firms whose partner or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

NA

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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N/A

Attorney's Signature: s/ Tara Twomey Date: March 26, 2019

Attorney's Printed Name: Tara Twomey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes: X No: ___

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The National Consumer Bankruptcy Rights Center, or NCBRC, is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of more than 2000 consumer bankruptcy attorneys practicing throughout the country. Among other things, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on fundamental issues of bankruptcy law. NACBA has filed numerous amicus briefs in cases involving the rights of consumer debtors. *See, e.g.*, *Schwab v. Reilly*, 560 U.S. 770 (2010); *United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

Amici do not seek to repeat the arguments the debtor makes in her brief. Instead, Amici focus on the legislative history of the 2005 amendments and argue that the vast expansion in nondischargeability advocated by the Illinois Department of Human Services ("DHS") cannot be supported by that history.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than Amici, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Bankruptcy has historically treated domestic support obligations (DSO) differently from other debts in recognition of the vulnerability of the recipients of those payments. In 1978, Congress codified nondischargeability of support obligations in section 523(a)(5). With various amendments to the Bankruptcy Code, culminating in the 2005 amendments, bankruptcy's treatment of DSOs has expanded to afford greater protection to domestic support recipients—most often women and children—and to extend protection to governmental agencies to which domestic support obligations are assigned.

In this case, Appellant seeks to recast a basic, non-fraudulent, public benefits overpayment as a DSO, which would vastly expand that category of nondischargeable debt. Under DHS's position, recipients of public assistance—generally the very same people Congress intended to protect with the 2005 amendments—who have been overpaid due to governmental error or innocent oversight would be saddled with nondischargeable debt—debt that would enjoy greater protection than debts incurred by fraud. The DHS's proposed expansion of the definition of DSO is both far-reaching and destructive. Here, the bankruptcy court correctly found that there is no legitimate basis in the statutory text or legislative history to justify such expansion to obligations having no connection to marital or parental obligations.

ARGUMENT

I. Statutory Framework

Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

One of the primary purposes of federal bankruptcy law is to "give the debtor a 'new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.'" *Lines v Frederick,* 400 U.S. 18, 19 (1921) (quoting *Local Loan Co. v Hunt*, 292 U.S. 234, 244-45 (1914)). The discharge granted to the debtor serves this purpose by releasing the debtor from liability for most prepetition claims. However, there are exceptions to the discharge. Prior to 2005, three sections of the Bankruptcy Code limited the discharge of marital and support obligations—523(a)(5) (addressing debt in the nature of alimony, maintenance, or support); 523(a)(15) (dealing with marital property settlements), and 523(a)(18) (relating to certain debt owed directly to the government). In 2005, amendments to the Bankruptcy Code combined section 523(a)(5) and 523(a)(18) into a uniform definition of a "domestic support obligation." 11 U.S.C. § 101(14A). That uniform definition was then also used in several other new sections of the Code to create greater protections for domestic support creditors. Under the 2005 amendments, section 523(a)(18) was repealed and section

523(a)(5) now bars a debtor from discharging any debt "for a domestic support obligation." In turn, section 101(14A) defines a domestic support obligation as:

> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

In contrast to the pre-2005 statutory sections, the new definition in section 101(14A) clearly delineates the four requirements necessary for a debt to qualify as a domestic support obligation. Those four elements relate to: 1) to whom the debt is

owed, 2) the nature of the debt, 3) the basis of the debt, and 4) certain assignments of the debt.

At issue in this case is the second of the four elements: the nature of the debt.

II. The Legislative History Does Not Support the Significant Expansion of Support Obligations Advocated by DHS.

Bankruptcy has long recognized marital and child support obligations as a unique type of debt to be treated differently due to the vulnerability of former spouses and dependents. *See Audubon v. Shufeldt*, 181 U.S. 575, 577-78 (1901) (creating alimony exception to discharge); *Dunbar v. Dunbar*, 190 U.S. 340, 351-52 (1903) (recognizing child support exception). With the enactment of the Bankruptcy Code in 1978, the exception to discharge for child and spousal support was codified in section 523(a)(5). That provision provided an exception to discharge for any debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that— (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

From 1978 to 2004, the section was amended several times by Congress. These amendments primarily served to expand the basis for such debts, and to allow such debts to maintain their nondischargeable status notwithstanding their assignment to certain government entities. Thus, just prior to the 2005 amendments, section 523(a)(5) excepted from discharge any debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, *or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit,* or property settlement agreement, but not to the extent that—(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise *(other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned the Federal Government or to a State or any political subdivision of such State);* or (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5)(2004) (changes from 1978 original emphasized).

In addition to the modest changes made to section 523(a)(5) over the years, in 1996, Congress added section 523(a)(18) to the Bankruptcy Code. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (Aug. 22, 1996), § 374. Under the new section 523(a)(18) certain debts owed directly to states and municipalities in the nature of support were made nondischargeable. Prior to the enactment of section 523(a)(18), courts had held that, based on the statutory language then in effect, only support related debts due at the time of assignment to a government entity[1] were nondischargeable. *See, e.g., Co. of Santa Clara v. Ramirez*, 795 F.2d 1494, 1498 (9th Cir. 1986) *(abrogated by statute).* The new language excluded from the discharge debt:

> (18) owed under State law to a State or municipality that is—(A) in the nature of support, and (b) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

[1] For example, federal law mandates that states obtain an assignment of support benefits from applicants under the Temporary Assistance to Needy Families (TANF) program. *See* 42 U.S.C. § 608(a)(3).

11 U.S.C § 523(a)(18)(2004).

In 2005, Congress significantly altered the structure of sections 523(a)(5) and 523(a)(18). First, it collapsed the definitional language in section 523(a)(5) and 523(a)(18) into a new definition of "domestic support obligation" in section 101(14A). It repealed section 523(a)(18) in its entirety, and replaced it with an unrelated provision. Section 523(a)(5) was amended to simply provide for the nondischargability of "domestic support obligations." In addition, several other protections beyond nondischargeability were created for domestic support obligations. *See* 11.U.S.C. §§ 507 (giving domestic support obligations first priority for distribution from the estate); 362(b)(1) (adding new exceptions to the automatic stay related to domestic support obligations); 522(c)(1) (subject exempt property to enforcement of support debts); 522(f)(1)(A) (relating to unavoidable judicial liens); 547(b)(7) (preventing avoidance of the payments on domestic support as preferential); 1325(a)(8) and 1328(a) (preventing confirmation of plans and discharge of debts in chapter 13 if postpetition support not paid in full).

While the new definition of domestic support obligation expands on the previous scope of section 523(a)(5) and 523(a)(18), it does not create the sweeping change advocated by DHS. First, the new definition includes postpetition obligations, as opposed to only those arising prior to the petition. 11 U.S.C. § 101(14A) (applying to a "debt that accrues before, on, or after the date of the order for relief"). Second, the definition enlarges the type of family obligations covered to include debts owed or recoverable by adding "child's parent, legal guardian, or

responsible relative." 11 U.S.C. § 101(14A)(A)(i). Consistent with former section 523(a)(18), the definition makes clear that, based on an obligation to provide support, debts owed to or recoverable by a governmental unit are excepted from discharge even if the spouse or child who received that assistance could not recover the debt individually. *See* Hon. William Houston Brown and Lawrence R. Ahern II, *2005 Bankruptcy Reform Legislation with Analysis 2D*, at § 7:42 (2006). Unlike the former section 523(a)(18), the new DSO exception to discharge applies in both chapter 7 and chapter 13.

DHS argues that the parenthetical language in subpart B greatly expands the type of obligations that are nondischargeable to basic public benefit overpayments. In light of the legislative history, such language is insufficient to support such a broad change in the scope of the discharge. Public benefit overpayments obtained by fraud of the recipient are and have long been nondischargeable. *See* 11 U.S.C. § 523(a)(2). DHS seeks to enlarge, via section 523(a)(5), the category of nondischargeable debts beyond those fraudulently acquired to any public benefits overpayment. Further, by seeking status as a DSO creditor, it also seeks the additional powers provided by the Code to collect these debts. However, such a vast expansion would surely have been noted somewhere in the congressional discussions. Yet, neither the House nor Senate Committee reports, or congressional testimony, make any reference to public benefit overpayments. Instead, the sparse legislative history is focused solely on the collection of traditional child support obligations. The only expansion in the

definition discussed refers to the inclusion of postpetition obligations and the type of family obligations (i.e., those payable to legal guardians and responsible relatives). The House Report summarized the changes:

> Enforcement of Family Support Obligations. S. 256 accords domestic and child support claimants a broad spectrum of special protections. The legislation creates a uniform and expanded definition of domestic support obligations to include debts that accrue both before or after a bankruptcy case is filed. It gives the highest payment priority for these debts (current law only accords them a seventh-level priority),[73] with allowance for the payment of trustee administrative expenses, under certain conditions. In addition, the bill mandates that a debtor must be current on postpetition domestic support obligations to confirm a chapter 11, chapter 12 (family farmer) or chapter 13 plan of reorganization. To facilitate the domestic support collection efforts by governmental units, the legislation creates various exceptions to automatic stay provisions of the Bankruptcy Code (which enjoin many forms of creditor collection activities). It also broadens the categories of nondischargeable family support obligations with the result that these debts will not be extinguished at the end of the bankruptcy process. The legislation, in addition, mandates that spousal and child support claimants as well as state child support agencies receive specified information and notices relevant to pending bankruptcy cases.

H.R. Rep. 109-31(I), 109th Cong., 1st Sess. 2005, 2005 WL 832198, at *102-03.

Under the view urged by DHS, the 2005 amendments would constitute an incredible expansion of the state's ability to collect public benefit overpayments. Not only would such debts be nondischargeable, the state would also obtain all the other benefits provided under the Bankruptcy Code to DSO creditors. For example, the state could proceed to collect the support obligation from the debtor or the debtor's property, 11 U.S.C. § 362(a)(2)(B), or it could seek to enforce the obligation against otherwise exempt property. 11 U.S.C. § 522(c)(1).

The 2005 amendments to the Code, though at times inartfully drafted,[2] did not broadly enlarge the type of nondischargeable domestic support obligations as DHS suggests.

III. DHS Urges A Result that Is the Exact Opposite of Congress's Intent In Creating and Protecting Domestic Support Obligations.

To support its position, DHS relies exclusively on the definition of domestic support obligations added to the Code in 2005. As discussed above, the definition derives from two previous section, 523(a)(5) and 523(a)(18). Proponents of the legislation argued that women and children would greatly benefit from the amendments. Senator Hatch noted that the bill would help "women and children by providing a comprehensive set of protections for child and domestic support throughout the bankruptcy process." 151 Cong. Rec. S2458 (Mar. 10, 2005). Senator Sessions also noted that the 2005 legislation would also protect women and children, as well family farmers and low-income individuals. 150 Cong. Rec. H145 (Jan. 28, 2004).

Here DHS argues for a result that is the exact opposite of Congress's intent. According to DHS, women and other recipients of public benefits, are responsible in

[2] Interpreting the statutory language of the 2005 bankruptcy amendments has been likened to hunting Easter eggs, deciphering a defective Rubik's cube, and imagining impossibilities with the White Queen from Alice in Wonderland. Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, Am. Bankr. Inst. J., Vol. XXIV, No. 7, at 71 (Sept. 2005) (describing the BAPCPA "Easter egg phenomemon"); *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006); *In re Trejos*, 352 B.R. 249, 253-54 (Bankr. D. Nev. 2006).

perpetuity for basic public benefit overpayments. This is true regardless of whether the benefit overpayment was based on a software error or other miscalculation by the state. It is also true for unintended errors by the recipients.[3] DHS's position does not protect innocent women and children, it punishes them, and this Court should reject DHS's argument.

CONCLUSION

For all the above reasons, the Amici pray that this Court affirm the decision of the bankruptcy court in this case.

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[3] As noted previously, any debt incurred by fraud, including public benefit overpayments, may be nondischargeable under section 523(a)(2).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 2834 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 12-point type.

s/ Tara Twomey
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on March 26, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae