No. 13-16588

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee

v.

MARK J. FALCON,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona

The Honorable Judge Frank R. Zapata
USDC Case No. 4:11-cv-00006-FRZ

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1291. Under 28 U.S.C. §1291, the court of appeals has jurisdiction over "all final decisions of the district courts".

II. STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court order granting summary judgment in favor of the United States of America was error by concluding there is no due process claim for student loan borrowers pursued for debt after Congress abrogated any statute of limitations for such borrowers in 1991, thus creating eternal student debt?

2. Whether the Congressional abrogation of any statute of limitations for certain student loan borrowers was unconstitutional when such debtors as a class are subjected to undue hardship and special considerations not subjected to other creditors, including a relaxed evidentiary burden and exemption from discharge in bankruptcy, among other special treatment singling out guaranteed student loans?

3. Whether the District Court abused its discretion by refusing to consider cited cases and language from the Supreme Court suggesting a due process claim for such debtors subjected to undue hardships, and other circuit and district court authority, by refusing to consider the Constitutional defenses raised against this stale debt collection case?

III. STATEMENT OF THE CASE

On January 4, 2011, Plaintiff United States of America filed a collection lawsuit against Mark J. Falcon, alleging he was indebted to the United States in the amount of $53,697.74 principal, plus $58,865.77 interest (Count I), and for the amount of $4,778.74 principal, plus $5,309.47 (Count II), citing two "Certificates of Indebtedness" attached to the Complaint, declared under oath by an employee of the U.S. Department of Education pursuant to 28 U.S.C. 1746(2). (ER 105-108.)

The Certificate of Indebtedness for Count I alleged Mr. Falcon obtained student loans from Bucks County Bank between August 31, 1983, and August 19, 1991, guaranteed by the Pennsylvania Higher Education Assistance Agency, and then re-insured by the U.S. Department of Education under loan guaranty programs authorized under Title IV-B of the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 Et. Seq. (ER 107.) The Certificate alleged he defaulted in 1994, and 1997, and that the Pennsylvania Guarantee agency paid the lender, and then was reimbursed by the U.S. Department of education. The Certificate alleged that once the Guarantor pays on a default claim, the entire amount becomes due, and that the guarantor attempted to collect the debt from Falcon, but was unable, and assigned its right to the loan to the U.S. Department of Education. (ER 107.) The second Certificate alleged that Falcon borrowed a student loan on October 2, 1990, from

Higher Education Loan Plan, Harrisburg PA, and defaulted on December 22, 1993, and that the loan was similarly assigned to the U.S. Department of Education under similar circumstances. (ER 108.)

Mr. Falcon appeared *pro se* and timely filed an Answer and Counter-Claim, which included the affirmative defense that the claim was time-barred by the statue of limitations, as it apparently arose more than 17 years ago, and further alleging the lawsuit was harassing and frivolous, given the Government's access to his IRS tax records which established that he earned less than $10,000 for the most recent tax year of 2009, and that the Department of Education had directed the Treasury Department to off-set federal payments due him without due process of law. (ER 100-104.) The United States timely Answered and denied the Counter-Claim, affirmatively alleging a valid right to set off and garnishments. (ER 98-99.)

On November 2, 2012, the United States filed a Motion for Summary Judgment. (ER 63-97.) Still *pro se*, Mr. Falcon filed his response and objection to summary judgment, raising federal Constitutional grounds and the statute of limitations against the debt, among other things. Mr. Falcon noted how many of the exhibits for the Motion for Summary Judgment were illegible copies of alleged promissory notes. (ER 60-62.)

On June 3, 2013, the District Court granted summary judgment in favor of

the United States, citing *Lockhart v. United States*, 546 U.S. 142, 144-45, 126 S.Ct. 699, 701 (2005) and *In re Lewis*, 506 F.3d 927, 932 (9th Cir. 2007). (ER 6-11.)

The Clerk entered Judgment on June 4th, 2013. (ER 6.) On July 2, 2013, the Clerk entered a Judgment of taxation of costs. (ER 5.) On July 16, 2014, the Clerk entered an Amended Judgment, stating the amounts due. (ER 4.) The Amended Judgment stated the actual sums of the monetary amounts awarded for a total of $122,651.72 ($112,563.51, principal and interest) and ($10,088.21, principal and interest), and included a recitation of applicable prejudgment and post-judgment interest amounts to be awarded, including the taxable costs of $370. (ER 4.)

On August 5, 2013, undersigned counsel entered his appearance in the case. (ER 59.) On the same date, Mr. Falcon, though undersigned counsel, timely filed a Motion to Alter/Amend the Judgment Pursuant to F.R.C.P. 59(e). (ER 45-58.)

After filing the Motion, Mr. Falcon filed a Notice of Appeal out of an abundance of caution in order to protect his appellate rights, just in case the effective date of the judgment against him was unclear since the Clerk had initially entered the Judgment on June 4, 2013, but thereafter filed an Amended Judgment on July 16, 2013. (ER 4, 41, 45-47.)[1] This Court deemed the Notice of Appeal to

1 Because there was an earlier but incomplete Judgment filed on June 4, 2013, Mr. Falcon's counsel contacted the Court Clerk and was informed by a subsequent voicemail that the Amended Judgment filed on July 16, 2013 was the operative final

be premature because of the timely filed Motion, and held appellate proceedings in abeyance until the resolution of the pending Motion. (ER 24-25.)

The United States opposed Mr. Falcon's Motion to Alter/Amend the Judgment, arguing that the Court had already rejected the Constitutional arguments and relied on controlling precedent set forth in *Lockhart v. United States*, 546 U.S. 142, 144-45, 126 S.Ct. 699, 701 (2005) and *In re Lewis*, 506 F.3d 927, 932 (9th Cir. 2007). (ER 35-40.) Mr. Falcon responded. (ER 26-34.)

On January 30, 2014, the District Court denied the Motion to Alter/Amend the Judgment Pursuant to F.R.C.P. 59(e). (ER 1-3.) On the following day, Mr. Falcon filed a Motion for Stay Pending Appeal, without bond. (ER 17-23.) That Motion for Stay was never resolved. (See Excerpt of Record No. , Docket Sheet.)

On March 28, 2014, Mr. Falcon timely filed an Amended Notice of Appeal,

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judgment for calculating time for filing a timely Notice of Appeal. In part, this was because the judgment filed June 4, 2013, did not state a final award of monetary relief or interest awarded and thus was not a "self contained" separate document stating who won and what was awarded. *Otis v. City of Chicago*, 29 F.3d 1159, 1163 (7th Cir. 1994) ("It should be a self-contained document, saying who has won and what relief has been awarded …."); *LOCAL 504 v. Roadmaster Corp.*, 954 F. 2d 1397, 1401 (7th Cir. 1992) ("A decision that fixes liability but not damages is not appealable, despite the entry of an order under Rule 54(b)"); see *Riley v. Kennedy*, 553 U.S. 406, __, 128 S. Ct. 1970, 1981, 170 L. Ed. 2d 837 (2008), citing *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) (an order resolving liability without addressing a plaintiff's requests for relief is not final); *Osternack v. Ernst & Whinney*,489 U.S. 169, 175-76, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989) (unresolved issues such as prejudgment interest relate to matters of merits of judgment and relief awarded to Plaintiff, and are not collateral matters); *Cooper v. Salomon Bros. Inc.*, 1 F. 3d 82, 84-85 (2nd Cir. 1993))"Where only liability has been determined, a court cannot execute the judgment before it has assessed the damages."; judgment not final).

appealing from the District Court's June 4, 2013 Order and Judgment, the Judgment on Costs, the final Amended Judgment entered on July 16, 2013, and the final Order denying a motion to Alter/Amend the Judgment Pursuant to Fed. R. Civ. Proc. 59(e), entered on January 30, 2014. (ER 14-15.)

IV. STATEMENT OF FACTS

Between 1983 and 1991, Mr. Mark J. Falcon was alleged to have taken out $58,476.48 in student loans, from a private lender, (ER 105-108.) By the year 2010, the total unpaid amount alleged owed by Mr. Falcon, plus interest, had allegedly reached the sizable sum of $122,651.72. (ER 105-108.)

In 1991, Congress enacted amendments to federal education laws, abrogating any state or federal statute of limitations for bringing suit to collect on defaulted federally guaranteed student loans. (ER 53; see generally *United States v. Phillips*, 20 F.3d 1005 (9th Cir. 1994).)

In January 2011, some twenty (27) years after the first loan and about twenty (20) years after the last loan allegedly obtained by Mr. Falcon in 1991, the United States initiated a collection action based on Certificates of Indebtedness from the U.S. Department of Education, alleging Mr. Falcon defaulted, that a non-federal guaranty agency had paid the lender, and that the Department of Education paid insurance to this entity and was later assigned the right to the loans.

In District Court, Mr. Falcon argued the debt was barred by a statute of limitations, and raised Constitutional grounds against a Motion for Summary Judgment and in his subsequent Motion to Amend/Alter the Judgment. He argued that Congressional action to abrogate any statute of limitations and establish never-ending permanent debt for student loan borrowers was unconstitutional and violated federal due process. (ER 26-34, 44-58, 60-61, 100-104.)

Mr. Falcon cited to the Supreme Court language in *Chase Securities Corp., Now Known As Amerex Holding Corp., v. Donaldson Et al.*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945) (no vested property interest in a statute of limitations but Court suggested federal due process claim could exist on allegations that abrogation of statute of limitations imposed 'special hardships or oppressive effects' on a special class of debtors), and Appellant Falcon also cited circuit court cases recognizing the existence of a federal due process claim for student loan borrowers based on the abrogation of any statute of limitations. See *United States v. DiStefano*, 279 F.3d 1241 (10th Cir. 2002) (recognizing and analyzing such a due process claim, but ruling against borrower), citing *United States v. Hodges*, 999 F.2d 341, 342 (1993) ("A fourteenth-amendment violation might occur if the abrogation of the statute of limitations had worked 'special hardships or oppressive effects' in this case. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65

S.Ct. 1137, 89 L.Ed. 1628 (1944). Hodges, however, made no allegation of hardship.") (ER 26-34, 44-58.)

In addition, when initially appearing *pro se* without the benefit of counsel, Mr. Falcon argued that the federal law abrogating any statute of limitations for student loan debtors was unconstitutional. He raised specific Constitutional provisions, including Art. 1, § 9, but also argued: "The amending of 20 U.S.C. 1091(a) in 1991 is unconstitutional." (ER 60.) Mr. Falcon went on to argue that:

> "There is a question as to the constitutionality of 20 U.S.C. 1091(a); Eternal debt without recourse begs of cruel and an unusual nature where only one type of loan, ones taken by students, is eternal and without recourse."

(ER 60-61.)

Mr. Falcon continued, citing to the Federalist Papers, and the eloquent words of James Madison, one of our country's founders, arguing:

> "Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. … The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community." James Madison, Federalist Number 44, 1788.

(ER 61.)

Mr. Falcon also argued that certain loan documents relied upon by the Government were illegible, and hearsay, and unsubstantiated. (ER 60.) In his written Answer and Counter-Claim, Mr. Falcon affirmatively raised the statute of limitations about a debt arising some 17 years before the action was commenced, and argued (in the context of a counter-claim) that demanding $3,000 from someone without ability to pay evidenced that "the Government had no real intention of truly and realistically resolving its claim. The very nature of my poverty, the hardship on my children, makes [the] plaintiff's claim frivolous and contemptuous." (ER 100-101.) Mr. Falcon argued that the U.S. Dept. of Education had caused the "Department of Treasury to off set federal payments due [him] without due process resulting in increased hardship for [him] and his children." (ER 101.)

As an exhibit to his initial answer, Mr. Falcon included a proposed judgment from the U.S. Attorney's Office for the amount of $58,476.48 in principal, and $64,175.24 computed through October 5, 2010, with monthly payments of $3,000.00. (ER 102-104.) The proposed judgment included requirements that Mr. Falcon would agree to submit a financial statement and copies of his state and federal income tax returns on request, and inform the U.S. Attorney's Office of any change in address or employment within 30 days until the judgment was paid in

full. The judgment included a requirement that the United States would record a judgment lien affecting any real estate owned now or that he might be aware of in the future. (ER 102-104.) Finally, the document stated that if he defaulted or failed to submit financial statements and tax returns within 60 days upon notice, the balance would become immediately due and payable, and the United States "may proceed with all available administrative and judicial remedies available to enforce the judgment debt, including adding the debt to the Treasury Offset Program." (ER 104.)

The District Court, in its Order granting summary judgment and the final Order denying Mr. Falcon's Motion to Alter/Amend the Judgment, relied on its citation of *Lockhart v. United States*, 546 U.S. 142, 144-45, 126 S.Ct. 699, 701 (2005) and *In re Lewis*, 506 F.3d 927, 932 (9th Cir. 2007), but did not discuss or address the specific federal due process arguments and cases cited by Appellant Falcon. (ER 6-11.) In its Order, the Court concluded that Mr. Falcon's argument about the statute of limitations "were not persuasive following the Supreme Court's holding in *Lockhart v. United States*, 546 U.S. 142, 126 S.Ct. 699 (2005) (retroactive application of change in law permitting the offset of delinquent student loans against Social Security benefits for loans incurred prior to the time the government could do so). See *In re Lewis*, 506 F.3d 927, 932 (9th Cir. 2007)." (ER

10.) The District Court also concluded Mr. Falcon had not come forward with evidentiary facts to establish a defense to liability, and that illegibility of some of the documents in the summary judgment proceeding was insufficient. (ER 10-11.)

V. SUMMARY OF THE ARGUMENT

In 1991, Section 484A of the Higher Education Act of 1965, as amended by section 3 of the Higher Education Technical Amendments of 1991 (Pub. L. 102-26) and section 1551 of the Higher Education Amendments of 1992 (Pub. L. 102-325) eliminated any statute of limitations on federal or federally guaranteed student loans. 20 U.S.C. Sec. 1091a(a). See *United States v. Phillips*, 20 F.3d 1005 (9th Cir. 1994). (See Addendum.) This action has resulted in eternal student loan debt for borrowers of federally guaranteed loans such as Appellant Mark J. Falcon.

The 1991 Congressional elimination of any statute of limitations on the collection of federally guaranteed student loans is unconstitutional and violates federal due process, as a result of the undue burdens and oppressive effects on a specific, targeted class of cases, federally guaranteed student loans. This case provides this Court with the opportunity to resolve a federal due process issue on arguments not fully resolved before now by this Court or by the Supreme Court.

The United States Supreme Court's language in *Chase Securities Corp., Now Known As Amerex Holding Corp., v. Donaldson Et al.*, 325 U.S. 304 (1945),

along with decisions from other federal circuits, provide the substance and grist for the due process claim argued in this case, based on undue hardships and oppressive effects resulting from the abrogation of a statute of limitations. See *United States v. DiStefano*, 279 F.3d 1241 (10th Cir. 2002); *United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993) *Lee v. Spellings*, 447 F.3d 1087, 1089-1090 (8th Cir., 2006). The treatment of this type or class of cases by the abrogation of any statute of limitations, retrospectively and prospectively, violates federal due process.

The District Court's decision to grant summary judgment despite the Constitutional arguments that the statute abrogating the statute of limitations for student loans is unconstitutional, was error. Even under a property rights analysis, there are limits to what the Government can do, and this case provides an example where such limits must be imposed in order give respect to the sanctity of contract, and to protect against unreasonable government action that impairs contracts in a manner benefiting the Government while eternally burdening borrowers like Mr. Falcon. Mr. Falcon respectfully urges this Court to reverse the summary judgment and find the abrogation of any statute of limitations for such cases unconstitutional.

VI. ARGUMENT

A. THE DISTRICT COURT DID NOT CONSIDER WHETHER CONGRESSIONAL ABROGATION OF ANY STATUTE OF LIMITATIONS FOR A UNIQUE CLASS OF DEBTORS - STUDENT LOAN BORROWERS - VIOLATES FEDRAL DUE PROCESS UNDER THE CONSTITUTION BY CREATING OPPRESSIVE EFFECTS AND UNDUE HARDSHIPS NOT IMPOSED ON OTHERS.

Appellant Falcon contends that the Congressional abrogation of any statute of limitations for the specific class of student loan debtors borrowing federally guaranteed student loans was unconstitutional, and violates federal due process under the United States Constitution because of the oppressive effects and special hardships imposed on a special class of debtors, student loan borrowers.

A district court's grant of a motion for summary judgment is reviewed *de novo*. *Blanford v. Sacramento County*, 406 F.3d 1110, 1114 (9th Cir.2005). The Court draws all reasonable inferences in favor of the non-moving party, and determines whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact. *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir.2004). A ruling on a Rule 59(e) motion will not be reversed absent abuse of discretion. *Duarte v. Bardales*, 526 F. 3d 563, 567 (9th Cir. 2008). It is proper to alter or amend if "(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in

controlling law." *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir.2001). On appeal, the Court reviews for clear error or manifest injustice and thus an abuse of discretion. *Duarte*, 526 F. 3d at 567.

1. STUDENT LOAN DEBT, TREATED DIFFERENTLY FROM OTHER DEBTS, IS RISING GREATLY AND IMPACTING BORROWERS AND THE NATION

Today,

> Student loans represent a large and growing share of consumer debt. In just the last ten years, aggregate student loan balances have quadrupled [fn. omitted] due to growth in both college enrollment and tuition. [fn. omitted] Outstanding student loan balances now exceed outstanding credit card or auto loan balances. [Fn. omitted] Americans today owe more than $1 trillion in student loans either held or guaranteed by the federal government and about $165 billion in private student loans. [Fn. Omitted.]

"Collection of Student Loans: A Critical Examination," Doug Rendleman and Scott Weingart, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215 (2014). The student loan debt situation in the U.S. has been described as a new crisis crushing the American dream, on the heels of the housing crisis. "Student Debt and the Crushing of the American Dream," Joseph E. Stiglitz, *New York Times* (May 12, 2013) (available at http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/?_php=true&_type=blogs&_r=0.)

Despite a wide variety of default-avoidance tools available, an incredible

number of borrowers default. See "Collection of Student Loans: A Critical Examination," Rendleman and Weingart, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. at p. 237.

> The consequences of default are serious indeed: a borrower who defaults can expect to find herself with lower credit ratings and higher debt because of assessment of collection fees, costs, and penalties. This Part begins by discussing some of these consequences and describing how student loans fall into default in the first place.
>
> Part of what makes federal student loan default particularly difficult for borrowers is the range of collection options available to creditors. *The federal government has an arsenal of powerful administrative tools at its disposal to collect student loans, one of which, garnishment, is also available to guaranty agencies.*

Id. at p. 238 (emphasis added).

> The consequences of default for the borrower extend beyond those already described. A borrower in default may find it difficult to obtain other credit products like car loans or mortgages, or even a job or a lease on a home or apartment.[Fn. Omitted.] Defaults extend the loan repayment period, increasing interest costs for the borrower.[Fn. Omitted.] Default also makes borrowers ineligible for deferments and certain cancellation and forgiveness programs. [Fn. Omitted.] A student loan may also be accelerated upon default —the entire amount of the loan becomes due immediately.[Fn. Omitted.] One of the most serious consequences of default and delinquency for the borrower is that lenders may assess collection costs, fees, or penalties that the borrower must pay in addition to any principal and interest.

Although most "insolvent debtors may find a refuge in the Bankruptcy Court where they may cast their debts off and end creditors' collection techniques[, t]his

refuge is unavailable to many student-loan borrowers." 271.

> Over several centuries, legislatures and courts have worked out the law of debtor and creditor. In the race of collection, the judgment is the creditor's starting line, except for prejudgment attachment. *Qualifying most creditors' rights are the debtor's contract defenses, the debtor's exemptions, the statute of limitations time bar, and the bankruptcy discharge. Many of these qualifications were eliminated or diminished for the student-loan debtor. Once she enters the collection labyrinth, the borrower's exits are few and difficult to find.*
>
> Of the student-loan creditor's advantages, the most difficult provision to justify—and the most disruptive—is the restriction of her bankruptcy discharge. The student loan exception stands out in the bankruptcy code. Most exceptions to discharge target wrongful or punishment-worthy conduct [Fn. Omitted] or domestic relations obligations like child support and alimony.[Fn. Omitted.] Other debtors of the federal government face far lower hurdles, if any, to discharge. Debtors may even receive a discharge for tax debts in many circumstances, provided that they have not engaged in tax evasion. As one consumer advocate put it, *the discharge exception relegates student loan borrowers to "a special circle of bankruptcy hell reserved for dads who avoid child support and tax evaders*." [Fn. Omitted.]

Id. at p. 292 (emphasis added).

Before 1976, educational loans were treated the same as all other unsecured consumer loans and were dischargeable in bankruptcy. In 1976, Congress changed the law so that education loans made or guaranteed by a governmental unit were non-dischargeable for five years except with a finding of "undue hardship" (a difficult standard to meet). After five years, the loans were treated the same as other consumer debt and were dischargeable. The law, initially set forth in the

Higher Education Act, was enshrined in bankruptcy law in 1976, and later in 1978 with the Bankruptcy Reform Act of 1978. See "The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings," Pottow, 44 Can. Bus. L.J. 245, 248-250 (2006-2007); see generally "Running the Gauntlet of 'Undue Hardship' - The Discharge of Student Loans in Bankruptcy," Kosel, 11 Golden Gate U. L. Rev. 457, 458-459 and footnote 11 (1981).

In 1990, the waiting period for ability to discharge a student loan increased to seven years, and the type of loans were expanded to include those made by a program funded in whole or in part by a governmental unit or a "nonprofit institution." In 1998, Congress made government and nonprofit education loans non-dischargeable except in cases of an undue hardship, by eliminating the seven year waiting period for a discharge. In 2005, when Congress amended the Bankruptcy laws, Congress included "any other education loan" – private student loans -- to the list of non-dischargeable education loans, thus giving private lenders the same protection under bankruptcy that the federally guaranteed loan program has and nonprofit organizations had. "The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings," Pottow, 44 Can. Bus. L.J. at pp. 249-250.

2. THE DISTRICT COURT'S RULING AND THE FEDERAL DUE PROCESS CLAIMS SQUARELY PRESENTED BELOW

Below, the District Court's initial Order granting summary judgment in favor

of the United States, rejected Appellant Falcon's federal constitutional arguments, and expressly cited *Lockhart v. United States*, 546 U.S. 142, 144-45, 126 S.Ct. 699, 701 (2005) and *In re Lewis*, 506 F.3d 927, 932 (9th Cir. 2007). (ER 6-11.)

Mr. Falcon argued that Congressional action abrogating any statute of limitations on federally guaranteed student loans violated federal due process, citing *Chase Securities Corp., Now Known As Amerex Holding Corp., v. Donaldson Et al.*, 325 U.S. 304 (1945). Appellant Falcon also cited to other federal circuit opinions recognizing a federal due process claim, such as *United States v. DiStefano*, 279 F.3d 1241 (10th Cir. 2002) (recognizing and analyzing such a due process claim, but ruling against borrower), citing *United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993) ("A fourteenth-amendment violation might occur if the abrogation of the statute of limitations had worked 'special hardships or oppressive effects' in this case. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1944). Hodges, however, made no allegation of hardship.")

The District Court's ruling did not examine the Constitutionality of the abrogation of statute of limitations and the belated collection lawsuit brought some 21 years after the first loan and some 17 years after the earliest alleged default in 1994. The District Court did not evaluate the legal constitutional arguments

challenging the statutory abrogation of the statute of limitations by 20 U.S.C. Sec. 1091a(a), as well as the applicable controlling Supreme Court law of Chase Securities, or the other federal circuits which have recognized that a federal due process claim could exist. (ER 7-11.)

In *Chase Securities Corp.*, the Supreme Court reconsidered an 1885 holding in *Campbell v. Holt*, 115 U.S. 620 (1885), as to whether there was a vested property right to a pre-existing statute of limitations provision for purposes of federal due process, after the *Campbell v. Holt* decision had undergone much criticism by scholars and various states had enshrined their own protections.

In *Chase Securities Corp.,* the Supreme Court ultimately declined to alter its holding in *Campbell v. Holt* that there was no "vested" property right in a statutory statute of limitations provision, but the Court's opinion did recognize the possible existence of a due process claim from the abrogation of a statute of limitations where it was alleged that there were "special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force." *Chase Securities Corp.*, 324 U.S. at 315 (underscore added).

The Ninth Circuit, and other circuits, have indisputably held that Congress abrogated any statute of limitations, and undeniably intended such changes to be retrospective. See *United States v. Phillips*, 20 F.3d 1005 (9th Cir. 1994) (student

loan collection case not barred by prior federal statute of limitations, since abrogated retrospectively by Congress); *Millard v. United Student Aid Funds, Inc.*, 66 F.3d 252 (9th Cir. 1995) (same); *United States v. Glockson*, 998 F.2d 896, 897 (11th Cir.1993) (Congress intended § 1091a to "apply retroactively to all student loan collection actions."); *United States v. Lawrence*, 276 F.3d 193 (5th Cir. 2001). Appellant does not deny that this was the obvious intent of Congress.

Most of the federal circuits, however, have not thoroughly examined or analyzed the due process claim presented here, though a number of district court cases have concluded there is no due process violation under *Chase Securities*.[2]

In *United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993), the Eighth Circuit agreed that the changes were retrospective and eliminated any statute of limitations. *Hodges* cited *Campbell v. Holt* for the language that there was no vested property right in a statute of limitations, but the Court in *Hodges* also noted that "[a] fourteenth-amendment violation might occur if the abrogation of the statute of limitations had worked 'special hardships or oppressive effects' in this case, citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1944). The Eighth Court concluded, however, that Hodges had "made

2 *U.S. v. McLaughlin*, 7 F.Supp.2d 90, 91 (D. Mass., 1998) (citing *Campbell v. Holt* in rejecting due process claim); *U.S. v. Smith*, 862 F. Supp. 257, 261 (D. Haw. 1994) (same); compare *U.S. v. Singer*, 943 F.Supp. 9, 12 (D.D.C., 1996) (rejecting ex post facto claim from abrogation, since law not penal)

no allegation of hardship" in that case. *Id.*

Even the circuits which have cited *Campbell v. Holt* have gone on to note the language in *Chase Securities* and have evaluated whether such a claim was alleged or met therein. E.g., *United States v. DiStefano*, 279 F.3d 1241 (10th Cir. 2002) (citing *Campbell v. Holt* to conclude "the Supreme Court has upheld, against due process challenges, statutes reviving such barred claims," but recognizing and analyzing possible federal due process claim on assertion of special hardship or oppressive effects but finding insufficient argument based on 3 year delay argument in collection). In addition, the Eighth Circuit in *Lee v. Spellings*, 447 F.3d 1087, 1089-1090 (8th Cir., 2006), similarly examined that defendant's federal due process claim but concluded the borrower "failed to show special hardships or oppressive effects of the elimination of a statute of limitations that the Supreme Court [in *Chase Securities Corp.*] stated might support a due process claim."[3]

However, the Court in *Chase Securities* noted that due process concerns could be alleged when such oppressive effects or hardships resulted from lifting the statute of limitations bar retrospectively as to *a class of cases*, not with respect to

3In *U.S. v. Haynes*, 158 F.3d 1327, 332 U.S. App. D.C. 421, 426 (C.A.D.C., 1998), the District of Columbia circuit remanded to district court to exercise discretion and consider whether a borrower had a valid due process claim as to funds taken based on their argument that abrogation of statute of limitations for student loans was unconstitutional, yet emphasized that it was not suggesting there was anything currently in the record of that case that would support a finding that the statute lifting the statute of limitations was unconstitutional.

an individual debtor, one by one. Thus, even those cases which have recognized the existence of a due process claim under the *Chase Securities* language argued here by Appellant Falcon, focused on the individual debtor, as opposed to examining the overall effect of lifting the bar retrospectively on a class of cases.

The *Lockhart* case relied upon by the Court did not examine any Constitutional issues at all and there were no federal due process arguments presented or decided in that Supreme Court opinion, and instead *Lockhart* only addressed statutory construction and whether off-set without any time limits for loans obtained prior to such changes in the law was intended by Congress.[4]

Likewise, the *Lewis* decision concerned whether a bankruptcy court under revised bankruptcy law could retroactively impair a student loan contract entered into at a time that prior federal bankruptcy law allowed student loans in repayment for seven years to be eligible for discharge. The due process issue considered in *Lewis* was in the context of that appellant arguing that the contract included the implied terms of pre-existing bankruptcy law at the time the contract was entered (allowing for discharge on student loans if a certain number of years of payment

4 In *Lockhart*, 126 S.Ct. at 700-02, the Supreme Court held that the time limit in § 3716(e)(1) did not bar the government from offsetting the plaintiff's social security benefits to repay federally-reinsured student loans. Relying on 20 U.S.C.A. § 1091a (a)(2)(D), the Court ruled that the time limits of § 3716(e)(1) did not apply to "various student loans, including the loans at issue" in *Lockhart*. Id. at 701.

had been made on the student loan), and arguing that the Fifth Amendment due process clause imposes essentially the same restraint on the impairment of contracts as does the Contract Clause (citing *Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir.1980)).

In *Lewis*, this Court noted that the district court had held that while such restraint required by the Fifth Amendment due process clause may be true in some instances, but the district court concluded that

> "the enacting legislation under the Bankruptcy Clause, Art. 1, § 8, cl. 4 of the U.S. Constitution controls in this instance. Relying on *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 516, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938), the district court reasoned that Lewis' student loan contract was made subject to constitutional power in the Congress to legislate on the subject of bankruptcies impliedly written into the contract between Lewis and the original lender."

Lewis, 506 F.2d at 931.

Thus, in *Lewis*, this Court held that under the Bankruptcy clause of the Constitution, Congress could retroactively impair contracts, noting this was what bankruptcy law was largely about. *Lewis* also cited *Lockhart*, suggesting it was a:

> 'powerful indication that the Supreme Court would not adopt the position advanced by Lewis. . . .' *Lockhart* applied law as it existed at the time of the decision rather than laws at the time the student loans were made. Applying laws existing at the time of this decision, we hold that Congress has the authority to impair appellant's contractual obligation, and did so appropriately through the 1998 Amendments.

Lewis, at 932.

In this case, the District Court's reliance on *Lockhart* and *Lewis* did not resolve or address the federal due process constitutional issues raised in this case. Appellant Falcon is not challenging the Bankruptcy clause of the federal Constitution, but rather, whether Congress violated due process in relation to federally guaranteed student loan debtors by abrogating any statute of limitations applicable under federal or state law. As explained next, the 1991 amendment barring any statute of limitations on such student loan debt violated federal due process under the Constitution.

B. CONGRESS VIOLATED FEDERAL DUE PROCESS BY ITS ABROGATION OF ANY STATUTE OF LIMITATION ON THE COLLECTION OF FEDERALLY GUARANTEED STUDENT LOANS, WHICH RESULTED IN UNDUE AND OPPRESSIVE HARSHIPS AND EFFECTS ON A SPECIAL CLASS OF DEBTOR.

In 1885, in *Campbell v. Holt*, *supra*, the Supreme Court concluded that there was no federal due process claim based on the abrogation of a statute of limitations for a particular claim because a statute of limitations did not create a "vested" property right. Sadly, in an example of how recognized rights can shift dramatically over time, the Supreme Court used the example of a legal action concerning ownership of a slave as a vested property right in that case, versus a statute of limitations.

A few years later, in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365 (1877),

the Supreme Court considered whether the reduction of an existing State statute of limitations in Georgia impaired contractual obligations in a case where the limitations period was 20 years at the time of the contract, and after the statute was running for more than four (4) years, it was reduced to nine months and 17 days by amendment. Although recognizing the legislative power to both enact and amend such limitations, the Supreme Court ultimately emphasized and focused on the reasonableness of the action at issue, which, in that case, was the reasonableness under the amendment of whether the legislative action had left adequate time for a party to bring a suit upon breach. *Terry v. Anderson*, 95 U.S. at 633.

The Supreme Court revisited the question sixty (60) years later as to whether it would overturn *Campbell v. Holt*, noting criticism by legal scholars and the fact that some state courts had not followed it in construing provisions of their constitutions similar to the due process clause. *Chase Securities Corp., Now Known As Amerex Holding Corp., v. Donaldson Et al.*, 325 U.S. at 312-313.

Although the Supreme Court declined to overturn its prior holding, the Court recognized the possible existence of a due process claim from abrogating a statute of limitations, stating, "Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force." *Chase Securities Corp.*, 325 U.S. at 315 (underscore added).

That is exactly what was argued here in this case, that the statutory abrogation of the statute of limitations is unconstitutional due to its retrospective force on this class of cases involving student loans, of which Mr. Falcon is a member, and there are resulting special hardships and oppressive effects.

In stark contrast with those circuit and district court cases that have rejected finding a federal due process claim, Mr. Falcon here has alleged the legal bases, citing *Chase Securities* and the circuit court decisions of *DiStefano* and *Hodges*. Mr. Falcon has argued the cruel and oppressive nature of the law, and argued that the statutory abrogation of the statute of limitations as to the certain type of cases at issue here (i.e., "class of cases"), namely, student loan debt, and that class of debtors, student loan borrowers.

Even when appearing *pro se*, Mr. Falcon referred to the undue hardship of this type of loan being without recourse. Mr. Falcon explained the legal hardship of the creation of an eternal debt, arguing about the "cruel and an unusual nature" of the situation "where only one type of loan, ones taken by students [for education], is eternal and without recourse." (ER 60-61.)[5]

Mr. Falcon's arguments establish the Constitutional federal due process

5 To the extent the District Court based its decision in part on a conclusion Mr. Falcon had "failed to present sufficient evidentiary facts to raise a genuine issue of material fact or a question as to liability for the indebtedness alleged" (ER 10), the Constitutional legal defense raised is substantial, and requires no reference to extrinsic evidentiary facts.

claims which are the crux of this case. In short, special hardships or oppressive effects exist as a result of the lifting the bar of any statute of limitations in this class of cases with retrospective force, including the following circumstances, and given the unique and otherwise harsh treatment imposed on such student loans.

First and foremost, in this regard, student loan borrowers are unable to discharge student loan debt in a bankruptcy case, because student loans are statutorily exempt from discharge in bankruptcy, as established earlier. This burden on student loan debt is established by federal law. 11 USC § 523(a)(8).

In a 2012 Report on Private Loans by the U.S. Department of Education and Consumer Protection Financial Services Bureau (CPFSB) to the U.S. Senate Committee Banking, Housing, and Urban Affairs, the Senate Committee on Health, Education, Labor, and Pensions, the House of Representatives Committee on Financial Services, and the House of Representatives Committee on Education and the Workforce, these agencies recommended re-evaluating discharge, and noted, "[student] loans are virtually immune from discharge in bankruptcy." (Available at: http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.)

As set forth earlier, the laws regarding student loan debt and bankruptcy have changed over the years. Previously, student loan debt could was statutorily

dischargeable. Before 1976, student loans were treated the same as any other debt. Congress passed a law permitting students only to discharge loans in bankruptcy five years after origination of the loan, unless they demonstrated undue hardship in an adversary case in bankruptcy court. In 1990 the five-year rule was extended to seven years. In 1998, Congress dropped the seven-year rule altogether, making student loans non-dischargeable in bankruptcy. After this 1998 change, an adversary litigation proceeding in bankruptcy court in order to determine undue hardship became the only way to discharge student loans in bankruptcy.[6]

Such discharge relief based on undue hardship under federal bankruptcy case standards is uncommon and rarely granted. See "When Does Repaying a Student Loan Become an Undue Hardship?", Robert C. Cloud, Ed. D., 185 Ed. Law Rep. 783, 798 (2004) ("[S]tudent loans are rarely discharged because undue hardship means more than temporary, severe financial difficulty. Student debtors must establish a certainty of hopelessness to achieve discharge, a very difficult legal hurdle to surmount."). Indeed, less than one percent of bankrupt student loan

6 In addition, student loan debt is not allowed to be claimed by debtors as an expense in bankruptcy cases for purposes of means testing to make a borrower eligible for Chapter 7 protection. See generally Anthony P. Cali, The "Special Circumstance" of Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 52 ARIZ. L. REV. 473, 473 (2010) ("Whether by design or oversight, Congress failed to include student loan repayment as an express, allowable expense in the means test.").

borrowers ever seek adversary discharge litigation concerning student loans.[7]

In addition, student loan debtor cases are already subject to the hardship of the debtor being subject to federal statutory administrative offsets on federal benefits such as Social Security benefits (and other benefits[8]), as was threatened by the United States in their proffered stipulated judgment and provided as an Exhibit to the Mr. Falcon's Answer/Counter Claim. (ER 105-106.)

Defendants with other consumer or private student loans are not subjected to such legal hardships or unusual collection measures. In contrast, student loan debtors in the position of Mr. Falcon are subject to creditor action not available to private creditors. This is also established by federal law. See 31 USC § 3716.

Moreover, federal student loan borrowers in default are subject to the government engaging in a levy against federal income tax refunds, if any. This burden is established by federal law, and not available to private creditors. E.g., 31

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7 According to one study, "99.9 percent of bankrupt student loan debtors do not even try to discharge their student loans," while approximately only 25 percent of those debtors who were able to afford adversarial litigation in a bankruptcy context were successful in obtaining a full discharge in 2007. Jason Iuliano, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard, 86 AM. BANKR. L.J. 495, 507, 523 (2013).

8 There are other federal benefits subject to offset such as Railroad Pension benefits, and payments made under certain programs based on financial need, such as Social Security and Disability Insurance. See 31 U.S.C. § 3716(c)(3)(A); 31 C.F.R. § 285.4(a)(1). See generally, "Collection of Student Loans: A Critical Examination," Doug Rendleman and Scott Weingart, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. at page 250.

USC § 3716(a)(8)("A levy pursuant to the Internal Revenue Code of 1986 shall take precedence over requests for administrative offset pursuant to other laws").

Perhaps most significantly, in addition to the inability to discharge such debt, the United States as a creditor in such student loan cases is provided special privileges in terms of a lessened burden of proof in collection litigation actions, by allowing that a sworn certificate of indebtedness may be introduced as proof of the debt. This is also established by federal law. See *United State v. Petroff-Kline*, 557 F. 3d 285, 290 (6th Cir. 2009), citing *United States v. Davis*, 28 Fed.Appx. 502, 503 (6th Cir. 2002) (government may introduce evidence of the note and a sworn transcript of the account or "certificate of indebtedness"). This is yet another burden on student loans as a unique class of debt.

Likewise, with respect to this class of cases against federally guaranteed student loan borrowers, Congress enacted disclosure requirements to ensure that borrowers had disclosures about the loan. However, such disclosures do not rise to the level of adequacy that other borrowers are afforded under the federal Truth in Lending Act (TILA). See Truth in Lending, Fifth Edition, National Consumer Law Center (2000), at Section 2.4.5.2 "Non-TIL Student Loan Disclosure Requirements," at pp. 40-41.) Furthermore, Congress has additionally restricted the benefits of such required disclosures in legal cases, by enacting restrictions on

student loan debt, enacting law stating that the failure of the lender to give such disclosures "shall not relieve a borrower of the obligation to repay the loan," nor give rise to civil claim for damages. See Truth in Lending, *supra*, at p. 41, footnote 261, citing 20 U.S.C. § 1083(c) and § 1087cc-1(c).

As if the circumstances imposed on such student loans, described above, removing discharge relief in bankruptcy, and the special hardships imposed by the variety of special privileges and evidentiary relief granted to the government as a creditor, and the other restrictions imposed on this class of debt were not enough, Congress then abrogated any statute of limitations for guaranteed student loans and related off sets in 1991, thus establishing eternal debt for this class of cases.

Such student loan debt is indeed eternal, and subject to special statutes for the benefit of the Government, not otherwise available to a private creditor. A twenty (20) year old borrower could take out a $10,000.00 student loan today, drop out and default, and at age 90, some seventy years later, the Government could file an action to collect. Using an 8% interest rate compounded annually, the debt and accrued interest at that date would be $2,186,064.06. In this case, the purported interest also exceeds the principal debt alleged. The evidentiary burden would be relaxed, and the passage of time or illegible documents would not stand in the way.

As noted, significantly, there is a lessened evidentiary proof is a special

privilege given to the Government by virtue of statutorily being able to present "Certificates of Indebtedness" (ER 107-108) as proof of such student loan debt. As a direct result, the use of old, illegible loan documents is not only possible in litigation, but actually happened in this case. While certain pages were legible, many of the pages presented by the United States were illegible. (ER 66-84.)

Therefore, specifically targeting student loan debt and abrogating any statute of limitations for federal guaranteed student loans, in conjunction with providing a lessened evidentiary standard of proof for the United States in these specific types of cases by allowing Certificates of Indebtedness, within the context of the pre-existing prohibition of any bankruptcy discharge, established oppressive and undue effects on this specific class of cases. Such burdens are not imposed on other types of debts. This violates federal due process in the manner contemplated by the language stated by the Supreme Court in *Chase Securities Corp.*.

C. EVEN UNDER A PROPERTY RIGHTS ANALYSIS, THE FEDERAL CONSTITUTION RECOGNIZES THE SANCTITY OF CONTRACT, AND CONGRESS MAY NOT UNCONSTITUTONALLY VIOLATE FEDERAL DUE PROCESS BY IMPAIRING PRIVATE CONTRACTS IN A MANNER SO AS TO ESTABLISH ETERNAL DEBT SOLELY FEDERALLY GUARANTEED STUDENT LOANS.

The Supreme Court has recognized that the sort of protections provided by the Contracts Clause (Art. 1, § 10) and applicable to the States – extend to the federal government insofar as valid contracts are "property," and rights as against

the United States arising out of contract are protected under the Fifth Amendment:

> "Although the constitutional prohibition of the impairment of contracts, U.S.Const., Art. 1, § 10, applies only to the States, we have held that '(v)alid contracts are property, whether the obligor be a private individual, a municipality, a State of the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.' *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934).

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, n. 31, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). The Supreme Court has concluded that "Contract rights are a form of property...." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

In the case *In re Lewis*, 506 F.3d at 932, this Court noted that the district court in *Lewis* had cited Ninth Circuit authority which holds that the Fifth Amendment due process clause imposes essentially the same restraint on the impairment of contracts as does the Contract Clause. Id., citing *Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir.1980)). The District Court in *Lewis* concluded that such law might be applicable to impose restraint on impairing contracts, but that Court – and the Ninth Circuit found the law inapplicable in light of the fact that the case involved application of bankruptcy law, the rule was not applicable. *Id.* at 931-932.

Under the circumstances presented herein, Appellant Falcon contends that

the congressional action to bar any state or federal limitations on the collection of student loans, was unreasonably and violated federal due process.

While recognizing that as a general proposition that a sovereign may enact or amend such statutes regarding procedural limitations on limitations, there must be some limit to Congressional overreach. See, e.g., *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) ("It does not follow … that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

Appellant Falcon submits that to bar any limitations on the collection of a targeted class of cases – a class of cases which are already subject to relaxed evidentiary burdens and subject to the "harsh and dramatic" treatment of non-dischargeability under bankruptcy law, violates federal due process by providing for unrestricted "eternal debt" that is unheard of in the modern day and age of commercial and consumer transactions. Congress has effectively provided for such student loans, a civil collection framework similar to the statute of limitations in criminal murder cases, which likewise has no statute of limitations. The harsh and dramatic singular treatment is unreasonable and violates federal due process.

Furthermore, under the context here, such harsh treatment of a private contract cannot be deemed to be merely an incidental "frustration" instead of implicating a property interest, in particular because Congress has specifically "targeted" this specific class of cases – federally guaranteed student loans.

Even where the federal Government is a direct party to a contract as a "sovereign," there may be limits to Congressional action, where ordinarily there is a recognized power as a sovereign to enact laws regulating economic life under the "sovereign act" doctrine which "balances the Government's need for freedom to legislate with its obligation to honor its contracts." *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996).[9] Here, the contract was not made with this sovereign.

9 The sovereign act doctrine holds that "Whatever acts the government may do … so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons …." *Horowitz v. United States*, 267 U.S. 458, 461 (1925). The doctrine levels the contractual playing field by ensuring that government contractors and private contractors are affected the same way when the government, acting in its sovereign capacity through a "public and general" enactment, affects existing contract rights. But, the "public and general" requirement, federal legislation found to specifically target existing contracts does not qualify for the sovereign acts defense. In *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996), Congressional action fell outside the sovereign act doctrine because a substantial part of the impact of Congress's action fell on the government's own contractual obligations, not to mention the government's financial self interest in the legislation, which made the defense inappropriate. See Id. at 899 ("a governmental act will not be public and general it has the substantial effect of releasing the government from its contractual obligations"). See also *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1367 (Fed. Cir. 2009) (sovereign acts defense unavailable "where the governmental action is specifically directed at nullifying contract rights"). Another example of a

In addition, the federal government often raises a defense based on *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), in which the Supreme Court handed the government a powerful defense against affirmative federal due process lawsuits based on interference with existing private contracts. The Supreme Court held that government actions that only incidentally interfere with performance of private contracts—rather than targeting them directly—constitute but a "frustration," not a taking, of those contract rights. See *Cienega Gardens v. United States*, 331 F.3d 1319, 1335 (Fed. Cir. 2003) ("Omnia refers to legislation targeted at some public benefit, which incidentally affects contract rights, not … legislation aimed at the contract rights themselves in order to nullify them.").

Likewise, the *Omnia* defense does not apply when the United States takes over a contract, *Omnia*, 261 U.S. at 510-511, as ostensibly occurred here with the assignment of the loans, or when only one party has performed. See *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988).[10] In other cases, a property right was found to be taken in a situation where the United States taking when the United

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legislative act being held not sufficiently public and general is *Centex Corp. v. United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005), in which the "targeted" aspect of the legislation was used by the court to support a holding that the implied covenant of good faith and fair dealing was been violated.

10In addition to violating federal due process rights, there can be a substantive due process right impacted. If an impairment is found, a substantive due process claim may exist, if the action was arbitrary. See generally, *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985).

States "put itself in the shoes of the claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had." *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 120 (1924).

Given the overall backdrop described above, there are additional Constitutional due process problems under applicable Supreme Court case law and the facts present here, to the extent the Government alleged Mr. Falcon entered student loan agreements with Bucks County Bank and Higher Education Loan Plan. (ER 73, 86, 107.) Those private entities were not the government, but any contractual rights and remedies available were later applicable to the government.[11]

Mr. Falcon entered into such contracts subject to applicable laws at the time, and having all available defenses even if the loan was later assigned in 2005. Such defenses included statute of limitations defenses against the original lender if the

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11Although it is unclear a Contracts Clause analysis would apply here, the Ninth Circuit has articulated the analysis required under the contracts clause as follows:

> [I]n testing the validity of legislative action under the contract clause, it must first be determined whether the state law substantially impairs the contractual relationship. *Allied Structural Steel [Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722 (1978)]. If only minor alterations of contractual obligations are present, then the inquiry ends as no constitutional violation has occurred. Id. at 245, 98 S.Ct. at 2723. But where the impairment is substantial, then the nature and purpose of the legislation must be examined to determine whether the governmental interests justify the impairment. *Id.*, *Northwestern National Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir.1980).

In re Anderson, 824 F.2d 754, 760 (9th Cir. 1987).

action was untimely. When the federal government took the loan later by apparent assignment, it did not have "holder in due course" status. *United States v. Griffin*, 707 F. 2d 1477 (D.C. Circuit 1983) (government is not considered a holder in due course for student loans they have taken by assignment after paying guarantee). When a party does not have holder in due course status, this means the original parties to the loan can bring a defense or claims they had against each other. In contrast, if there was "holder in due course" status, defenses the borrower would have had against the original lender are unavailable. This means the Government should have been subject to any defenses Appellant Falcon would have had against the original private lenders under state contract or federal law.

Yet, by abrogating the statute of limitations, Congress selectively targeted and impaired any alleged contracts with the original lender, and deprived Mr. Falcon of the right of a statute of limitations defense that he would have be able to assert against the original lender, as being applicable against the government as subsequent holder. This is true even if there were applicable state statute of limitations against Bucks County bank under Pennsylvania law that existed at the time in from 1983 through 1991. With the abrogation, such state defenses are now obliterated preempted. "Collection of Student Loans: A Critical Examination," Rendleman and Weingart, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. at p.

255 (state law defenses, like statute of limitations, now pre-empted).

However, in *United States Trust Co. v. New Jersey,* 431 US 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977), the Supreme Court held that a higher level of scrutiny was needed for situations where laws modified the government's own contractual obligations. That is what appears to have occurred here.

As a consequence of the abrogation of any statute of limitations, this has resulted in eternal student loan liability, at least for federally guaranteed student loans. See "Eternal Student Loan Liability: Who Can Sue Under 20 U.S.C. § 1091a?" Glenn Roper, 20 B.Y.U. JOURNAL OF PUBLIC LAW 35 (2005).

Thus, there are valid Constitutional arguments raised here, based on due process grounds, as well as issues based on federal constitutional provisions on bills of attainder or prohibiting interference with contract.[12]

In sum, Mr. Falcon has raised the very due process issue recognized by the Supreme Court in *Chase Securities* and similarly recognized by other federal cases,

12 "No Bill of Attainder or ex post facto Law shall be passed [by the Congress]." Art. I, § 9, cl. 3. The Constitution provides "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ." Art. I, § 10. "The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." *Fletcher v. Peck*, 10 U.S. 87 (1810)("[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."). *Nixon v. Administrator of General Services*, 433 US 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)("Our treatment of the scope of the [Bill of Attainder] Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee.")

and has established that "special hardships or oppressive effects … result from lifting the bar in this class of cases with retrospective force." Indeed, those same special hardships and oppressive effects apply prospectively as well. Thus, for the reasons stated above, it is also Appellant's respectful position that the statutory amendment is unconstitutional not just as to debts accrued before 1991 such as his own, but also to relevant student loan debt incurred after the passage of the law.

The enforcement of a debt by applying an unconstitutional law creating eternal student loan debt is unconstitutional, unreasonable, and a miscarriage of justice. Appellant respectfully asks this Court to strike down this law.

VII. CONCLUSION

Mark J. Falcon respectfully asks this Court to reverse the District Court's judgment and orders, find the 1991 statute abrogating any statute of limitations for federally guaranteed loans unconstitutional, and dismiss the case.

DATED: September 2, 2014

Respectfully submitted,

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VINCE RABAGO LAW OFFICE PLC
Counsel for Appellant Mark J. Falcon

No. 13-16588

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases as defined in Ninth Circuit R. 28-2.6.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument would assist in resolution of this case.

CERTIFICATE OF COMPLIANCE

As required by F.R.A.P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,268 words. I relied on my word processor to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Vince Rabago
Vince Rabago, Esq.

No. 13-16588

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2014, a copy of the foregoing APPELLANT'S OPENING BRIEF was served via CM/ECF on the following:

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No. 13-16588

ADDENDUM

Public Law 102-26
102d Congress

An Act

To resolve legal and technical issues relating to Federal postsecondary student assistance programs and to prevent undue burdens on participants in Operation Desert Storm, and for other purposes.

Apr. 9, 1991
[H.R. 1285]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Higher Education Technical Amendments of 1991.
Colleges and universities.
20 USC 1001 note.

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Higher Education Technical Amendments of 1991".

(b) REFERENCES.—References in this Act to "the Act" are references to the Higher Education Act of 1965.

SEC. 2. ABILITY TO BENEFIT.

(a) DEFINITION OF ELIGIBLE INSTITUTION.—

(1) STAFFORD LOANS.—Section 435(c)(1) of the Act (20 U.S.C. 1085(c)(1)) is amended by striking out "and who have the ability to benefit (as determined by the institution under section 481(d)) from the training offered by such institution" and inserting in lieu thereof "or who are beyond the age of compulsory school attendance in the State in which the institution is located".

(2) DEFINITION OF PROPRIETARY INSTITUTION OF HIGHER EDUCATION.—Section 481(b) of the Act (20 U.S.C. 1088 (b)) is amended—

(A) by striking out "and who have the ability to benefit (as determined by the institution under section 484(d)) from the training offered by the institution"; and

(B) by striking out the last sentence thereof.

(3) DEFINITION OF POSTSECONDARY VOCATIONAL INSTITUTION.—Section 481(c) of the Act (20 U.S.C. 1088(c)) is amended by striking out "and who have the ability to benefit (as determined by the institution under section 484(d)) from the training offered by the institution".

(4) DEFINITION FOR INSTITUTIONAL AID PROGRAMS.—Section 1201(a) of the Act (20 U.S.C. 1141(a)) is amended by striking "and who meets the requirements of section 484(d) of this Act" in the third sentence.

(b) DEFINITION OF ELIGIBLE STUDENT.—Section 484(d) of the Act (20 U.S.C. 1091(d)) is amended to read as follows:

"(d) TESTING OF STUDENTS WHO ARE NOT HIGH SCHOOL GRADUATES.—In order for a student who does not have a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate, to be eligible for any assistance under subparts 1, 2, and 3 of part A and parts B, C, D and E of this title, the student shall pass an independently administered examination approved by the Secretary.".

(c) CONFORMING AMENDMENTS.—

(1) SUPPLEMENTAL LOANS.—Section 428A(a)(1) of the Act is amended by striking the last sentence thereof and inserting "No

20 USC 1078-1.

student shall be eligible to borrow funds under this section until such student has obtained a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate.".

20 USC 1091.

(2) STUDENT ELIGIBILITY.—Section 484(a)(1) of the Act is amended by inserting before the semicolon at the end thereof the following: ", and not be enrolled in an elementary or secondary school".

20 USC 1094.

(3) PROGRAM PARTICIPATION AGREEMENTS.—Section 487(a)(11) of the Act is amended by striking "which admits" and all that follows through "484(d)),'' and inserting "whose students receive financial assistance pursuant to section 484(d),".

(d) EFFECTIVE DATE.—

20 USC 1078-1 note.

(1) IN GENERAL.—The amendments made by this section shall apply to any grant, loan, or work assistance to cover the cost of instruction for periods of enrollment beginning on or after July 1, 1991.

20 USC 1088 and note, 1091.

(2) ELIMINATION OF CONFLICTING PROVISIONS.—(A) Section 3005 of the Omnibus Budget Reconciliation Act of 1990 is repealed. Sections 484(d) and 481(b) of the Act shall be applied as if such section 3005 had not been enacted.

(B) The last proviso of the paragraph under the heading "STUDENT FINANCIAL ASSISTANCE" of title III of Public Law 101-517 (104 Stat. 2213) is repealed.

SEC. 3. ELIMINATION OF STATUTE OF LIMITATIONS FOR STUDENT LOAN COLLECTIONS.

(a) AMENDMENT.—Section 484A(a) of the Act (20 U.S.C. 1091a(a)) is amended to read as follows:

"(a) IN GENERAL.—(1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.

"(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by—

"(A) an institution that receives funds under this title that is seeking to collect a refund due from a student on a grant made, or work assistance awarded, under this title;

"(B) a guaranty agency that has an agreement with the Secretary under section 428(c) that is seeking the repayment of the amount due from a borrower on a loan made under part B of this title after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;

"(C) an institution that has an agreement with the Secretary pursuant to section 453 or 463(a) that is seeking the repayment of the amount due from a borrower on a loan made under part D or E of this title after the default of the borrower on such loan; or

"(D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this title, or for the repayment of the amount due from a

borrower on a loan made under this title that has been assigned to the Secretary under this title.".

(b) CONFORMING AMENDMENT.—Section 16041 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272) is amended— 20 USC 1071 note.

(1) by striking out subsection (e);

(2) in subsection (f), by striking out "The amendment made by section 16034" and inserting in lieu thereof "The amendments made by sections 16033 and 16034"; and

(3) by redesignating subsection (f) as subsection (e).

(c) EFFECTIVE DATE.—The amendments made by this section shall be effective as if enacted by the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272), and shall apply to any actions pending on or after the date of enactment of the Higher Education Technical Amendments of 1991 that are brought before November 15, 1992. 20 USC 1091a note.

SEC. 4. OPERATION DESERT SHIELD/DESERT STORM WAIVER AUTHORITY. Armed Forces. 20 USC 1070 note.

(a) PURPOSE.—It is the purpose of this section to ensure that—

(1) the men and women serving on active duty in connection with Operation Desert Shield or Operation Desert Storm who are borrowers of Stafford Loans or Perkins Loans are not placed in a worse position financially in relation to those loans because of such service;

(2) the administrative requirements placed on all borrowers of student loans made in accordance with title IV of the Act who are engaged in such military service are minimized to the extent possible without impairing the integrity of the student loan programs, in order to ease the burden on such borrowers, and to avoid inadvertent, technical defaults; and

(3) the future eligibility of such an individual for Pell Grants is not reduced by the amount of such assistance awarded for a period of instruction that such individual was unable to complete, or for which the individual did not receive academic credit, because he or she was called up for such service.

(b) WAIVER REQUIREMENT.—Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education shall waive or modify any statutory or regulatory provision applicable to the student financial aid programs under title IV of the Act that the Secretary deems necessary to achieve the purposes stated in subsection (a), including—

(1) the length of, and eligibility requirements for, the military deferments authorized under sections 427(a)(2)(C)(ii), 428(b)(1)(M)(ii), and 464(c)(2)(A)(ii) of the Act, in order to enable the borrower of a Stafford Loan or a Perkins Loan who is or was serving on active duty in connection with Operation Desert Shield or Operation Desert Storm to obtain a military deferment, under which interest shall accrue and shall, if otherwise payable by the Secretary, be paid by the Secretary of Education, for the duration of such service;

(2) administrative requirements placed on all borrowers of student loans made in accordance with title IV of the Act who are or were engaged in such military service;

(3) the number of years for which individuals who are engaged in such military service may be eligible for Pell Grants under subpart 1 of part A of title IV of the Act;

(4) the point at which the borrower of a Stafford Loan who is or was engaged in such military service is required to resume repayment of principal and interest on such loan after the borrower completes a period of deferment under section 427(a)(2)(C)(ii) or 428(b)(1)(M)(ii) of the Act;

(5) the point at which the borrower of a Stafford Loan who is or was engaged in such military service is required to resume repayment of principal and interest on such loan after the borrower completes a single period of deferment under section 427(a)(2)(C)(i) or 428(b)(1)(M)(i) of the Act subsequent to such service; and

(6) the modification of the terms "annual adjusted family income" and "available income," as used in the determination of need for student financial assistance under title IV of the Act for such individual (and the determination of such need for his or her spouse and dependents, if applicable), to mean the sums received in the first calendar year of the award year for which such determination is made, in order to reflect more accurately the financial condition of such individual and his or her family.

Federal Register, publication.

(c) NOTICE OF WAIVER.—Notwithstanding section 431 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of title 5, United States Code, the Secretary shall, by notice in the Federal Register, publish the waivers or modifications of statutory and regulatory provisions the Secretary deems necessary to achieve the purposes of this section. Such notice shall include the terms and conditions to be applied in lieu of such statutory and regulatory provisions. The Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis.

(d) DEFINITIONS.—For purposes of this Act—

(1) Individuals "serving on active duty in connection with Operation Desert Shield or Operation Desert Storm" shall include—

(A) any Reserve of an Armed Force called to active duty under section 672(a), 672(g), 673, 673b, 674, or 688 of title 10, United States Code, for service in connection with Operation Desert Shield or Operation Desert Storm, regardless of the location at which such active duty service is performed; and

(B) for purposes of waivers of administrative requirements under subsection (b)(2) only, any other member of an Armed Force on active duty in connection with Operation Desert Shield or Operation Desert Storm, who has been assigned to a duty station at a location other than the location at which such member is normally assigned.

(2) The term "active duty" has the meaning given such term in section 101(22) of title 10, United States Code, except that such term does not include active duty for training or attendance at a service school.

20 USC 1070 note.

SEC. 5. TUITION REFUNDS OR CREDITS.

(a) SENSE OF CONGRESS.—It is the sense of the Congress that all institutions offering postsecondary education should provide a full refund to any member or Reserve of an Armed Force on active duty service in connection with Operation Desert Shield or Operation Desert Storm for that portion of a period of instruction such individual was unable to complete, or for which such individual did not receive academic credit, because he or she was called up for such

service. For purposes of this section, a full refund includes a refund of required tuition and fees, or a credit in a comparable amount against future tuition and fees.

(b) ENCOURAGEMENT AND REPORT.—The Secretary of Education shall encourage institutions to provide such refunds or credits, and shall report to the appropriate committees of Congress on the actions taken in accordance with this subsection as well as information he receives regarding any institutions that are not providing such refunds or credits.

SEC. 6. TERMINATION OF AUTHORITY.

20 USC 1070 note.

The provisions of sections 4 and 5 shall cease to be effective on September 30, 1997.

SEC. 7. EDUCATION PROGRAMS FOR COMMERCIAL DRIVERS.

Part C of the Adult Education Act (20 U.S.C. 1211 et seq.) is amended by inserting at the end thereof the following new section 373:

"SEC. 373. EDUCATION PROGRAMS FOR COMMERCIAL DRIVERS.

20 USC 1211b.

"(a) PROGRAM AUTHORIZED.—The Secretary is authorized to make grants on a competitive basis to pay the Federal share of the costs of establishing and operating adult education programs which increase the literacy skills of eligible commercial drivers so that such drivers may successfully complete the knowledge test requirements under the Commercial Motor Vehicle Safety Act of 1986.

"(b) FEDERAL SHARE.—The Federal share of the costs of the adult education programs authorized under subsection (a) shall be 50 percent. Nothing in this subsection shall be construed to require States to meet the non-Federal share from State funds.

"(c) ELIGIBLE ENTITIES.—Entities eligible to receive a grant under this section include—

"(1) private employers employing commercial drivers in partnership with agencies, colleges, or universities described in paragraph (2);

"(2) local educational agencies, State educational agencies, colleges, universities, or community colleges;

"(3) approved apprentice training programs; and

"(4) labor organizations, the memberships of which include commercial drivers.

"(d) REFERRAL PROGRAM.—Grantees shall refer to appropriate adult education programs as authorized under this Act individuals who are identified as having literacy skill problems other than or beyond those which prevent them from successfully completing the knowledge test requirements under the Commercial Motor Vehicle Driver Safety Act of 1986.

"(e) DEFINITIONS.—For purposes of this section:

"(1) The term 'approved apprentice training programs' has the meaning given such term in the National Apprenticeship Act of 1937.

"(2) The term 'eligible commercial driver' means a driver licensed prior to the requirements of the Commercial Motor Vehicle Safety Act of 1986.

"(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $3,000,000 for each of fiscal years 1991, 1992, and 1993.".

Michigan.

SEC. 8. ADMINISTRATIVE TREATMENT.

The Secretary of Education shall treat the University of Detroit Mercy of Detroit, Michigan, as an eligible institution under part A of title III of the Act for purposes of section 356 of the Act for fiscal year 1991.

SEC. 9. LOAN CERTIFICATION BY ELIGIBLE INSTITUTIONS.

20 USC 1078.

Section 428(a)(2)(F) of the Act is amended to read as follows:

"(F) Except as provided in subparagraph (D), an eligible institution may refuse to certify a statement which permits a student to receive a loan under this part or to certify a loan amount that is less than the student's determination of need (as determined under part F of this title), if the reason for such action is documented and provided in written form to each student so affected.".

SEC. 10. STUDENT RIGHT-TO-KNOW AND CAMPUS SECURITY TECHNICAL AMENDMENTS.

20 USC 1092.

(a) GRADUATION RATES.—Section 485(a)(1)(L) of the Act is amended by inserting "undergraduate" after "full-time".

(b) CALCULATION OF RATES.—Section 485(a)(3) of the Act is amended—

(1) by inserting "and" at the end of subparagraph (A);

(2) by striking "; and" at the end of subparagraph (B) and inserting a period; and

(3) by striking subparagraph (C).

(c) USE OF COMPARABLE DATA.—Section 485(a) of the Act is amended by adding at the end thereof the following new paragraph:

"(5) The Secretary shall permit any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that, in the opinion of the Secretary, is substantially comparable to the information required under this subsection, to use such data to satisfy the requirements of this subsection.".

(d) SCHEDULE FOR DISCLOSURE.—Section 485(f)(1) of the Act is amended—

(1) in the matter preceding subparagraph (A), by striking "September 1, 1991," and inserting "August 1, 1991,";

(2) in subparagraph (F)—

(A) by striking "school year" and inserting "calendar year"; and

(B) by striking "school years" and inserting "calendar years".

(e) EFFECTIVE DATE.—Section 104(b) of the Student Right-to-Know and Campus Security Act is amended to read as follows:

20 USC 1092 note.

"(b) EFFECTIVE DATE.—The report to the Secretary of Education required by the amendments made by this section shall be due on July 1, 1993, and annually thereafter, and shall cover the one-year period ending on June 30 of the preceding year.".

SEC. 11. SIMPLIFIED NEEDS ANALYSIS.

Section 479(a) of the Act is amended by adding before the period at the end thereof the following: ", or who file an income tax return pursuant to the tax code of the Commonwealth of Puerto Rico or who are not required to file pursuant to that tax code". 20 USC 1087ss.

Approved April 9, 1991.

LEGISLATIVE HISTORY—H.R. 1285:

CONGRESSIONAL RECORD, Vol. 137 (1991):
Mar. 19, considered and passed House.
Mar. 21, considered and passed Senate.