

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STUDENT AID FUNDS, :

4 INC., :

5 Petitioner :

6 v. : No. 08-1134

7 FRANCISCO J. ESPINOSA. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, December 1, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:04 a.m.

15 APPEARANCES:

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17 the Petitioner.

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19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioner.

22 MICHAEL J. MEEHAN, ESQ., Tucson, Ariz.; on behalf of the
23 Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-1134, United Student Aid Funds
5 v. Espinosa.

6 Ms. Wanslee.

7 ORAL ARGUMENT OF MADELEINE C. WANSLEE

8 ON BEHALF OF THE PETITIONER

9 MS. WANSLEE: Mr. Chief Justice, and may it
10 please the Court:

11 Congress has precisely delineated three
12 types of debt in bankruptcy: those that are
13 dischargeable, those that are dischargeable unless the
14 creditor timely objects, and those debts that are simply
15 not dischargeable. Student loans fall within a subset
16 of this third category. Their exception from discharge
17 is self-executing unless a debtor proves that
18 repayment will cause an undue hardship on the debtor and
19 the debtor's dependents. The Ninth Circuit rewrote
20 Bankruptcy Code section 523 to reduce those three types
21 of debt down to two. Allowing debtors to discharge
22 their student loan debts by mere declaration opens the
23 door to recategorizing every category of
24 non-dischargeable debt, and that includes --

25 JUSTICE SCALIA: Only -- only -- only if the

1 bankruptcy court disregards the law. I mean, it's --
2 it's clear that the bankruptcy court should not have
3 done what it did here. The only issue is, it having
4 made that mistake, can it -- can it subsequently be --
5 be undone in the manner that's -- that's sought here?

6 They haven't reduced three to two. The
7 three -- the three remain three. The bankruptcy court
8 should not do this.

9 MS. WANSLEE: Your Honor, this case turns
10 upon the effect of section 1328. And the --

11 JUSTICE GINSBURG: Before -- before we get
12 to that, the Ninth Circuit did say, now, bankruptcy
13 judges, we don't want you to -- to intermeddle in this.
14 So -- so the first step -- it wasn't clear to the Ninth
15 Circuit that bankruptcy judges should not say, now, I am
16 not going to let you do this until you prove hardship.

17 MS. WANSLEE: Well, Justice Ginsburg, the
18 Ninth Circuit said that bankruptcy courts have no
19 business involving themselves in this dispute if the
20 creditor fails to object.

21 JUSTICE GINSBURG: Yes.

22 MS. WANSLEE: And the problem here is that
23 1328 specifically says that the effect of the discharge,
24 the discharge that every debtor is looking for in a
25 chapter 13 case, that discharge shall not include

1 non-dischargeable debt. And the language is very, very
2 important, Your Honor. It prescribes the statutory
3 effect of the discharge order, and it says that after a
4 debtor completes their payments under a plan, open
5 quote, "the court shall grant the debtor a discharge of
6 all debts provided for by the plan, except any debt of
7 the kind specified in paragraph 8."

8 JUSTICE SOTOMAYOR: It was wrong. Let's
9 assume --

10 MS. WANSLEE: Yes.

11 JUSTICE SOTOMAYOR: -- the circuit -- the
12 district court judge, the bankruptcy court judge, got it
13 wrong, legal error. Should not have been discharged, a
14 given. Neither -- the confirmation plan should not have
15 been approved, neither should the discharge order have
16 been entered. We will go back to what was entered
17 and -- and -- and the effect of that, because I'm not
18 sure of it -- it's an error.

19 How does that give you a right to undo that
20 judgment 7 years later -- was it 5, 6, 7 years later?
21 That's the question here. Why is something that's in
22 error become a void judgment?

23 MS. WANSLEE: Justice Sotomayor, it's not
24 mere error. It's in fact void because of the plain
25 language of these particular specific statutes. They

1 have very precise words, very precise meanings.

2 JUSTICE SOTOMAYOR: But so does -- most
3 error committed by courts, inadvertently or otherwise,
4 are in contravention of some statutory command. This is
5 no different.

6 Voidness, as I've heard it described by many
7 others, appears to mean that the court is acting either
8 without jurisdiction over the people, and that's not at
9 issue here -- there was jurisdiction over the parties
10 here -- or without jurisdiction over the res. But the
11 bankruptcy court does have jurisdiction, albeit in
12 some -- in all circumstances, it had jurisdiction over
13 the student debt. The issue is what could it do with
14 it. But this is not a case involving a lack of
15 jurisdiction by the court over property.

16 So why is this more than mere error?

17 MS. WANSLEE: Because Congress's statutory
18 scheme must be enforced as written. And it's -- it's
19 unequivocal here what Congress wants. Congress has 19
20 categories of debts that are excepted from discharge,
21 important exceptions: Alimony, child support --

22 JUSTICE BREYER: What's the strongest case,
23 I mean, that you can muster in favor of this
24 proposition, my question being the same as Justice
25 Sotomayor's? What's the strongest case where you can

1 find any court that said a matter is void -- it's void,
2 not -- not just legal error, so you can attack it 90
3 years later -- it's void just because the lower court
4 that made the error didn't apply a clear statute?

5 MS. WANSLEE: Rule --

6 JUSTICE BREYER: Give me your strongest case.

7 MS. WANSLEE: Your Honor, Rule 60 says that
8 void orders can be attacked, and the passage of time
9 does not transmute a void order into a valid order.
10 Once void, it --

11 JUSTICE BREYER: But I'd like an answer
12 to my question, because I can -- I have read the
13 treatises, which I have in front of me, and they say
14 that it's void only if you show a -- the same thing that
15 Justice Sotomayor just said. And so, since I don't
16 think there is some kind of constitutional due process
17 error here, and there's clearly jurisdiction over the
18 parties, I guess you are saying there wasn't subject
19 matter jurisdiction, which is a little vague.

20 And so I want to know what's the clearest
21 case, strongest for you, where a court has ever said
22 that a failure of some -- of some other court to apply
23 the language of a statute properly, no matter how clear,
24 is a lack of subject matter jurisdiction? What is your
25 strongest precedent? That's all I'm asking.

1 MS. WANSLEE: Your Honor, we did cite a
2 number of cases in the materials. One of them is the
3 Vallely case, in which --

4 JUSTICE BREYER: All right.

5 MS. WANSLEE: That was the insurance company
6 case. Congress said that insurance companies could not be
7 afforded the protections of bankruptcy. And in that
8 case, the president of the company, the secretary of the
9 company, all participated in the bankruptcy. But the
10 Court found that the bankruptcy court had no authority
11 to -- to issue orders and to have that insurance company
12 within the bankruptcy context.

13 JUSTICE SOTOMAYOR: But that -- that goes back
14 to something more fundamental. There's no issue here
15 that the court had jurisdiction over these parties,
16 unlike the insurance company. And there's no issue that
17 the court didn't have jurisdiction over this res. They
18 could decide that a student loan was dischargeable.
19 They just had to follow certain procedures. It's a very
20 different set of circumstances in that case.

21 MS. WANSLEE: Well, Your Honor, if -- if
22 this order is merely voidable, then why do we have
23 section 523(c)? 523 -- a very specific code provision:
24 All debts not included in 523 are as a matter of course
25 discharged through bankruptcy. Those that are

1 specifically enumerated, except for (2), (4), and (6), are
2 excepted from discharge -- (2), (4), and (6), the
3 creditor must timely file objection.

4 Why do we have that scheme? Why do we have
5 the tripart ordering?

6 JUSTICE GINSBURG: Can a -- can a creditor
7 say, oh, skip it, I know this bankrupt is going to be
8 able to prove hardship, why go through unnecessary
9 expense? Can a -- can a creditor waive the hardship
10 determination?

11 MS. WANSLEE: No, Your Honor, a creditor may
12 not waive the undue hardship determination. 523 says
13 that student loans are only discharged upon a finding of
14 undue hardship.

15 JUSTICE GINSBURG: So he can't -- he can't
16 stipulate to -- he will say: I want the deal that is
17 being proposed; I think I am better off getting the
18 principal, skipping the interest. I can't make that
19 deal? We have to go through this hardship procedure,
20 whether the creditor wants it or not?

21 MS. WANSLEE: Your Honor, within the proper
22 context of an adversary proceeding in which the issue
23 has in fact been raised. Here, there was never any --
24 any allegation of undue hardship, never.

25 JUSTICE STEVENS: Well, would the case be

1 different if there had been such an allegation in the
2 petition?

3 MS. WANSLEE: I think not, Your Honor,
4 Because, once again 523, requires a finding.

5 JUSTICE STEVENS: It would not have been
6 different then? What if it had been not only an
7 allegation but an affidavit? Would the case be
8 different?

9 MS. WANSLEE: Once again, I -- I think you
10 go back to the language of 1328, Your Honor.

11 JUSTICE STEVENS: I'm kind of curious to
12 know what your answer to my question is.

13 MS. WANSLEE: I apologize.

14 JUSTICE STEVENS: Would the case be
15 different if the Petitioner had filed an affidavit of
16 undue hardship with the papers? Same notice, everything
17 else exactly the same.

18 MS. WANSLEE: Certainly a harder case, Your
19 Honor. However, I don't --

20 JUSTICE STEVENS: Why is it a harder case?

21 MS. WANSLEE: I don't think -- there would
22 not have been an adjudication of undue hardship,
23 however. Just because the debtor stated it doesn't mean
24 there was then --

25 JUSTICE STEVENS: And I say it's supported

1 by an affidavit.

2 MS. WANSLEE: Correct, Your Honor.

3 JUSTICE STEVENS: Supported by -- would then
4 the case be different?

5 MS. WANSLEE: No, Your Honor. There has to
6 be --

7 JUSTICE STEVENS: There has to be an
8 adversary hearing under your view?

9 MS. WANSLEE: Under our view, the creditor
10 is entitled to the protections of 7001 to say --

11 JUSTICE STEVENS: Okay. So if there's not
12 only an affidavit, but an offer of proof, and then
13 there's no answer filed and nothing in response to the
14 notice of the -- the lender did exactly what it did
15 here.

16 MS. WANSLEE: No, Your Honor. I -- I don't
17 believe that undue hardship would be established under
18 those facts. Our facts, of course, are a little bit
19 easier. There was never even an allegation of undue
20 hardship --

21 JUSTICE STEVENS: Yes.

22 MS. WANSLEE: -- much less proof.

23 JUSTICE STEVENS: But your legal theory
24 would be the same if there had been an affidavit filed
25 and the same -- the same response by the -- by the

1 company?

2 MS. WANSLEE: That's correct, Your Honor.

3 And I would -- I would note --

4 JUSTICE KENNEDY: Well, what -- what if
5 the creditor is sitting in the courtroom and has
6 actually made arguments and appeared in some other
7 aspects of the case? Then they come to the student loan
8 and the -- and it's ordered discharged without any
9 hearing, with the creditor sitting there. The case
10 goes to judgment, there's a final decree of discharge.
11 Can the debtor -- pardon me. Can the creditor come in
12 10 years later and say, oh, this is void?

13 MS. WANSLEE: I think they can, Your Honor.
14 And I think we can look to this Court's own precedent in
15 the Stoll case. The Stoll case said that it's important
16 to know when litigation begins and when it ends. And
17 usually this Court's opinions talk about the ending of
18 litigation. What we are talking about here is the
19 beginning. We want to know --

20 JUSTICE KENNEDY: Well, what about -- what
21 about my question?

22 MS. WANSLEE: Your Honor, at that point the
23 litigation has not commenced. There is no summons,
24 there is no service --

25 JUSTICE KENNEDY: No, no. No, no, no. My

1 hypothetical is there is -- it has commenced.
2 It's a big hearing. There's lots of issues. The
3 student loan creditor is there, actually participates in
4 some of the hearings on other issues. Then, while they
5 -- while they are still there, still represented, the
6 judge says: Now, I'm going to discharge the student
7 debt; I'm not going to have any hearing. The creditor
8 does nothing. Can the creditor come in 10 years later
9 and say this is a void judgment?

10 JUSTICE GINSBURG: That's this case. The
11 creditor was there. The creditor put in a proof of
12 claim. The creditor knew that the plan gave the
13 creditor less than the proof of claim.

14 JUSTICE KENNEDY: Well, my case is just a
15 little different in that the creditor is there in the
16 courtroom represented.

17 MS. WANSLEE: Okay. And a proof of claim is
18 merely for distribution purposes under a chapter 13
19 finding. It's not for discharge purposes.

20 JUSTICE KENNEDY: What about my --

21 MS. WANSLEE: It --

22 JUSTICE KENNEDY: What about my question?

23 MS. WANSLEE: Your Honor, in your case, once
24 again, we -- we do believe that that is not the
25 appropriate constitutional notice, constitutional

1 practice. Notice and opportunity are just but one part
2 of access and due process. Due process also requires
3 compliance with whatever --

4 JUSTICE KENNEDY: I think --

5 MS. WANSLEE: -- Congress --

6 JUSTICE KENNEDY: I think that's an astounding
7 -- an astounding conclusion, that there -- that you
8 simply are writing out the doctrine of -- of waiver
9 altogether.

10 MS. WANSLEE: Well, Your Honor, the
11 exception to discharge is self-executing. And if it's
12 self-executing, how can we waive it? If there is no
13 duty to object --

14 CHIEF JUSTICE ROBERTS: What -- what provision
15 was this discharge under?

16 MS. WANSLEE: The debtor's discharge was
17 entered under section 1328(a)(2).

18 CHIEF JUSTICE ROBERTS: And 1328 says: "The
19 court shall grant a debtor a discharge." That doesn't
20 sound self-executing to me.

21 MS. WANSLEE: Well, but 1328 further goes on
22 to say: "A discharge of all debts provided for by the
23 plan" -- as this debt was provided for by the plan --
24 "except any debt of a kind specified in paragraph 8 of
25 section 523."

1 CHIEF JUSTICE ROBERTS: (a), and section
2 523(a) does not refer to a discharge under 1328(a). It
3 refers to a discharge under 1328(b).

4 MS. WANSLEE: That's correct, Your Honor.
5 1328(a)(2) is the discharge in play here, and 1328(a)(2)
6 brings in the discharge provisions of 523.

7 CHIEF JUSTICE ROBERTS: No, no, no.
8 1328(a)(2) brings in the definition, the kind of debt
9 specified in 523(a). It doesn't bring in the discharge
10 under 523(a), which is limited to 1328(b).

11 MS. WANSLEE: It brings in the enumerated
12 debts of 523.

13 And I think it's important to -- to remember
14 that back in 1990 student loan debts were fully
15 dischargeable in chapter 13 plans. In 1992, when this
16 plan was proposed, Mr. Espinosa sought to claw back what
17 Congress had taken away 2 years earlier.

18 JUSTICE BREYER: Well -- we're conceding
19 that they violated the statute, the bankruptcy judge.
20 The question is whether it's void. And void, as you
21 just said, was three categories: One, was there a
22 violation of basic due process for your client? I don't
23 see it. Two, did the bankruptcy judge have jurisdiction
24 over the parties? It seems the answer is yes. And,
25 three, did they have subject matter jurisdiction? Which

1 we started by saying was vague.

2 So I asked you for your strongest case. You
3 said Vallely. I have only looked at it quickly, but
4 it's only four pages. And what that case seems to say
5 is that there is a statute which says there is
6 bankruptcy jurisdiction over all commercial businesses
7 except for insurance companies and two other categories.

8 This party here is an insurance company, and
9 and therefore they can attack it later, because there
10 was no jurisdiction over an insurance company.

11 Now, if that's your strongest case, I don't
12 know what the others are going to say, but it seems to
13 me you don't have much precedential support to put this
14 in a category of lacking jurisdiction.

15 MS. WANSLEE: Your Honor, we are talking
16 about a statutory right here, and the fact that Congress
17 has specifically provided that certain categories of
18 debts, for very important public policy reasons, are
19 carved out from discharge. And the reason it's void is
20 because it violates the plain language of the statute.
21 Again, even if it's provided for by the plan, the
22 discharge this debtor got under 1328 --

23 JUSTICE GINSBURG: But why -- why should it be
24 void, looking at 1327? We have a confirmed plan. You -
25 - you have -- 1328 does include -- except 523(a), as you

1 pointed out. But 1327 says "Effect of
2 confirmation," and that says, "The provisions of a
3 confirmed plan" -- the provision here is you get 13,000,
4 not 17,000 -- "bind the debtor and each creditor,
5 whether or not the claim of such creditor is provided
6 for by the plan" -- which it wasn't in full here -- "and
7 whether or not such creditor has objected to or has
8 accepted or rejected the plan."

9 That seems to say at the end of the line,
10 you get that final determination confirmed, that's it.
11 That's as final as you come and whatever mistakes were
12 made on the way there, you can't look behind at the
13 confirmation.

14 MS. WANSLEE: Your Honor, I'd like to
15 reserve some time.

16 But, Justice Ginsburg, to answer your
17 question, 1327 is the more general -- general
18 provision. Statutory canons provide that the more
19 specific shall control. But there's three other quick
20 reasons I'd like to give you.

21 If this case relies just on 1327, it
22 deprives the Bankruptcy Code and the rules of a coherent
23 effect. There are four other provisions implicated:
24 1322, 1325, 1328, and 523. A ruling in Mr. Espinosa's
25 favor undermines the will of Congress in this regard.

1 CHIEF JUSTICE ROBERTS: If -- if you'd
2 like to reserve time, it's probably time to wrap up.

3 MS. WANSLEE: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Heytens.

5 ORAL ARGUMENT OF TOBY J. HEYTENS

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

8 MR. HEYTENS: Mr. Chief Justice, and may it
9 please the Court:

10 Section 1328 and section 523 are best
11 construed as self-executing limitations on the effect of
12 the bankruptcy court's discharge order rather than as
13 directives to the bankruptcy court. There are two
14 reasons for --

15 CHIEF JUSTICE ROBERTS: I don't -- sorry to
16 start -- stop you at the beginning, but I don't see
17 that. I see in 1328(a) it says the court "shall
18 grant" the debtor. And that is not self-executing. It's
19 a directive to the court. And I see that 523(a) is
20 referred to later on, but only for purposes of
21 definition, not for purposes of discharge.

22 MR. HEYTENS: Two responses to that, Mr.
23 Chief Justice. First, if we are looking just at the
24 language of 1328, which is reproduced at the page 3 of
25 the appendix to the blue brief, it states, as the Chief

1 Justice notes, that: "The court shall grant the debtor
2 a discharge" of certain debts. There is then a comma,
3 and it says "except any debt" -- now, I can see that
4 that language is subject to a degree of ambiguity. But
5 I think even that language is susceptible to being read
6 as a legal limitation on the effect of the discharge
7 order that the provision has just told the court to
8 grant. In other words, the reason that --

9 CHIEF JUSTICE ROBERTS: Well, then the key
10 distinction you draw in your brief is totally
11 meaningless. You say on page 18 that this -- the issue
12 is whether the provision is, quote, "framed as a
13 directive" to the bankruptcy court. And here it is
14 framed as a directive to the bankruptcy court, and
15 therefore doesn't -- isn't self-executing.

16 MR. HEYTENS: Mr. Chief Justice, I think the
17 provision before the comma clearly is framed as a
18 directive to the bankruptcy court. What I'm suggesting
19 is that the language after the comma is at least capable
20 of being read consistent with --

21 JUSTICE SCALIA: There are a lot of commas.
22 What comma are you referring to?

23 MR. HEYTENS: Excuse me, Justice Scalia. I
24 am referring to the comma in -- in 1328(a), the last comma
25 right before the (1), "except any debt."

1 And the reason that we think that has to be
2 construed as a limitation on the scope of the bankruptcy
3 court's discharge order is twofold. First and foremost,
4 there has been no suggestion whatsoever that there is a
5 different rule for chapter 13 plans, which is covered by
6 1328, than there is for chapter 7 bankruptcies, chapter
7 11 bankruptcies, or chapter 12 bankruptcies. But the
8 consequences of saying that 1328 alone is not a
9 limitation, that is the consequence that that would
10 have.

11 JUSTICE BREYER: Well, what about the
12 consequence of -- there happen to be -- well, I counted --
13 14 different kinds of things that follow that comma,
14 including criminal fines, sentences. There are all
15 kinds of things. And is it the consequence of my
16 accepting your argument that anybody who is a creditor
17 in respect to any of those 14 things can come in at any
18 time and announce under Rule 60(b)(4), even if it's 10
19 years later, that the district court -- the bankruptcy
20 court made a mistake?

21 MR. HEYTENS: Well, Justice --

22 JUSTICE BREYER: Now, that would be quite --
23 to me -- extraordinary. So I hope the answer from your
24 point of view must still be no.

25 MR. HEYTENS: Well, Justice Breyer, it

1 wouldn't be under Rule 60(b)(4), because if you
2 understand this is a limitation on the effect of the
3 discharge order, the original discharge order never
4 covers it in the first place. And I think quite the --

5 JUSTICE BREYER: Wait a moment. What would it
6 be in the case where you have a discharge order and it
7 says things in it which somebody feels fall within 1
8 of these 13 categories? Now, are you saying that that
9 somebody can come back and make his argument 15 years
10 later, because he will say that, since it falls in that
11 category, the judgment is void insofar as this language
12 covers what I don't want it to cover?

13 MR. HEYTENS: Well, Justice Breyer, there
14 are three very specific categories of somebodies who
15 can't do that, and Congress has specifically identified
16 those three categories.

17 In 523(c), Congress specifically identified
18 three categories of non-dischargeable debt for which the
19 onus is on the creditor to request a hearing and obtain
20 a determination by the bankruptcy court.

21 JUSTICE SOTOMAYOR: So it's not -- it's not
22 that it is not dischargeable. It's only dischargeable
23 under certain conditions.

24 MR. HEYTENS: That is true with regard to
25 student loan debt, Justice --

1 JUSTICE SOTOMAYOR: All right. So -- so
2 you're almost begging the question, because it's
3 possible to argue that if a debt is not dischargeable at
4 all under any circumstance, your argument might have
5 more legs because then the court has no jurisdiction
6 over that property.

7 MR. HEYTENS: That was --

8 JUSTICE SOTOMAYOR: But that's not the case
9 with these exceptions. They can all be discharged.
10 It's just a matter of whether the conditions have been
11 met or not.

12 MR. HEYTENS: That would certainly be the
13 argument that would be made in future cases, if the
14 Court were to accept Mr. Espinosa's argument. And to be
15 clear, the consequences of accepting it and not
16 accepting that limitation would be that this would not
17 be limited to student loans.

18 JUSTICE BREYER: Well, but you see, it's the
19 same problem that's bothering us. I would like a yes
20 or no answer.

21 MR. HEYTENS: The answer is --

22 JUSTICE BREYER: Is it the case if somebody
23 feels the conditions were not met with in the 13
24 categories that -- or 14 -- that follow the comma, he --
25 you feel that they were met. The other side says, they

1 weren't met. I sent him a notice, but it was in a
2 balloon, okay. You know, was the notice a real notice,
3 wasn't it? People argue about that.

4 So in any case where you have a person who
5 says, no, they weren't met, and the other side says,
6 yes, they were met, that first person can come back
7 13 years later and say that the judgment was void? Is
8 the answer of the government yes or no?

9 MR. HEYTENS: With the exception of the
10 three categories in (c), the answer is yes, Justice
11 Breyer, and we think that follows straightforwardly from
12 the --

13 JUSTICE BREYER: All right. Is there any --

14 JUSTICE SCALIA: Where is (c)? You have
15 been talking about 523(c). I can't find it in any of
16 the materials.

17 MR. HEYTENS: Justice Scalia, we discussed
18 page -- 523(c) on pages 13 to 14 of our brief.

19 JUSTICE SCALIA: Why don't you put it
20 in an appendix if it's going to be part of your case?
21 I've got to search through your brief for it?

22 What page in your brief?

23 MR. HEYTENS: Pages 13 and 14. I apologize,
24 Justice Scalia.

25 The language of 523(c), which I also have, I

1 can read it. It states "the debtor shall be
2 discharged from a debt of a kind specified in paragraphs
3 (2), (4), or (6) of subparagraph (a) ... unless, on request
4 of the creditor to whom such debt is owed, and after
5 notice and a hearing, the court determines" that such
6 debt is to be excepted under (2), (4), or (6).

7 So for those three categories of otherwise
8 non-dischargeable debt, Congress has specifically
9 provided that the onus is on the creditor to --

10 JUSTICE STEVENS: Can I just get your answer
11 to a similar question --

12 MR. HEYTENS: Sure.

13 JUSTICE STEVENS: -- I asked your colleague?
14 If the facts of this case were changed by the -- the
15 creditor had come in and stipulated to the plan before
16 the court and explained at the time, we think it would
17 be better to get what money's available now rather than
18 waiting for the interest to be collected later on, if
19 they had stipulated to it, and then the order was
20 entered, you would still say, 10 years later, they could
21 charge it?

22 MR. HEYTENS: With -- with one caveat,
23 Justice Stevens, which I -- I don't mean to fight the
24 hypothetical. I just think I need to clarify. The
25 creditor can certainly stipulate to the underlying facts

1 that the debtor alleges in support --

2 JUSTICE STEVENS: He stipulates to the entry
3 of the plan. That's all he stipulates to.

4 MR. HEYTENS: Justice Stevens, in that
5 situation, there has not been an undue hardship
6 determined --

7 JUSTICE STEVENS: So you -- you would have the
8 same position then?

9 MR. HEYTENS: We would say yes, and we think
10 that follows naturally from this Court's decision in
11 Hood, where the Court clearly described 523(8)(a) as a
12 self-executing limitation. The Court specifically
13 said it --

14 JUSTICE GINSBURG: And the only way to do it
15 is to go through an adversary hearing with full notice,
16 and every -- and nobody wants to incur that expense.
17 This is a bankruptcy. You are trying to save assets.
18 The bankruptcy judge thinks this makes no sense. The
19 creditor says, okay. But you -- you agree with your
20 colleague that, under this 523 whatever, you must have
21 the full adversary hearing, notice, complaint, the
22 works?

23 MR. HEYTENS: Justice Ginsburg, you don't
24 necessarily need to have the full adversary hearing.
25 What you have to have is what Congress provided for in

1 523(a)(8). You have to have an undue hardship
2 determination that is made by the bankruptcy court.

3 Now, the parties can stipulate to the
4 underlying facts. But as this Court said in Hood, even
5 if the creditor does not show up for the adversary
6 proceeding, if the creditor completely defaults, this
7 Court said, on pages 453 and 454 of Hood, the bankruptcy
8 court still cannot discharge that debt --

9 JUSTICE STEVENS: But the irony of your
10 position is it's in the creditor's interest to get what
11 is available at this time, rather than waiting 10 years
12 hoping to get interest later on, and even though that's
13 the fact, you cannot give relief in this situation.

14 MR. HEYTENS: Well, Justice Stevens, the
15 creditor certainly does have interests. But I think the
16 reason Congress would provide for this regime is that
17 there is an important public interest at stake here,
18 too, which is that the Department of Education is
19 reinsuring all of these student loans.

20 And there is a powerful interest in ensuring
21 the integrity of the student loan system as a whole,
22 that, regardless of the decisions that an individual
23 debtor and perhaps an individual creditor are willing to
24 make in particular cases, Congress has an overriding
25 policy that student loans should not be discharged

1 unless there is a determination that this is the
2 extraordinary case, rather than the ordinary.

3 Now, there's a very practical reason why
4 this matters. There were 374,000 chapter 13 filings
5 last year. There is no such thing as a standard form
6 chapter 13 plan.

7 The logical consequences of affirming the
8 Ninth Circuit's judgment in this case is to tell every
9 single chapter 13 debtor who has a student loan debt to
10 include a provision like this in his plan, in the hopes
11 that the creditor will not object and he will be able to
12 obtain a discharge in the absence of any finding by the
13 bankruptcy court.

14 It won't just be limited to chapter 13
15 debtors, either. It will apply to any debtor who has
16 a non-dischargeable --

17 JUSTICE SCALIA: Don't bankruptcy courts
18 read the law?

19 MR. HEYTENS: Justice Scalia --

20 JUSTICE SCALIA: So you've got to assume that
21 every bankruptcy court is going to violate the
22 provisions of the statute.

23 MR. HEYTENS: Well, first and foremost,
24 Justice Scalia, the Ninth Circuit has specifically
25 forbidden bankruptcy courts from doing that on pages

1 25a --

2 JUSTICE BREYER: Oh, they may not have said it
3 right, but they -- but they -- that's a different
4 problem. But the -- the -- why doesn't the Treasury
5 just say to people: We're not going to insure your
6 loans where you don't object.

7 MR. HEYTENS: They -- the Department of
8 Education --

9 JUSTICE BREYER: All right. Then the
10 government is harmless.

11 MR. HEYTENS: Well, it's not harmless,
12 Justice Stevens -- I'm sorry, Justice Breyer, excuse
13 me -- because the question is: Who does it make sense to
14 put the onus on? Now, to your question -- the
15 bankruptcy judges can do it.

16 There were 374,000 filings last year. There
17 are less than 350 bankruptcy judges in this country.
18 That means more than 1,000 chapter 13 plans for every
19 single bankruptcy judge in the country. The idea that
20 bankruptcy judges are going to be policing every single
21 chapter 13 plan, it's just not realistic, and I don't --

22 JUSTICE SCALIA: Why, of course, they
23 are supposed to police --

24 JUSTICE KENNEDY: But the idea that they
25 have to have a charade hearing is -- is equally

1 off-putting.

2 MR. HEYTENS: I don't think it would be a
3 charade hearing, Justice Kennedy. It would be
4 consistent with the normal rules of civil litigation
5 that if a party wishes not to contest a factual issue in
6 a properly noticed hearing, they can make that choice.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Meehan.

10 ORAL ARGUMENT OF MICHAEL J. MEEHAN

11 ON BEHALF OF THE RESPONDENT

12 MR. MEEHAN: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 Last term, in Travelers, this Court held
15 that, if the plain terms of a confirmed 11 plan
16 unambiguously apply to a particular issue, they are
17 entitled to their effect. That is this case, I submit.

18 Now, the case did go on to acknowledge that
19 there can be some situations in which the finality is
20 not going to be found -- it said subject matter per se
21 is not one of those -- but that if the court's action
22 was so plainly beyond its jurisdiction as to be a
23 manifest abuse of authority -- and this was not
24 necessary to the holding, I suppose, but it was
25 described in kind of where we would be in terms of

1 exceptions -- then perhaps finality would not apply.

2 JUSTICE SCALIA: Do you acknowledge that
3 what the bankruptcy court did here was wrong? Do you
4 acknowledge that?

5 MR. MEEHAN: I acknowledge that it did
6 violate the statute. And I would --

7 JUSTICE SCALIA: Okay. And it should not
8 have done it, and future bankruptcy courts shouldn't do
9 it?

10 MR. MEEHAN: I think that --

11 JUSTICE SCALIA: It makes a big difference
12 to how I'm going to look on this case. I mean, if you --

13 MR. MEEHAN: I would agree that that is
14 correct, Your Honor. The reason I hesitate is this:
15 Mr. Heytens said that there are, on average, 1,000
16 chapter 13 plans filed per bankruptcy judge every year.
17 The bankruptcy judges do and are entitled to have
18 creditors make objections. Indeed, I think that Justice
19 Stevens was right that if a creditor and a debtor wanted
20 to come in and stipulate that there would be a discharge
21 of a portion of the student loan without a finding of
22 undue hardship, then certainly they can do so.

23 I don't --

24 JUSTICE SCALIA: Is it -- is it easy for a
25 bankruptcy judge to identify a particular debt as a

1 student loan debt? I mean, would the bankruptcy
2 filing -- filing show it -- you know, student loan debt?

3 MR. MEEHAN: As far as I know, it would.

4 JUSTICE SCALIA: It would?

5 MR. MEEHAN: And there may be circumstances
6 in which there is student loan debt which is not one of
7 the two plans that are guaranteed by the Department of
8 Education because Congress --

9 JUSTICE SCALIA: Yes.

10 MR. MEEHAN: -- has broadened it, so that may
11 be the case. But I think this case obviously was such a
12 case. And I --

13 JUSTICE GINSBURG: It was the only debt.
14 This -- there was no other debt.

15 MR. MEEHAN: It was the only debt, yes.

16 CHIEF JUSTICE ROBERTS: Did --

17 JUSTICE GINSBURG: Do --

18 CHIEF JUSTICE ROBERTS: I'm sorry.

19 JUSTICE GINSBURG: So I take it that you do
20 think the Ninth Circuit was wrong when they said:
21 bankruptcy judges, don't stand in the middle of these
22 arrangements. Because you -- your answer was you think
23 the bankruptcy judge does have the obligation to bring
24 out this requirement that -- of a hardship showing?

25 MR. MEEHAN: If I used the word

1 "obligation," perhaps I was a little imprecise. Let me
2 put it this way: Number one, I am not here to say, nor
3 have we ever said at any stage of this litigation, that
4 this plan complied with 523(a)(8). That's clear.

5 Number two, if there had been any objection
6 raised whatsoever at any time, then it would obviously
7 have been wrong for the bankruptcy judge to confirm the
8 plan.

9 JUSTICE ALITO: What if there's no
10 objection? The bankruptcy judge sees a chapter 13 plan,
11 and it -- it provides for the discharge of student debt;
12 it covers student debt. It's labeled "student debt."

13 Is it improper for the bankruptcy judge to
14 say you can't do this by this mechanism, you have to
15 start an adversary proceeding?

16 MR. MEEHAN: I do not think it is improper
17 for the bankruptcy judge to act that way, because under
18 section --

19 JUSTICE KENNEDY: I didn't hear. Proper --

20 MR. MEEHAN: I do not think -- I'm sorry. I
21 do not think it would be improper. I think, under
22 section 105 of the code, indeed, the bankruptcy court
23 has what I would analogize as sort of the All Writs Act,
24 which says that the bankruptcy court may act sua sponte
25 to enforce --

1 JUSTICE SCALIA: That -- that's not enough for
2 me, that it's not improper for him to do it. I want you
3 to say that that is what he ought to do.

4 MR. MEEHAN: Well, Justice Scalia --

5 JUSTICE SCALIA: And you're not willing to
6 say that. You're willing to say that bankruptcy courts
7 can do that if they like, but, you know, if they have a
8 kid that has a lot of bankruptcy debts, he has a soft
9 heart for student loan debts, he sees this as a student
10 loan debt, all right, let's give this kid a break. And
11 he enters -- that's okay?

12 MR. MEEHAN: No, I balance -- I balance your
13 question against Justice Stevens's hypothetical, and
14 only in the circumstance where it is clear either
15 through extensive notice, and I say waiver here, or
16 through an actual stipulation -- only in those
17 circumstances would it be appropriate for a bankruptcy
18 court to confirm a plan.

19 And even then, I submit, under section 105,
20 if the bankruptcy court said I will not do so, the
21 bankruptcy court need not do so, and in fact -- in fact,
22 the bankruptcy judge here, Judge Hollowell, when she
23 denied United relief under Rule 60, said that she as a
24 bankruptcy judge would not have done so. And that is
25 certainly within their authority to do. And Justice

1 Scalia --

2 JUSTICE SCALIA: So you would say it's wrong
3 for the bankruptcy court to do it without a waiver, and --
4 but you're leaving open if there is a clear waiver,
5 despite the fact of no adversary proceeding -- you're
6 not -- you're not necessarily willing to say that the
7 bankruptcy court can't do that?

8 MR. MEEHAN: Yes, because -- let me back up
9 and talk perhaps a little more generally.

10 I mean, in litigation in general, parties are
11 free to stipulate away or to decide not to litigate an
12 element of a claim. If they, in fact, do that, most
13 judges would say that's fine. Now, in this instance,
14 again -- and I don't want to be too repetitious -- but
15 in this instance, the bankruptcy judge does have that
16 extra "well, no," I read this as being something that's
17 too important for me to let the parties stipulate away.
18 That's the only reason that I don't go completely with
19 your hypothetical.

20 JUSTICE ALITO: Was the Ninth Circuit
21 correct in saying that an attorney can't be sanctioned
22 under the bankruptcy rules' equivalent version of Rule
23 11, for attempting to sneak through a discharge of
24 student debt in a chapter 13 petition?

25 MR. MEEHAN: Justice Alito, number one, we

1 don't have a case here of sneaking through. I do want
2 to make that point. This was clear notice.

3 Number two, I think the bankruptcy court --
4 excuse me, the Ninth Circuit was not wrong, because in
5 the Ninth Circuit, there was binding precedent, the Pardee
6 case.

7 JUSTICE ALITO: No, I understand that. But in
8 the absence of circuit -- controlling circuit precedent,
9 is it -- can an attorney be sanctioned for attempting to
10 get the discharge of student debt through a chapter 13
11 petition, knowing, as I assume every bankruptcy attorney
12 knows, that that is not the proper way to attempt to get
13 discharge of a student debt -- student loan?

14 MR. MEEHAN: I'm not able to tell you as a
15 matter of settled Ninth Circuit law that that is or is
16 not the case.

17 JUSTICE ALITO: I am not interested in what
18 Ninth Circuit law is.

19 MR. MEEHAN: Then, Justice Alito, I thought
20 that you had been asking me under Ninth Circuit law.
21 You're saying as a matter of --

22 JUSTICE ALITO: No, I'm asking you -- I'm
23 asking you, under -- under Bankruptcy Rule 9011.

24 MR. MEEHAN: My position would be that if it
25 is up front, clear notice -- in effect, a proposal that we

1 just don't have a Federal case out of an undue hardship
2 determination for \$4,000 -- that it does not violate
3 Rule 11 or 9011 to make that proposal.

4 If there is some sort of lack of candor or
5 if there's some sort of weaseling, one might say
6 perhaps. And I think it's interesting that those
7 courts which have said that this is not something that
8 bankruptcy lawyers should do have not, so far as I was
9 able to find, invoked Rule 11 or Rule 9011.

10 JUSTICE GINSBURG: But did you -- the net
11 effect of this is if you have taken a debt that is
12 non-dischargeable and put it into the category that it
13 is dischargeable unless the creditor objects.

14 MR. MEEHAN: Yes.

15 JUSTICE GINSBURG: The -- the code puts the
16 onus on the debtor to raise the hardship question.

17 Your reading is, even if the debtor is
18 silent, totally silent, says nothing about hardship,
19 unless the creditor objects, then the discharge will be
20 proper; the plan can be confirmed. So you are taking a
21 burden that Congress has put on the debtor and switching
22 it to the creditor.

23 MR. MEEHAN: Well, Justice Ginsburg, I would
24 say that it doesn't shift the burden. It -- it does
25 shift the going forward, I suppose, in the sense of

1 making an objection.

2 But let's remember that this is something
3 that would obviously have been reversed on appeal had
4 the --

5 JUSTICE BREYER: But why would it not be a
6 sanctionable matter under Rule 11? If -- the lawyer
7 knows that he is supposed to make this special claim to
8 get this kind of discharge -- he knows an ordinary claim
9 won't do it. He submits a paper that asks for the
10 ordinary discharge, but he has to sign it, and that
11 sign -- that signature, is a -- is a certification that to
12 the best of his knowledge, the claims and other legal
13 contentions are warranted by existing law.

14 So if he signs it knowing that that isn't
15 the way to do it -- indeed, there is not even an
16 argument for doing it that way, for modifying the law --
17 then why isn't that a sanctionable matter under Rule 11?

18 MR. MEEHAN: I am not here to say absolutely
19 it is not, Justice Breyer.

20 What I'm saying, I think, is that some of
21 the bankruptcy courts in some of the circuits have said,
22 at least without invoking Rule 11, that it -- that it is
23 improper. Others have not had that difficulty. I, as a
24 lawyer who has litigated for 39 years and is very
25 conscious of Rule 11, have never thought that if --

1 again, if it was something that was plain and not
2 obfuscated, that a proposal to simply omit one element
3 of a claim violated Rule 11.

4 JUSTICE BREYER: I mean, the reason I ask that
5 --

6 MR. MEEHAN: I think it's debatable --

7 JUSTICE BREYER: The reason I ask that is I
8 think the argument on the other side is that it's so
9 clear in the law that this is not the way to go about it,
10 that you have to make a separate piece of paper saying
11 you have special hardship; that that's so clear what
12 Congress wanted, that 40 years later you can come back
13 and attack it, if they didn't do it. I mean, that's
14 basically, in my mind, their argument.

15 But I think a simpler way would be to say if
16 it's that clear, if it really is that clear, the bar
17 itself will enforce the rule by not knowingly deviating
18 from the way that Congress set it out, to which there is
19 no legal objection. Now, is it really -- what do you
20 think of that?

21 MR. MEEHAN: I think that -- I think that,
22 again, in the context of what this case -- the issue of
23 this case, I think that's right.

24 I think -- and this Court said in Taylor v.
25 Freeland & Kronz that we are not going to adopt a rule

1 respecting finality that is going to take on the onus
2 of policing the bar, and noted that rule in criminal
3 bankruptcy fraud and the requirement that a petition be
4 signed and filed on a verification. And I think that's
5 -- I think that's absolutely right. I think that --

6 JUSTICE SCALIA: If that's the price of
7 your winning this case, it's clearly worth it now --
8 agreeing with Justice Breyer on that point.

9 MR. MEEHAN: You mean that the bar may have
10 further scrutiny?

11 JUSTICE SCALIA: Yes. I mean, if indeed the
12 Court would not be willing to go along with -- with your
13 assertion that you can't undo it later, once it's been
14 done, unless it is clear that it should not be done and
15 that the bankruptcy judge shouldn't do it, and that a
16 lawyer shouldn't propose it -- if that's the condition,
17 then you should accept it, right? Because you want to
18 win this case --

19 MR. MEEHAN: I would accept -- I would
20 accept --

21 JUSTICE BREYER: I wasn't making any
22 conditions.

23 MR. MEEHAN: I would --

24 (Laughter.)

25 MR. MEEHAN: I would accept that condition on

1 direct review or on a Rule 60. Or even --

2 JUSTICE KENNEDY: I was going to ask whether
3 or not in -- on the facts of this case, the client could
4 have waited until the final judgment, not appeal, but
5 then come in under Rule 60?

6 MR. MEEHAN: I think that they could have.
7 Rule 60, as it --

8 JUSTICE KENNEDY: So then the client is not
9 required to -- the creditor is not required to appeal?

10 MR. MEEHAN: Well, they take the risk,
11 Justice Kennedy, that they could fit within 60(a), (b),
12 or (c): surprise, inadvertence, mistake, excusable
13 neglect, fraud, et cetera.

14 In this instance, I think they might have
15 had a hard time, because at most stage --

16 JUSTICE KENNEDY: All right. So I don't
17 think they could have -- and of course, you don't think
18 it's void. It could come in under 60(b) if it's void,
19 but you don't think it's void.

20 MR. MEEHAN: Well, void, under those
21 circumstances, I think would throw us into the due
22 process issue and I don't think so. No, I do not think
23 so.

24 JUSTICE KENNEDY: All right. So you have to
25 show mistake or surprise, and you doubt that there was a

1 mistake or surprise here.

2 MR. MEEHAN: Yes.

3 JUSTICE KENNEDY: Let me just ask this and
4 maybe I have bankruptcy law wrong. My -- my
5 understanding is that if creditors are not listed, they
6 are not discharged, correct? I think that's right in
7 most cases. If you don't list the creditor, the
8 creditor is not discharged.

9 MR. MEEHAN: Um --

10 JUSTICE KENNEDY: I'm -- if you're having
11 problems with this --

12 MR. MEEHAN: I hesitate because rule 13 --
13 excuse me, section 1327 says the plan is binding upon
14 creditors whether or not they are listed. But generally
15 speaking that is correct.

16 JUSTICE KENNEDY: I'm just wondering,
17 doesn't it happen all the time that creditors are not
18 listed and then they come in later and say the debt is
19 not discharged? I mean, doesn't that happen all the time?

20 MR. MEEHAN: I think that does happen
21 frequently.

22 JUSTICE KENNEDY: And is -- is the rationale
23 that that -- that that discharge would be void as to
24 them, or that they are just not covered?

25 Suppose the bankruptcy judge makes a mistake

1 and lists a creditor by name as being discharged, but
2 that creditor never received notice. Is it void?

3 MR. MEEHAN: I think it is. I do think it
4 is. I mean, bottom line, about the only thing, I
5 submit --

6 JUSTICE KENNEDY: Well, is this -- is this
7 case all that different, then?

8 MR. MEEHAN: Well, in this case, the creditor
9 got fulsome notice, submitted to the jurisdiction of the
10 court, filed a proof of claim, accepted --

11 JUSTICE KENNEDY: He got notice of something
12 that was void.

13 MR. MEEHAN: No, I may be misunderstanding
14 your question. He was --

15 JUSTICE KENNEDY: I mean, that -- that --
16 that assumes that he got notice of something that was
17 legally improper.

18 MR. MEEHAN: But not void. To go -- to
19 proceed without the adversary proceeding, I submit is
20 not void, and what the Petitioners had to try to do is
21 to ask you to interpret the statute, whether it's 1328
22 or 523(a)(8), to make this some sort of a -- there's no
23 way you can touch it; if you didn't do the adversary, it
24 just didn't happen kind of a thing.

25 JUSTICE SOTOMAYOR: Could I --

1 JUSTICE GINSBURG: But it's in a category
2 that's labeled "non-dischargeable." There were other
3 items in that -- that category, so let's take it that --
4 the child support arrears --

5 MR. MEEHAN: Yes.

6 JUSTICE GINSBURG: The debtor says, look, I'll
7 pay half of what I owe, and the spouse says, I need
8 something for the children, I'll take it. And then the
9 plan is confirmed, with only half of the child support;
10 and then the caretaker spouse has a second thought and
11 says, 2 years later, I need that money, I'm going to go
12 after the debtor for the rest.

13 MR. MEEHAN: Justice Ginsburg, the child
14 support or domestic support has a number of additional
15 protections surrounding it. Number one, not only does
16 the petitioner for chapter 13 have to notify the
17 creditor of the domestic support obligation, but under
18 section 1302, the trustee has to do so. And my --

19 JUSTICE GINSBURG: But let's suppose -- this
20 is my hypothetical. It's right in there, and the -- the
21 creditor haven't gotten all the notices -- I want what I
22 can get right now. So I'll make this deal.

23 MR. MEEHAN: There are additional notices
24 that would go into your hypothetical, and I think it
25 makes a difference in this --

1 JUSTICE GINSBURG: Well, there are supposed
2 to be additional notices here. There's supposed to be a
3 summons and complaint and all that. And let's go down
4 the list of the others. How about taxes?

5 MR. MEEHAN: Well, I think that the
6 principle that we are -- that we are bringing to the
7 Court does have broad application. And I don't want to
8 -- I'd like to come back, if I get a second, to the
9 domestic --

10 JUSTICE GINSBURG: So you're saying any of
11 these things that are listed as non-dischargeable can
12 become dischargeable unless the creditor --

13 MR. MEEHAN: If the creditor --

14 JUSTICE GINSBURG: -- objects?

15 MR. MEEHAN: -- does not object and if the
16 court does not --

17 JUSTICE GINSBURG: So then, why do we have
18 this third category, then? Nothing is non-
19 dischargeable.

20 MR. MEEHAN: Well, may I submit, Justice
21 Ginsburg, that the argument proves too much, and that is
22 to say that if one can wait and make a voidance argument
23 under Rule 60(b) 6 years after the discharge and
24 12 years after the filing of the petition, and if that
25 could happen to anything, then what we have is that we may

1 as well just worry about litigating Rule 60 motions
2 whenever they come up.

3 JUSTICE SOTOMAYOR: Counsel --

4 JUSTICE SCALIA: I guess I don't understand
5 your position, because I thought you had said that this
6 should not have been discharged and now -- now you've
7 answered to Justice Ginsburg that so long as the -- as the
8 creditor appears they can all be discharged. Now, which
9 is it?

10 MR. MEEHAN: Well, Justice --

11 JUSTICE SCALIA: Even if the creditor
12 appears, it shouldn't be discharged. I thought that
13 that's what you had said before. But now you are saying
14 that so long as a creditor appears, all of these are
15 dischargeable.

16 MR. MEEHAN: What I had tried --

17 JUSTICE SCALIA: Which is it?

18 MR. MEEHAN: The position that I had tried to
19 explain -- and, again, I think it balances your point
20 with Justice Stevens's point about waiver -- is that:
21 Should? Absolutely, unless there is an affirmative
22 waiver. But let's remember that when we talk about
23 "should," I think we're talking about appellate issues.
24 We're talking about error on appeal. We're talking
25 about what ought to happen. And the reason I say that,

1 the point about the same effect occurring for taxes and
2 breaches of fiduciary duty et cetera, et cetera, proves
3 too much, is that if we are going to say that none of
4 those is finally put to rest, even though there was
5 notice, even though there was acceptance of benefits, as
6 occurred here, even though there was a submission to the
7 jurisdiction of the bankruptcy court, as occurred here
8 -- even though there was, you know, just bypassing the
9 early, if I may say "early" Rule 60 remedies -- if we
10 are going to say that none of those --

11 JUSTICE GINSBURG: But your answer to me was
12 that if the creditor doesn't object, even to a
13 non-dischargeable debt -- if the creditor doesn't
14 object, it's discharged. That's what you answered, I
15 thought.

16 MR. MEEHAN: Yes.

17 JUSTICE GINSBURG: And it doesn't matter
18 whether it's child support, taxes, or student loans,
19 right? Anything in the category -- you're saying the
20 creditor must object; otherwise it's covered by the
21 discharge.

22 MR. MEEHAN: Well, my position, I think,
23 first is, is that, as I think Justice Breyer said,
24 this is a -- this is a clear waiver, and I think the
25 Court could rule on that basis. But, number two, I think

1 if this is a judgment -- a final judgment, proper
2 notice -- we do not have a due process concern, we do not
3 have a notice issue -- and the creditor has had plenty
4 of opportunity to -- to raise the error --

5 JUSTICE KENNEDY: Well, I'm not sure there
6 was proper notice. There was not a notice that there
7 would be a contested hearing. Or that there would be an
8 adversary hearing.

9 MR. MEEHAN: Justice Kennedy, I think --

10 JUSTICE KENNEDY: I'm -- I'm not sure that
11 there was a proper notice.

12 MR. MEEHAN: I think you must look at it
13 this way: The notice that was given was for the
14 confirmation of a plan. That is the notice then that is
15 required under the bankruptcy rules, and it was noticed
16 in accordance with the bankruptcy rules.

17 Is it right to do it in a bankruptcy plan
18 confirmation? If objected to, no, it's not. If not
19 objected to, the plan says what the plan says, and the
20 notice that must be given is notice of the plan.

21 JUSTICE KENNEDY: Well, of course that's the
22 problem in the case. Sometimes we decide cases that
23 don't make a lot of difference and that once we decide
24 the rule everybody will know what the rule is. But in
25 this case, the Petitioners say that if we adopt the rule

1 that the Ninth Circuit adopted, it's going to be
2 extremely burdensome and costly on -- on municipalities,
3 on -- on those who give student loans, et cetera. And
4 that -- and that you are just creating a tremendous
5 burden on an already overburdened system.

6 MR. MEEHAN: Well, the argument that was
7 made by the Petitioner and its amici on that point, I
8 think, as -- as was pointed out in one of our amicus
9 briefs, overlooks the electronic notice, the
10 instantaneous notice, the fact that under Federal
11 regulations, which, by the way, do also require the
12 guarantee and lenders to do these things and to exercise
13 due diligence before they can get repaid --

14 JUSTICE BREYER: That's -- that's what why
15 it's a -- this is actually -- the part that is a lack of
16 understanding or a complete understanding on my part, is
17 -- is how Rule 60(b) works, because -- because it does -
18 - the law does have the three categories -- the three
19 categories that your friend described. And this third
20 category is supposed to prevent a discharge even where
21 the creditor doesn't object, unless certain things are
22 filled out, and they weren't.

23 So the three are there, made an objection.
24 If at any point the creditor had come in and objected,
25 not to the discharge but, you know, just said, hey, it's

1 the wrong form; you've got it wrong. It's like an error -
2 - they win.

3 MR. MEEHAN: They win.

4 JUSTICE BREYER: But -- but they waited a
5 very long time.

6 MR. MEEHAN: They did.

7 JUSTICE BREYER: So now they have to come in,
8 I guess, under 60(b), and it must be either 60(b)(4) or
9 60(b)(6) --

10 MR. MEEHAN: And it was only --

11 JUSTICE BREYER: -- and I take it there's a
12 time limit on that, and the time limit is "a reasonable
13 time." Is that how we are supposed to do, that we have
14 to say they didn't file -- in fact they never filed
15 60 -- it's your side that filed the 60(b)(4), I
16 gather. So this is good and mixed up.

17 MR. MEEHAN: They responded with a 60(b)(4).

18 JUSTICE BREYER: It's good and mixed up. So
19 what is -- how is it supposed to work?

20 MR. MEEHAN: Well, the crux of it is, is
21 that there are other subparts of Rule 60, of course,
22 as -- as we all know, that give broader potential relief,
23 but they have time limits on them.

24 And there is also the --

25 JUSTICE BREYER: Yes.

1 MR. MEEHAN: -- provision in section 1330
2 that allows revocation for fraud, but also has a time
3 limit upon it. But Rule 60(b)(4) does not have that
4 time limit on it, but Rule 60(b)(4), which is the
5 only basis upon which Petitioners sought relief in the
6 bankruptcy court -- and they made that very clear in the
7 district court -- the only basis would be if it is void,
8 and that means one of two things: Number one is the due
9 process issue, which we haven't spent a whole lot of
10 time taking about, but I submit is clearly not viable
11 because they had actual notice, and this Court has held,
12 and so have --

13 JUSTICE GINSBURG: But that's not -- their
14 position is that 528(a)(8) -- or 523(a)(8) makes this --
15 it puts it outside the discharge order. The discharge
16 order does not cover this kind of debt. It doesn't
17 discharge student -- student loans absent a hardship
18 determination.

19 So, what they are saying is the discharge
20 discharged other things, but it could not discharge this
21 particular debt, so it's not discharged.

22 MR. MEEHAN: To be precise, if I may,
23 1328(a) says, "The discharge shall not" and then defines
24 the categories. And as Chief Justice Roberts said --

25 JUSTICE SOTOMAYOR: Counsel, may I interrupt

1 for just one moment, because I -- there is something
2 niggling at me that I do need an answer to before you sit
3 down --

4 JUSTICE GINSBURG: And I'd like him to
5 answer the question that I asked him first.

6 JUSTICE SOTOMAYOR: I'm sorry.

7 MR. MEEHAN: 1328 is the operative statute
8 for the discharge of a chapter 13, and it says "shall
9 discharge" except for those categories that are listed.

10 The argument has been made that there is
11 some significance to the 523, which says "does not
12 discharge." But as -- as the Chief Justice observed,
13 that applies only to the subpart (b)'s in 1328, which is
14 discharges even if the plan has not been fully performed
15 by the debtor. And the -- and this is not that
16 circumstance.

17 So the "does not" language is simply not
18 applicable to our case, because it is not a 1328(b)
19 discharge that we are involved with.

20 And so, Justice Ginsburg, I -- I think your
21 question, again, comes back to an argument of law, of
22 procedure that would be dealt with on any appeal or
23 perhaps on the -- on the more expansive subparts of Rule
24 60 if they had been properly brought. But I do not
25 see -- I have always had a hard time grappling with the

1 argument that somehow the fact that a statutory
2 requirement was not followed falls into the category of
3 acting so plainly beyond the court's jurisdiction that
4 its action was a manifest abuse of discretion, and I
5 think that's what you would have to conclude --

6 JUSTICE KENNEDY: On the practicality point,
7 you talk about electronic notice. I suppose that
8 that -- that the creditors for student loans could have
9 the automatic electronic thing where they say, we insist
10 on a hardship hearing. But that doesn't solve the
11 problem, because they'd then have to go back and see
12 whether or not there was a hardship hearing in the case.

13 So that -- that means they have -- they
14 have -- they have to -- they have to inquire into every
15 case whether or not the proper hearing has been made.

16 MR. MEEHAN: Well, Justice Kennedy, they
17 have to inquire, in any event, because the Federal
18 regulations require them to, number one, determine that
19 there was a filing; and, number two, even before there is
20 an adversary proceeding, to make its own assessment, the
21 lender or the guarantee -- the guarantor to make its own
22 assessment whether it's likely that there would be an
23 undue hardship in the given case, and there are other
24 circumstances which are set forth in the -- in an amicus
25 brief --

1 JUSTICE KENNEDY: Oh, you mean they can't ask
2 for a hearing unless there is a reasonable ground to
3 believe that there is no undue hardship -- can't even ask?

4 MR. MEEHAN: No, I don't mean to say that.
5 What I mean to say is that -- is that I submit that the
6 hardship argument is a little bit overblown because they
7 have the obligations -- even though they say they don't
8 have even an obligation to open the envelope, they
9 have an obligation to look at the petition, to see what
10 the situation is, to see whether there's likely an
11 undue hardship.

12 They don't have to forbear from making an
13 objection to a plan unless they have a basis to
14 determine that there was undue hardship.

15 JUSTICE SOTOMAYOR: Counsel, if they had
16 come to the court at the time the discharge order was
17 about to be entered and said we object, there has been
18 no undue hardship found, would the court have been
19 obligated to alter the plan at that point? The
20 confirmed plan proposed a discharge, but at the time
21 that the discharge order was being entered, there's an
22 objection.

23 MR. MEEHAN: Justice --

24 JUSTICE SOTOMAYOR: What would have
25 happened?

1 MR. MEEHAN: Justice Sotomayor, I think that
2 the result would not change, because at that point we
3 have a long final plan, and we do have -- you know, the
4 issue that is real important that we don't spend a lot
5 of time talking about because it's sort of ingrained in us
6 is finality. There are chapter 13 --

7 JUSTICE SOTOMAYOR: So that's the question.
8 What's final? Is it the plan that's final or is it the
9 discharge order that's final?

10 MR. MEEHAN: It's the plan, I submit,
11 because the plan is what determines what's going to
12 happen. The discharge is like giving the release after
13 the plan has been fully --

14 JUSTICE SOTOMAYOR: Well, but -- but here we
15 have a discharge order that on its face appeared to be
16 proper. It excepted out the student loan from the
17 discharge.

18 MR. MEEHAN: The original --

19 JUSTICE SOTOMAYOR: And your other -- the
20 other side has sort of given up on that as a --

21 MR. MEEHAN: They have.

22 JUSTICE SOTOMAYOR: -- as a point, because
23 that, interestingly enough to me, would have been the
24 stronger due process argument, whether the Ninth Circuit
25 and the district court could have amended that discharge

1 order illegally to except something it didn't except,
2 that was -- shouldn't have been excepted to start with.
3 But that argument seems to have been put aside.

4 MR. MEEHAN: It definitely was put aside.
5 It was not raised.

6 JUSTICE SOTOMAYOR: But -- so, it might have
7 been the stronger due process argument. But having put
8 that aside, then your belief is that there is no point
9 in time between the confirmation in the plan and the
10 discharge order in which a party can object for -- to an
11 error --

12 MR. MEEHAN: Well, of course --

13 JUSTICE SOTOMAYOR: -- except as permitted by
14 60(b) and 1330?

15 MR. MEEHAN: Well -- and as permitted by just
16 simply appealing the order. They could have done that.
17 They could have appealed. They could have done 60 --

18 JUSTICE SOTOMAYOR: Which order could they
19 have -- they could not have appealed --

20 MR. MEEHAN: The confirmation -- the
21 confirmation -- the -- the order confirming the plan.

22 JUSTICE SOTOMAYOR: They could not have
23 appealed the discharge order?

24 MR. MEEHAN: I can't answer that one. I
25 don't know that they could have appealed it.

1 JUSTICE SOTOMAYOR: Well, going back to
2 Justice Kennedy's point, I mean, some people are listed
3 in discharge orders that were never discussed in the
4 plan, or otherwise some people are excluded that should
5 have been included. Those people can't appeal?

6 MR. MEEHAN: Well, I am not prepared to say
7 that they cannot. I certainly, if I were representing
8 them, would try -- try it, but it's just something that
9 I have not seen, and in working up this case, I am not
10 familiar with it, but it may very well be an appealable
11 order.

12 My point is simply that, the bottom line, we
13 have something here that is very final; there are
14 literally billions of dollars of disbursements made by
15 chapter 13 trustees in reliance on the these plans; and
16 it would be very, very upsetting to the bankruptcy
17 jurisdiction, exceedingly upsetting, to make a very broad
18 exception to finality.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Wanslee, you have 3 minutes remaining.

21 REBUTTAL ARGUMENT OF MADELEINE C. WANSLEE

22 ON BEHALF OF THE PETITIONER

23 MS. WANSLEE: Briefly, just on this last
24 point, no upset whatsoever to bring this matter back
25 before the bankruptcy court. Mr. Espinosa is still free

1 to come back to bankruptcy court and argue that he has
2 got an undue hardship.

3 The distributions that are made through a
4 chapter 13 plan are a matter of statutory right, every
5 single adversary -- every single plan that had this
6 illegal plan language could come back and it would not
7 upset anything, nothing would change, no distribution
8 whatsoever. I think that's an important point.

9 And to be clear, the chief judge's -- Chief
10 Justice's question, 523 by its terms brings in 1328(b),
11 which is a different kind of discharge.

12 CHIEF JUSTICE ROBERTS: Right.

13 MS. WANSLEE: But 1328(a)(2) specifically
14 then incorporates 523. It is applicable. It is in play.

15 CHIEF JUSTICE ROBERTS: Well, I -- my -- I'm
16 not -- I'm not sure it does. It refers back to 523(a)
17 to define the debt. I don't think it incorporates
18 all -- all of 523. It's simply referring to the kind of
19 debt that should not be discharged.

20 MS. WANSLEE: Certainly, 1328(a)(2) provides
21 the laundry list of exceptions to discharge. And that's
22 the point, is that student loans are within that 19
23 categories of debts that Congress said are excepted from
24 discharge.

25 In this case, there was really no basis to

1 appeal the discharge order. It was proper. It was
2 appropriate. It excepted the student debt, and that's
3 found at page 46 of the record, Your Honor.

4 In terms of what happened when the matter was
5 on its limited remand, it was a very limited remand,
6 and this issue was already teed up with the Ninth Circuit.

7 JUSTICE SOTOMAYOR: Could you go back to the
8 fundamental part of my question to your adversary? The
9 plan order included a discharge of the student
10 interest -- of the interest on the student loan.

11 MS. WANSLEE: It did not so specifically
12 state, Your Honor.

13 JUSTICE SOTOMAYOR: It just proposed a
14 discharge of a certain amount lesser than the principal
15 plus interest.

16 MS. WANSLEE: It had a predicate of
17 discharge of interest, no predicate of undue hardship.

18 JUSTICE SOTOMAYOR: Right. That's the plan.
19 And then you have a discharge order. And the two are
20 not congruent. So what's the final judgment?

21 MS. WANSLEE: The final judgment, Your
22 Honor, is the effect of 1328. Think of bankruptcy as --

23 JUSTICE SOTOMAYOR: No, no. Is it the
24 confirmation order or is it the discharge order? Are they
25 different judgments? What -- what controls? And what

1 were you --

2 MS. WANSLEE: The controlling order here is
3 the discharge order. And the reason why is because
4 bankruptcy is a continuum of events all leading to the
5 discharge. The discharge is the goal. That's what the
6 debtor wants. But only Congress can tell a debtor what
7 he gets to discharge.

8 JUSTICE KENNEDY: Well, what does the notice
9 of -- the time for a notice of appeal run from?

10 MS. WANSLEE: Pardon me?

11 JUSTICE KENNEDY: What does the time for the
12 notice of appeal run from -- the discharge order?

13 MS. WANSLEE: Well, for the plan itself,
14 from the plan entry. Now, once again, we never got a
15 copy of the plan entry.

16 JUSTICE KENNEDY: Now -- now, just in the --
17 in the general run of the bankruptcy, how do you calculate
18 when you have to file your appeal -- from the time of
19 the discharge order?

20 MS. WANSLEE: Well, if we were going to
21 appeal from -- from the plan, it would be the plan or --
22 but there's no reason to appeal from the plan, because
23 once again, 1328 excepts our debt specifically from
24 discharge through the plan.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 MS. WANSLEE: Thank you, Your Honor.

3 (Whereupon, at 12:06 p.m., the case in the

4 above-entitled matter was submitted.)

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