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4	On behalf of the Petitioner
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6	On behalf of the United States, as amicus
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8	MICHAEL J. MEEHAN, ESQ.
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P R O C E E D I N G S

(11:04 a.m.)

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

Ms. Wanslee.

ORAL ARGUMENT OF MADELEINE C. WANSLEE

ON BEHALF OF THE PETITIONER

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

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

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 does 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 errors 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
7 case.

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

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

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

1 strongest precedent? That's all I'm asking.

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

5 JUSTICE BREYER: All right.

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

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

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

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

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

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

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

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

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

1 JUSTICE STEVENS: Well, would the case be
2 different if there had been such an allegation in the
3 petition?

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

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

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

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

14 MS. WANSLEE: I apologize.

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

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

21 JUSTICE STEVENS: Why is it a harder case?

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

1 JUSTICE STEVENS: And I say it's supported
2 by an affidavit.

3 MS. WANSLEE: Correct, Your Honor.

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

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

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

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

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

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

22 JUSTICE STEVENS: Yes.

23 MS. WANSLEE: -- much less proof.

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

1 and the same -- the same response by the -- by the
2 company?

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

4 And I would -- I would note --

5 JUSTICE KENNEDY: Well, what -- what if
6 the creditor is sitting in the courtroom and has
7 actually made arguments and appeared in some other
8 aspects of the case? Then they come to the student loan
9 and the -- and it's ordered discharged without any
10 hearing, with the creditor sitting there. The case
11 goes to judgment, there's a final decree of discharge.
12 Can the debtor -- pardon me. Can the creditor come in
13 10 years later and say, oh, this is void?

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

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

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

1 JUSTICE KENNEDY: No, no. No, no, no. My
2 hypothetical is that there is -- it has commenced.
3 It's a big hearing. There's lots of issues. The
4 student loan creditor is there, actually participates in
5 some of the hearings on other issues. Then, while they
6 -- while they are still there, still represented, the
7 judge says: Now, I'm going to discharge the student
8 debt; I'm not going to have any hearing. The creditor
9 does nothing. Can the creditor come in 10 years later
10 and says this is a void judgment?

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

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

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

21 JUSTICE KENNEDY: What about my --

22 MS. WANSLEE: It --

23 JUSTICE KENNEDY: What about my question?

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

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

5 JUSTICE KENNEDY: I think --

6 MS. WANSLEE: -- Congress --

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

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

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

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

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

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

1 section 523."

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

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

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

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

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

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

1 three, did they have subject matter jurisdiction? Which
2 we started by saying was vague.

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

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

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

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

24 JUSTICE GINSBURG: But why -- why should it
25 be void, looking at 1327? We have a confirmed plan.

1 You -- you have -- 1328 does include -- except 523(a),
2 as you pointed out. But 1327 says "Effect of
3 confirmation," and that says, "The provisions of a
4 confirmed plan" -- the provision here is you get 13,000,
5 not 17,000 -- "bind the debtor and each creditor,
6 whether or not the claim of such creditor is provided
7 for by the plan" -- which it wasn't in full here -- "and
8 whether or not such creditor has objected to or has
9 accepted or rejected the plan."

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

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

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

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

1 favor undermines the will of Congress in this regard.

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

4 MS. WANSLEE: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Heytens.

6 ORAL ARGUMENT OF TOBY J. HEYTENS

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

24 MR. HEYTENS: Excuse me, Justice Scalia. I
25 am referring to the comma in -- in 1328(a), the last

1 comma right before the (1), "except any debt."

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

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

22 MR. HEYTENS: Well, Justice --

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

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

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

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

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

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

25 MR. HEYTENS: That is true with regard to

1 student loan debt, Justice --

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

8 MR. HEYTENS: That was --

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

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

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

22 MR. HEYTENS: The answer is --

23 JUSTICE BREYER: Is it the case if somebody
24 feels the conditions were not met with in the 13
25 categories that -- or 14 -- that follow the comma, he --

1 you feel that they were met. The other side says, they
2 weren't met. I sent him a notice, but it was in a
3 balloon, okay. You know, was the notice a real notice,
4 wasn't it? People argue about that.

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

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

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

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

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

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

23 What page in your brief?

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

1 The language of 523(c), which I also have, I
2 can read it. It states "the debtor shall be
3 discharged from a debt of a kind specified in paragraphs
4 (2), (4), or (6) of subparagraph (a) ... unless, on
5 request of the creditor to whom such debt is owed, and
6 after notice and a hearing, the court determines" that
7 such debt is to be excepted under (2), (4), or (6).

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

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

13 MR. HEYTENS: Sure.

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

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

1 creditor can certainly stipulate to the underlying facts
2 that the debtor alleges in support --

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

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

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

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

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

24 MR. HEYTENS: Justice Ginsburg, you don't
25 necessarily need to have the full adversary hearing.

1 What you have to have is what Congress provided for in
2 523(a)(8). You have to have an undue hardship
3 determination that is made by the bankruptcy court.

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

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

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

21 And there is a powerful interest in ensuring
22 the integrity of the student loan system as a whole,
23 that, regardless of the decisions that an individual
24 debtor and perhaps an individual creditor are willing to
25 make in particular cases, Congress has an overriding

1 policy that student loans should not be discharged
2 unless there is a determination that this is the
3 extraordinary case, rather than the ordinary.

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

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

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

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

20 MR. HEYTENS: Justice Scalia --

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

24 MR. HEYTENS: Well, first and foremost,
25 Justice Scalia, the Ninth Circuit has specifically

1 forbidden bankruptcy courts from doing that on pages
2 25a --

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

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

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

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

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

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

25 JUSTICE KENNEDY: But the idea that they

1 have to have a charade hearing is -- is equally
2 off-putting.

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

8 Thank you.

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

11 ORAL ARGUMENT OF MICHAEL J. MEEHAN

12 ON BEHALF OF THE RESPONDENT

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

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

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

1 described in kind of where we would be in terms of
2 exceptions -- then perhaps finality would not apply.

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

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

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

11 MR. MEEHAN: I think that --

12 JUSTICE SCALIA: It makes a big difference
13 to how I'm going to look on this case. I mean, if you -
14 -

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

25 I don't --

1 JUSTICE SCALIA: Is it -- is it easy for a
2 bankruptcy judge to identify a particular debt as a
3 student loan debt? I mean, would the bankruptcy
4 filing -- filing show it -- you know, student loan debt?

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

6 JUSTICE SCALIA: It would?

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

11 JUSTICE SCALIA: Yes.

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

15 JUSTICE GINSBURG: It was the only debt.
16 This -- there was no other debt.

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

18 CHIEF JUSTICE ROBERTS: Did --

19 JUSTICE GINSBURG: Do --

20 CHIEF JUSTICE ROBERTS: I'm sorry.

21 JUSTICE GINSBURG: So I take it that you do
22 think the Ninth Circuit was wrong when they said:
23 Bankruptcy judges, don't stand in the middle of these
24 Arrangements. Because you -- your answer was you think
25 the bankruptcy judge does have the obligation to bring

1 out this requirement that -- of a hardship showing?

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

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

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

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

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

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

22 MR. MEEHAN: I do not think -- I'm sorry. I
23 do not think it would be improper. I think, under
24 section 105 of the code, indeed, the bankruptcy court
25 has what I would analogize as sort of the All Writs Act,

1 which says that the bankruptcy court may act sua sponte
2 to enforce --

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

6 MR. MEEHAN: Well, Justice Scalia --

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

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

21 And even then, I submit, under section 105,
22 if the bankruptcy court said I will not do so, the
23 bankruptcy court need not do so, and in fact -- in fact,
24 the bankruptcy judge here, Judge Hollowell, when she
25 denied United relief under Rule 16, said that she as a

1 bankruptcy judge would not have done so. And that is
2 certainly within their authority to do. And Justice
3 Scalia --

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

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

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

22 JUSTICE ALITO: Was the Ninth Circuit
23 correct in saying that an attorney can't be sanctioned
24 under the bankruptcy rules' equivalent version of Rule
25 11, for attempting to sneak through a discharge of

1 student debt in a chapter 13 petition?

2 MR. MEEHAN: Justice Alito, number one, we
3 don't have a case here of sneaking through. I do want
4 to make that point. This was clear notice.

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

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

17 MR. MEEHAN: I'm not able to tell you as a
18 matter of subtle Ninth Circuit law that that is or is
19 not the case.

20 JUSTICE ALITO: I am not interested in what
21 Ninth Circuit law is.

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

25 JUSTICE ALITO: No, I'm asking you -- I'm

1 asking you, under -- under Bankruptcy Rule 9011.

2 MR. MEEHAN: My position would be that if it
3 is up front, clear notice -- in effect, a proposal that
4 we just don't have a Federal case out of an undue
5 hardship determination for \$4,000 -- that it does not
6 violate Rule 11 or 9011 to make that proposal.

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

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

17 MR. MEEHAN: Yes.

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

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

1 MR. MEEHAN: Well, Justice Ginsburg, I would
2 say that it doesn't shift the burden. It -- it does
3 shift the going forward, I suppose, in the sense of
4 making an objection.

5 But let's remember that this is something
6 that would obviously have been reversed on appeal had
7 the --

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

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

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

23 What I'm saying, I think, is that some of
24 the bankruptcy courts in some of the circuits have said,
25 at least without invoking Rule 11, that it -- that it is

1 improper. Others have not had that difficulty. I, as a
2 lawyer who has litigated for 39 years and is very
3 conscious of Rule 11, have never thought that if --
4 again, if it was something that was plain and not
5 obfuscated, that a proposal to simply omit one element
6 of a claim violated Rule 11.

7 JUSTICE BREYER: I mean, the reason I ask
8 that --

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

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

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

24 MR. MEEHAN: I think that -- I think that,
25 again, in the context of what this case -- the issue of

1 this case, I think that's right.

2 I think -- and this Court said in Taylor v.
3 Freeland & Kronz that we are not going to adopt a rule
4 respecting finality that is going to take out the onus
5 of policing the bar, and noted that rule in criminal
6 bankruptcy fraud and the requirement that a petition be
7 signed and filed on a verification. And I think that's
8 -- I think that's absolutely right. I think that --

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

12 MR. MEEHAN: You mean that the bar may have
13 further scrutiny?

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

22 MR. MEEHAN: I would accept -- I would
23 accept --

24 JUSTICE SCALIA: -- any conditions.

25 MR. MEEHAN: I would --

1 (Laughter.)

2 MR. MEEHAN: I would accept that condition
3 on direct review or on a Rule 60. Or even --

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

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

10 JUSTICE KENNEDY: So then the client is not
11 required to -- the creditor is not required to appeal?

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

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

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

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

1 JUSTICE KENNEDY: All right. So you have to
2 show mistake or surprise, and you doubt that there was a
3 mistake or surprise here.

4 MR. MEEHAN: Yes.

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

11 MR. MEEHAN: Um --

12 JUSTICE KENNEDY: I'm -- if you're having
13 problems with this --

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

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

23 MR. MEEHAN: I think that does happen
24 frequently.

25 JUSTICE KENNEDY: And is -- is the rationale

1 that that -- that that discharge would be void as to
2 them, or that they are just not covered?

3 Suppose the bankruptcy judge makes a mistake
4 and lists a creditor by name as being discharged, but
5 that creditor never received notice. Is it void?

6 MR. MEEHAN: I think it is. I do think it
7 is. I mean, bottom line, about the only thing, I
8 submit --

9 JUSTICE KENNEDY: Well, is this -- is this
10 case all that different, then?

11 MR. MEEHAN: Well, in this case, the
12 creditor got fulsome notice, submitted to the
13 jurisdiction of the court, filed a proof of claim,
14 accepted --

15 JUSTICE KENNEDY: He got notice of something
16 that was void.

17 MR. MEEHAN: No, I may be misunderstanding
18 your question. He was --

19 JUSTICE KENNEDY: I mean, that -- that --
20 that assumes that he got notice of something that was
21 legally improper.

22 MR. MEEHAN: But not void. To go -- to
23 proceed without the adversary proceeding, I submit is
24 not void, and what the Petitioners had to try to do is
25 to ask you to interpret the statute, whether it's 1328

1 or 523(a)(8), to make this some sort of a -- there's no
2 way you can touch it; if you didn't do the adversary, it
3 just didn't happen kind of a thing.

4 JUSTICE SOTOMAYOR: Could I --

5 JUSTICE GINSBURG: But it's in a category
6 that's labeled "non-dischargeable." There were other
7 items in that -- that category, so let's take it that --
8 the child support arrears --

9 MR. MEEHAN: Yes.

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

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

23 JUSTICE GINSBURG: But let's suppose -- this
24 is my hypothetical. It's right in there, and the -- the
25 creditor haven't gotten all the notices -- I want what I

1 can get right now. So I'll make this deal.

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

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

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

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

17 MR. MEEHAN: If the creditor --

18 JUSTICE GINSBURG: -- objects?

19 MR. MEEHAN: -- does not object and if the
20 court does not --

21 JUSTICE GINSBURG: So then, why do we have
22 this third category, then? Nothing is non-
23 dischargeable.

24 MR. MEEHAN: Well, may I submit, Justice
25 Ginsburg, that the argument proves too much, and that is

1 to say that if one can wait and make a voidance argument
2 under Rule 60(b) 6 years after the discharge and
3 12 years after the filing of the petition, and if that
4 could happen to anything, then what we have is that we
5 may as well just worry about litigating Rule 60 motions
6 whenever they come up.

7 JUSTICE SOTOMAYOR: Counsel --

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

14 MR. MEEHAN: Well, Justice --

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

20 MR. MEEHAN: What had I tried --

21 JUSTICE SCALIA: Which is it?

22 MR. MEEHAN: The position that I had tried
23 to explain -- and, again, I think it balances your point
24 with Justice Stevens's point about waiver -- is that:
25 Should? Absolutely, unless there is an affirmative

1 waiver. But let's remember that when we talk about
2 "should," I think we're talking about appellate issues.
3 We're talking about error on appeal. We're talking
4 about what ought to happen. And the reason I say that,
5 the point about the same effect accounting for taxes and
6 breaches of fiduciary duty et cetera, et cetera, proves
7 too much, is that if we are going to say that none of
8 those is finally put to rest, even though there was
9 notice, even though there was acceptance of benefits, as
10 occurred here, even though there was a submission to the
11 jurisdiction of the bankruptcy court, as occurred here
12 -- even though there was, you know, just bypassing the
13 early, if I may say "early" Rule 60 remedies -- if we
14 are going to say that none of those --

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

20 MR. MEEHAN: Yes.

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

1 MR. MEEHAN: Well, my position, I think,
2 first is, is that, as I think Justice Breyer said,
3 this is a -- this is a clear waiver, and I think the
4 Court could rule on that basis. But, number two, I
5 think if this is a judgment -- a final judgment, proper
6 notice -- we do not have a due process concern, we do
7 not have a notice issue -- and the creditor has had
8 plenty of opportunity to -- to raise the error --

9 JUSTICE KENNEDY: Well, I'm not sure there
10 was proper notice. There was not a notice that there
11 would be a contested hearing. Or that there would be an
12 adversary hearing.

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

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

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

21 Is it right to do it in a bankruptcy plan
22 confirmation? If objected to, no, it's not. If not
23 objected to, the plan says what the plan says, and the
24 notice that must be given is notice of the plan.

25 JUSTICE KENNEDY: Well, of course that's the

1 problem in the case. Sometimes we decide cases that
2 don't make a lot of difference and that once we decide
3 the rule everybody will know what the rule is. But in
4 this case, the Petitioners say that if we adopt the rule
5 that the Ninth Circuit adopted, it's going to be
6 extremely burdensome and costly on -- on municipalities,
7 on -- on those who give student loans, et cetera. And
8 that -- and that you are just creating a tremendous
9 burden on an already overburdened system.

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

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

1 filled out, and they weren't.

2 So the three are there, made an objection.

3 If at any point the creditor had come in and objected,

4 not to the discharge but, you know, just said, hey, it's

5 the wrong form; you've got it wrong. It's like an error

6 -- they win.

7 MR. MEEHAN: They win.

8 JUSTICE BREYER: But -- but they waited a

9 very long time.

10 MR. MEEHAN: They did.

11 JUSTICE BREYER: So now they have to come

12 in, I guess, under 60(b), and it must be either 60(b)(4)

13 or 60(b)(6) --

14 MR. MEEHAN: And it was only --

15 JUSTICE BREYER: -- and I take it there's a

16 time limit on that, and the time limit is "a reasonable

17 time." Is that how we are supposed to do, that we have

18 to say they didn't file -- in fact they never filed

19 60 -- it's your side that filed the 60(b)(4), I

20 gather. So this is good and mixed up.

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

22 JUSTICE BREYER: It's good and mixed up. So

23 what is -- how is it supposed to work?

24 MR. MEEHAN: Well, the crux of it is, is

25 that there are other subparts of Rule 60, of course,

1 as -- as we all know, that give broader potential
2 relief, but they have time limits on them.

3 And there is also the --

4 JUSTICE BREYER: Yes.

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

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

23 So, what they are saying is the discharge
24 discharged other things, but it could not discharge this
25 particular debt, so it's not discharged.

1 MR. MEEHAN: To be precise, if I may,
2 1328(a) says, "The discharge shall not" and then defines
3 the categories. And as Chief Justice Roberts said --

4 JUSTICE SOTOMAYOR: Counsel, may I interrupt
5 for just one moment, because I -- there is something
6 niggling at me that I do need an answer to before you
7 sit down --

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

10 JUSTICE SOTOMAYOR: I'm sorry.

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

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

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

24 And so, Justice Ginsburg, I -- I think your
25 question, again, comes back to an argument of law, of

1 procedure that would be dealt with on any appeal or
2 perhaps on the -- on the more expansive subparts of Rule
3 60 if they had been properly brought. But I do not
4 see -- I have always had a hard time grappling with the
5 argument that somehow the fact that a statutory
6 requirement was not followed falls into the category of
7 acting so plainly beyond the court's jurisdiction that
8 its action was a manifest abuse of discretion, and I
9 think that's what you would have to conclude --

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

17 So that -- that means they have -- they
18 have -- they have to -- they have to inquire into every
19 case whether or not the proper hearing has been made.

20 MR. MEEHAN: Well, Justice Kennedy, they
21 have to inquire, in any event, because the Federal
22 regulations require them to, number one, determine that
23 there was a filing; and, number two, even before there
24 is an adversary proceeding, to make its own assessment,
25 the lender or the guarantee -- the guarantor to make its

1 own assessment whether it's likely that there would be
2 an undue hardship in the given case, and there are other
3 circumstances which are set forth in the -- in an amicus
4 brief --

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

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

17 They don't have to forbear from making an
18 objection to a plan unless they have a basis to
19 determine that there was undue hardship.

20 JUSTICE SOTOMAYOR: Counsel, if they had
21 come to the court at the time the discharge order was
22 about to be entered and said we object, there has been
23 no undue hardship found, would the court have been
24 obligated to alter the plan at that point? The
25 confirmed plan proposed a discharge, but at the time

1 that the discharge order was being entered, there's an
2 objection.

3 MR. MEEHAN: Justice --

4 JUSTICE SOTOMAYOR: What would have
5 happened?

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

12 JUSTICE SOTOMAYOR: So that's the question.
13 What's final? Is it the plan that's final or is it the
14 discharge order that's final?

15 MR. MEEHAN: It's the plan, I submit,
16 because the plan is what determines what's going to
17 happen. The discharge is like giving the release after
18 the plan has been fully --

19 JUSTICE SOTOMAYOR: Well, but -- but here we
20 have a discharge order that on its face appeared to be
21 proper. It excepted out the student loan from the
22 discharge.

23 MR. MEEHAN: The original --

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

1 MR. MEEHAN: They have.

2 JUSTICE SOTOMAYOR: -- as a point, because
3 that, interestingly enough to me, would have been the
4 stronger due process argument, whether the Ninth Circuit
5 and the district court could have amended that discharge
6 order illegally to except something it didn't except,
7 that was -- shouldn't have been excepted to start with.
8 But that argument seems to have been put aside.

9 MR. MEEHAN: It definitely was put aside.
10 It was not raised.

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

17 MR. MEEHAN: Well, of course --

18 JUSTICE SOTOMAYOR: -- except as permitted by
19 60(b) and 1330?

20 MR. MEEHAN: Well -- and as permitted by
21 just simply appealing the order. They could have done
22 that. They could have appealed. They could have done
23 60 --

24 JUSTICE SOTOMAYOR: Which order could they
25 have -- they could not have appealed --

1 MR. MEEHAN: The confirmation -- the
2 confirmation -- the -- the order confirming the plan.

3 JUSTICE SOTOMAYOR: They could not have
4 appealed the discharge order?

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

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

12 MR. MEEHAN: Well, I am not prepared to say
13 that they cannot. I certainly, if I were representing
14 them, would try -- try it, but it's just something that
15 I have not seen, and in working up this case, I am not
16 familiar with it, but it may very well be an appealable
17 order.

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Wanslee, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF MADELEINE C. WANSLEE

3 ON BEHALF OF THE PETITIONER

4 MS. WANSLEE: Briefly, just on this last
5 point, no upset whatsoever to bring this matter back
6 before the bankruptcy court. Mr. Espinosa is still free
7 to come back to bankruptcy court and argue that he has
8 got an undue hardship.

9 The distributions that are made through a
10 chapter 13 plan or a matter of statutory right, every
11 single adversary -- every single plan that had this
12 illegal plan language could come back and it would not
13 upset anything, nothing would change, no distribution
14 whatsoever. I think that's an important point.

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

18 CHIEF JUSTICE ROBERTS: Right.

19 MS. WANSLEE: But 1328(a)(2) specifically
20 then incorporates 523. It is applicable. It is in
21 play.

22 CHIEF JUSTICE ROBERTS: Well, I -- my -- I'm
23 not -- I'm not sure it does. It refers back to 523(a)
24 to define the debt. I don't think it incorporates
25 all -- all of 523. It's simply referring to the kind of

1 debt that should not be discharged.

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

7 In this case, there was really no basis to
8 appeal the discharge order. It was proper. It was
9 appropriate. It excepted the student debt, and that's
10 found at page 46 of the record, Your Honor.

11 In terms what happened when the matter was
12 on its limited remand, it was a very limited remand,
13 and this issue was already teed up with the Ninth
14 Circuit.

15 JUSTICE SOTOMAYOR: Could you go back to the
16 fundamental part of my question to your adversary? The
17 plan order included a discharge of the student
18 interest -- of the interest on the student loan.

19 MS. WANSLEE: It did not so specifically
20 state, Your Honor.

21 JUSTICE SOTOMAYOR: It just proposed a
22 discharge of a certain amount lesser than the principal
23 plus interest.

24 MS. WANSLEE: It had a predicate of
25 discharge of interest, no predicate of undue hardship.

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

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

6 JUSTICE SOTOMAYOR: No, no. Is it the
7 confirmation order or is it the discharge order? Are
8 they different judgments? What -- what controls? And
9 what were you --

10 MS. WANSLEE: The controlling order here is
11 the discharge order. And the reason why is because
12 bankruptcy is a continuum of events all leading to the
13 discharge. The discharge is the goal. That's what the
14 debtor wants. But only Congress can tell a debtor what
15 he gets to discharge.

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

18 MS. WANSLEE: Pardon me?

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

21 MS. WANSLEE: Well, for the plan itself,
22 from the plan entry. Now, once again, we never got a
23 copy of the plan entry.

24 JUSTICE KENNEDY: Now -- now, just in the --
25 in the general run of the bankruptcy, how do you

1 calculate when you have to file your appeal -- from the
2 time of the discharge order?

3 MS. WANSLEE: Well, if we were going to
4 appeal from -- from the plan, it would be the plan or --
5 but there's no reason to appeal from the plan, because
6 once again, 1328 excepts our debt specifically from
7 discharge through the plan.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 The case is submitted.

10 MS. WANSLEE: Thank you, Your Honor.

11 (Whereupon, at 12:06 p.m., the case in the
12 above-entitled matter was submitted.)

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