IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STUDENT AID FUNDS, :

INC., :

Petitioner :

v. : No. 08-1134

FRANCISCO J. ESPINOSA. :

- x

Washington, D.C.

Tuesday, December 1, 2009

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

APPEARANCES:

MADELEINE C. WANSLEE, ESQ., Phoenix, Ariz.; on behalf of the Petitioner.

TOBY J. HEYTENS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

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

C O N T E N T S

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 a 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

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

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

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

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

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

JUSTICE GINSBURG: Yes.

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

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

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

MS. WANSLEE: Yes.

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

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

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

have very precise words, very precise meanings.

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

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

So why is this more than mere error?

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

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

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

MS. WANSLEE: Rule --

JUSTICE BREYER: Give me your strongest case.

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

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

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

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

JUSTICE BREYER: All right.

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Well, would the case be

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

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

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

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

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

MS. WANSLEE: I apologize.

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

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

JUSTICE STEVENS: Why is it a harder case?

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

JUSTICE STEVENS: And I say it's supported

by an affidavit.

MS. WANSLEE: Correct, Your Honor.

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

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

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

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

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

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

JUSTICE STEVENS: Yes.

MS. WANSLEE: -- much less proof.

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

company?

MS. WANSLEE: That's correct, Your Honor. And I would -- I would note --

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: What about my --

MS. WANSLEE: It --

JUSTICE KENNEDY: What about my question?

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

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

JUSTICE KENNEDY: I think --

MS. WANSLEE: -- Congress --

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

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

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

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

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

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

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

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

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

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

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

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

we started by saying was vague.

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

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

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

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

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

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

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

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

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

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

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

MS. WANSLEE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Heytens.

ORAL ARGUMENT OF TOBY J. HEYTENS

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

MR. HEYTENS: Well, Justice --

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

MR. HEYTENS: Well, Justice Breyer, it

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

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

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

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

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

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

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

MR. HEYTENS: That was --

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

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

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

MR. HEYTENS: The answer is --

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

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

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

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

JUSTICE BREYER: All right. Is there any --

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

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

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

What page in your brief?

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

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

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

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

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

MR. HEYTENS: Sure.

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

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

that the debtor alleges in support --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HEYTENS: Justice Scalia --

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

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

25a --

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

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

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

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

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

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

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

off-putting.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Meehan.

ORAL ARGUMENT OF MICHAEL J. MEEHAN

ON BEHALF OF THE RESPONDENT

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

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

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

exceptions -- then perhaps finality would not apply.

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

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

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

MR. MEEHAN: I think that --

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

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

I don't --

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

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

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

JUSTICE SCALIA: It would?

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

JUSTICE SCALIA: Yes.

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

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

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

CHIEF JUSTICE ROBERTS: Did --

JUSTICE GINSBURG: Do --

CHIEF JUSTICE ROBERTS: I'm sorry.

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

MR. MEEHAN: If I used the word

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

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

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

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

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

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

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

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

MR. MEEHAN: Well, Justice Scalia --

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

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

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

Scalia --

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

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

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

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

MR. MEEHAN: Justice Alito, number one, we

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

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

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

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

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

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

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

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

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

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

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

MR. MEEHAN: Yes.

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

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

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

making an objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: I wasn't making any conditions.

MR. MEEHAN: I would --

(Laughter.)

MR. MEEHAN: I would accept that condition on

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

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

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

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

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

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

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

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

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

mistake or surprise here.

MR. MEEHAN: Yes.

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

MR. MEEHAN: Um --

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

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

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

MR. MEEHAN: I think that does happen frequently.

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

Suppose the bankruptcy judge makes a mistake

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Could I --

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

MR. MEEHAN: Yes.

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

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

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

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

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

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

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

MR. MEEHAN: If the creditor --

JUSTICE GINSBURG: -- objects?

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

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

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

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

JUSTICE SOTOMAYOR: Counsel --

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

MR. MEEHAN: Well, Justice --

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

MR. MEEHAN: What I had tried --

JUSTICE SCALIA: Which is it?

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

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

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

MR. MEEHAN: Yes.

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

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

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

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

MR. MEEHAN: Justice Kennedy, I think --

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

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

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

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

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

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

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

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

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

MR. MEEHAN: They win.

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

MR. MEEHAN: They did.

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

MR. MEEHAN: And it was only --

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

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

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

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

And there is also the --

JUSTICE BREYER: Yes.

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

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

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

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

JUSTICE SOTOMAYOR: Counsel, may I interrupt

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

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

JUSTICE SOTOMAYOR: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

MR. MEEHAN: Justice --

JUSTICE SOTOMAYOR: What would have happened?

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

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

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

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

MR. MEEHAN: The original --

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

MR. MEEHAN: They have.

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

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

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

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

MR. MEEHAN: Well, of course --

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Wanslee, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF MADELEINE C. WANSLEE

ON BEHALF OF THE PETITIONER

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

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

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

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

CHIEF JUSTICE ROBERTS: Right.

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

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

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

In this case, there was really no basis to

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

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

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

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

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

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

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

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

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

were you --

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

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

MS. WANSLEE: Pardon me?

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

MS. WANSLEE: Thank you, Your Honor.

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