No. 08-1134

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a confirmed plan of arrangement in a Chapter 13 bankruptcy case, which a creditor received actual notice of and allowed to become final, is void either because its student loan discharge language did not include a finding of undue hardship or because the actual notice given was that required to give notice of a plan confirmation instead of for an adversary proceeding.

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STATEMENT OF THE CASE

Student loans are non-dischargeable under the Bankruptcy Code unless repayment would cause the debtor undue hardship. Petitioner Francisco Espinosa proposed a Chapter 13 plan under which he would pay all principal on his student loan, but be discharged from interest. Espinosa did not propose that there be a finding of undue hardship, which under Bankruptcy Rule 7001 would occur in an adversary proceeding. United Student Aid Funds, Inc. received actual notice of the plan and filed a proof of claim. United did not object to the plan. The plan was confirmed, and United did not move to alter or amend the order, nor move for relief from it on the ground of mistake, excusable neglect or fraud under Civil Rule 60(b), and it did not appeal. Instead, it ignored the order and collected five years of payments by Espinosa pursuant to the plan. Then it began collecting additional money from Espinosa. Espinosa sought to enforce the finality of the Bankruptcy Court's order.

United defended against Espinosa's action by claiming that the order was void. However, the only grounds upon which it seeks relief are those that could have and should have been asserted by objecting to the order confirming a plan. United seeks a result which would eviscerate the finality accorded plans of arrangement and expand the reach of the due process clause to constitutionalize any procedures found in court rules or congressional statutes. Such an outcome would produce chaos for the finality of litigation in general, and bankruptcy in particular. It would also generate huge numbers of due process cases as the courts tried to determine what rules or statutes bore constitutional significance.

1. Espinosa received four student loans in 1988, totaling $13,250.00, to attend a trade school in Arizona, I.T.T. Technical Institute. JA 16, 26. At that time, Espinosa was working as an airline ramp agent in Phoenix, Arizona. JA 21. Four years later, he still held the same job. *Ibid.* Espinosa was unmarried and lived frugally. He rented an apartment for $370.00 per month. He drove a car valued at $1,200.00 – the proverbial "beater."

In 1992, Espinosa filed a Voluntary Petition for Chapter 13 relief in the Bankruptcy Court for the District of Arizona. JA 5. United was Espinosa's only creditor. JA 16. Espinosa's plan proposed that he pay United $274.00 per month, slightly more than the entire amount of his available disposable income. JA 23. The plan obligated Espinosa to pay for five years, JA 24, the maximum duration of a Chapter 13 plan. 11 U.S.C. 1322(d)(2). The plan proposed to pay United the entire outstanding principal amount of Espinosa's four student loans, totaling $13,250.00. JA 26, 33. After deduction of fees and costs related to his Chapter 13 case, that principal amount would just be covered by all of his payments.

2. Under Bankruptcy Rule 1007, when a petition is filed a debtor must file a "Master Mailing List" of known addresses of all of his creditors and verify to the best of his knowledge that the list is true and correct. Rule 1007. Espinosa did this. ER 57, 58. The mailing list included:

- The post office box address that United had told Espinosa to use in making loan payments;

- The address for the United States Department of Education National Payment Center;

- The address for the Educational Loan Servicing Center;

- The address for General American Credits, a collection agency; and

- The address for the educational institution, ITT Technical Institute. ER 57.

Notice of Espinosa's bankruptcy was mailed to the entities on the mailing list, as required by 11 U.S.C. 341. The notice advised that Espinosa would seek Bankruptcy Court confirmation of his plan on April 15, 1993, more than four months later. Espinosa sent the complete, proposed plan of arrangement along with the notices of filing his petition, of the first meeting of creditors, and of the hearing to confirm the plan.

The Plan prominently featured on it first page, in bold letters, the legend:

> "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." JA 23.

The plan also spelled out in full detail its proposal that the principal of the education loans held by United, in specific amounts, would be fully paid, and that all other amounts claimed owing by the debtor, of any nature, would be discharged. The fourth page of the plan specified:

> "(2) These loans totaling $13,250.00 shall be paid in full as an unsecured claim all as set forth in the Chapter 13 Debt Adjustment Plan attached hereto.
>
> "(3) . . . .
>
> "(4) Any amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26.

The notice was successful and complete. A stamped legend on the Notice demonstrates that the litigation department of United received the notice on December 18, 1992, more than four months before the date of the hearing to confirm a plan. JA 34. United received actual notice of the filing, of the plan and of the hearings from the Clerk of the Bankruptcy Court, as specified by Fed. R. Bankr. P. 2002(b). JA 34. Proof that the actual notice was in fact successful is also confirmed by the fact that United filed a Proof of Claim on January 8, 1993, more than three months before the scheduled hearing to confirm the plan.

United made no objection to its treatment in the Plan. The Bankruptcy Court confirmed the plan on May 6, 1993. United did not appeal that order. But there is more.

On June 10, 1993, within the time for United to appeal, the Trustee served notice of her objection to United's proof of claim upon United, giving United 30 days to respond. E.R. 36. Service was accomplished by mail to the address specified in United's proof of claim. The objection notified United that its claim of $17,832.15 would only be paid in the amount of

$13,250.00. The Trustee's notice provided thirty days to object to this treatment of United's claim. United did not object or appeal.

It's not as though United had no recourse at this point. United could have appealed. It could have moved under Rule 9023 to alter or amend the judgment confirming the plan, to remove the provision discharging student loan charges. It could have filed within one year a motion for relief under Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60(b)(1), (2) or (3), on the grounds of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct. It took none of these steps.

Instead of availing itself of any legal remedies, United collected its proposed amount under the plan, waited for seven years and then began unilaterally intercepting government payments belonging to Espinosa.

3. Espinosa paid all obligations for the five year duration of the plan. In 1997 the Bankruptcy Court issued him a discharge which contained the standard form language excepting student loans from the discharge normally granted a debtor who successfully performs a plan. JA 46. As the Bankruptcy Court later found, use of this boilerplate was an obvious clerical error since the whole purpose of Espinosa's Chapter 13 plan was to pay most of the student loans, but discharge the remainder. JA 48.

United's inaction continued for another two years, after which the Department of Education began to intercept Espinosa's income tax refunds, and United began to dun Espinosa for payment of some

$17,000.00. Espinosa's counsel twice wrote to the United States Department of Education and to United's Arizona counsel, explaining in detail that Espinosa's Chapter 13 plan explicitly called for discharge of student loan sums not paid in the plan, that United had been sent a copy of the plan, that United had filed a proof of claim, which it had been told by the Trustee would not be paid in full, that United did not object to the plan, and that United had been paid every dollar obligated to it under the plan. Excerpts of Record in Ninth Cir. 62 – 70 ("E.R"). Neither ever responded, and instead continued collection efforts.

Eleven years after the plan was confirmed, and only because Espinosa's motion to enforce the injunction forced the issue, United filed a Rule 60(b)(4) motion for relief on the grounds that the order of confirmation was void.

4. Espinosa moved the Bankruptcy Court to reopen the original Chapter 13 case, and moved for a declaration that United had violated the discharge injunction, for a finding of contempt, and for an award of sanctions and damages. E.R. 39. In response, United argued that the order of confirmation was "void" because the Bankruptcy Court had lacked subject matter jurisdiction to confirm an "illegal plan." The supposed illegality was that there had never been an adjudication of undue hardship on the merits. E.R. 85. United also argued that the order violated due process because it had not received notice in the form of an adversary proceeding summons. E.R. 83 – 85.

The Bankruptcy Court held that the due process requirements of *Mullane v. Central Hannover Bank &*

Trust Co., 339 U.S. 306 (1950) were satisfied, that the confirmation order was not void, and that Espinosa was entitled to have the discharge injunction enforced. E.R. 103, 104. As the court put it, "the idea that a creditor with more than 25 days notice of a plan containing a provision that adversely affects it can ignore the proceeding, sit on its rights, and then raise a due process argument years later, defies common sense." E.R. 102.

5. United appealed to the District Court. Again, United raised but two issues – that the order of confirmation was void either because its due process rights had been violated, or for lack of subject matter jurisdiction. E.R. 134. Espinosa's answering brief in the District Court argued that the only issue before the court was whether the confirmation order was void for lack of due process. Espinosa argued that any other attempt to set aside the order of confirmation brought under Bankruptcy Rule 9024 failed because the 180-day time limit within which to do so, established both by 11 U.S.C. 1330, dealing with revocation, and Rule 9024, had long elapsed. E.R. 174.

In its reply brief in the District Court United expressly disavowed any attempt to revoke the plan under section 1330. United argued that Espinosa's contention, that United was seeking to revoke the plan under section 1330, "is simply not accurate – USA Funds instead argues that the confirmation order is void under Fed. R. Civ. P. 60(b)(4)." E.R. 187.

The District Court reversed. Finding that United had been denied due process, the District Court held the confirmation order to be void. E.R. 225.

6. Espinosa appealed the District Court's judgment. In its Ninth Circuit answering brief, United again relied upon its position in the District Court – that relief was appropriate under Bankruptcy Rule 9024 and Civil Rule 60(b)(4) because the confirmation order was void for denial of due process and lack of subject matter jurisdiction. Although sprinkling various other arguments in its brief, such as that res judicata could not apply because the undue hardship was not *actually* litigated, *id.* at 23, and because United's challenge to the confirmation order was not a collateral attack, *id.* at 24, the vast majority of its argument to the Ninth Circuit was based upon due process, *e.g. id.* at 1, 2, 11, 14 – 22, 23 – 32, 39, 40, or lack of subject matter jurisdiction. *E.g. id.* at 40 – 46. Nor did United present to the court any other grounds upon which it was entitled to relief other than to prove the order to be void under Rule 60(b)(4).

The Ninth Circuit issued an opinion remanding the case to the District and Bankruptcy Courts for a limited purpose. *Espinosa v. United Student Aid Fund, Inc.,* 530 F.3d 895 (9th Cir. 2008). The court noted the anomaly that, although Espinosa's confirmed plan explicitly called for a student loan discharge, the form discharge order issued upon Espinosa's successful performance of his plan nonetheless contained language reciting 11 U.S.C. 523(a)(8)'s exceptions to discharge. Thinking that the wrong form discharge order may simply have been automatically generated by the Clerk of the Bankruptcy Court, the court remanded to the Bankruptcy Court, giving it "express leave to consider whether its discharge order in this case was entered as a result of a clerical error and, if so, whether to correct it so as to conform to Espinosa's Chapter 13 plan." 530 F.3d at 899; Pet. App. 59.

Upon remand, the Bankruptcy Court found that the exception from discharge for student loans in Espinosa's discharge order "was inserted because of a clerical mistake, because it was the clear intent of the court, as reflected in the Chapter 13 plan, as approved by the Court, that all student-loan related obligations were to be discharged if the debtor successfully performed the plan." J.A. 48. The court's order corrected the discharge order accordingly. *Ibid.*

The Ninth Circuit then considered the case on the merits and reversed the District Court, holding that Espinosa was entitled to the benefit of the discharge and the injunction enforcing it.

The Ninth Circuit rejected what it characterized as United's "statutory argument," Pet. App. 8, that there had been no discharge because there had been no finding of undue hardship after an adversary proceeding. The court viewed the statutory issue not as one of substantive bankruptcy law, but as one of waiver. "Rights may of course be waived or forfeited, if not raised in a timely fashion." *Id.* at 10. The Court observed that there are perfectly logical reasons why a creditor *would* waive its right to insist on the full-blown adversary proceeding to determine undue hardship. *Id.* at 9, 10. First, a creditor might think a debtor could make a convincing showing of undue hardship and choose to avoid the expense of an adversary proceeding. Second, a creditor may conclude that the Chapter 13 plan provided its best option of collection, "rather than spending years trying to squeeze blood out of a turnip." Pet. App. 9. Third, a creditor may hope a debtor makes some plan payments, but ultimately fails to complete the plan, in which event the creditor is free to attempt further

collections. The Ninth Circuit observed that such is not an unrealistic prospect, given that an estimated two-thirds of Chapter 13 plans ultimately fail. *Id.* at 10 & n. 2.

The court concluded that "[r]egardless" the reason, "when the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding." *Id.* at 10. Because United did not object, it therefore waived its right to those "special procedures," and allowed the plan of confirmation to become final. The court held that the plan finality mandated by 11 U.S.C. 1327 governed and did not conflict with "those provisions of the Code and Rules that call for an adversary proceeding before a student loan debt may be discharged." *Id.* at 9.

Judge Kozinski then turned to United's due process argument, noting that United had received actual notice. Pet. App. 21. The court concluded that the receipt of actual notice eliminated a due process issue altogether. "Because 'due process does not require actual notice,' *Jones v. Flowers*, 547 U.S. 220, 225 (2006), it follows a fortiorari that actual notice satisfies due process." *Ibid.* The opinion portrays the facts underlying United's notice issue in blunt, but accurate, terms:

> "It makes a mockery of the English language and common sense to say that Funds wasn't given notice, or was somehow ambushed or taken advantage of. The only thing the creditor was not told is that it could insist on an

> adversary proceeding and a judicial determination of undue hardship. But that's less a matter of notice and more of a tutorial as to what rights the creditor has under the Bankruptcy Code – a long form *Miranda* warning for bankers. If that were the standard for adequate notice, every notification under the Bankruptcy Code would have to be accompanied by Collier's Treatise, lest the creditor overlook some rights it might have under the Code." Pet. App. 16.

The opinion considered and declined to accept the views of *Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle),* 412 F.3d 679 (6th Cir. 2005), *In re Hanson,* 397 F.3d 482 (7th Cir. 2005) and *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002), that constitutional due process required service of a summons and complaint for an adversary proceeding. Pet. App. 22 – 25. The court saw the approach taken by those circuits as one under which "a creditor who is entitled to heightened notice by statute is also entitled to such heightened notice as a matter of due process." *Id.* 22. The court demonstrated its problem with "this novel approach" by quoting the attempt in *In re Banks, supra,* to explain its rationale: "'We do not today hold that the Constitution in itself requires a summons and service of process to discharge student loan debt. We merely confirm that where the Bankruptcy Code and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.' 299 F.3d at

303 n. 4."[1] *Id.* 22. The Ninth Circuit disagreed with the proposition that Congress can dictate what due process the constitution requires; and observed that in any event, Congress did not even purport to do so. *Id.* 23.

In sum, the Ninth Circuit said, "We reject the idea that a creditor who is in the business of administering student loans has a *constitutional* right to ignore a properly served notice that clearly specifies that its debt will be discharged on successful completion of the plan."[2] App. 24.

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[1] The conundrum contained in this quote from *In re Banks* accurately describes the rule that Petitioner and its amici seek from this court. The same rationale is pervasively contained in their briefs. *E.g* Brief of National Council of Higher Education Loan Programs, Inc., at 37 – 30 (Acknowledging that the Fifth Amendment to the Constitution does not expressly require a summons and yet arguing that due process required use of a summons).

[2] The Court also observed that some courts seemed "uncomfortable with the practice" of debtors proposing in their plans that creditors waive an adversary proceeding to determine undue burden, and that some courts had even "announced that they won't confirm plans that seek to discharge student loan debts without an adversary proceeding, even when the creditor fails to object to the plan." Pet. App. 25. The Court said that, given current circuit law holding that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, "Bankruptcy Courts have no business standing in the way." Pet. App. 26. Given the existing circuit precedent, Judge Kozinski's logic seems unassailable. Yet *amici* criticize the court's statement. *E.g* Brief, *amicus curiae* States at 5, 39. This Court needn't deal with this part of the opinion, because it is not part of the holding or resolution of Espinosa's case.

SUMMARY OF ARGUMENT

1. United waived its several opportunities to insist upon an express finding of undue hardship. It did not object to, appeal from, or move to set aside the plan. United much later filed a Rule 60(b)(4) motion. Therefore, it can now only prevail if the judgment confirming the plan is void.

United argued below that the confirmation order was void for two reasons. One was that without a finding of undue hardship, the plan conflicted with three Code provisions, and therefore the Bankruptcy Court had lacked authority to enter the order it did. The other was that – even though United had actual notice of the plan and the hearing – Espinosa's failure to initiate an adversary proceeding and use a summons rendered the confirmation order void for lack of constitutional due process. United's claims based on the Code are ordinary claims of legal error that are raised far too late – years after the unappealed confirmation order became final. And United's due process claim is just plain wrong for a host of reasons, including that United had actual notice of the bankruptcy proceeding and Espinosa's request to discharge his student loans.

2. United is faced with a confirmed plan that became final long ago. Section 1327 makes the plan binding upon United, just as it is upon Espinosa. Further, this Court has long held that after a judgment, including a bankruptcy judgment, has become final, it cannot be challenged for error contained in the order. Indeed the Court has held that even the existence of subject matter jurisdiction of a

final judgment cannot be re-litigated after the judgment is final.

Citing cases of this Court that are from 80 to 170 years old, United urges the Court to hold that the order confirming Espinosa's plan, containing language directing partial student loan discharge, was "not within the powers granted the Bankruptcy Court by law," and thus was void. United overlooked cases as recent as *Travelers Indem. Co. v. Bailey,* 129 S. Ct. 2195 (2009) which demonstrate that the Espinosa confirmation order fell well within the Bankruptcy Court's authority, and well outside the narrow category of judgments that are void because the court acted outside of the powers granted it by law.

United alternatively argues that the finality of the plan is immaterial because the plan does not affect student loans in any way. It argues that 11 U.S.C. 523(a)(8) is "self executing," based upon one sentence in a Senate Report for the 1978 Bankruptcy reform act, and a reference to that sentence in *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004). But "self executing" simply means that if no affirmative action is taken to grant a student loan discharge, 11 U.S.C. 523(a)(8) governs and such a loan is not discharged. It says nothing about whether the requirement of section 523(a)(8) can be waived, as United did here by failing to object, nor whether the final, unappealed confirmation order in this case is void. In the plan confirmation context, the court orders the discharge in a formal recognized proceeding that encompasses notice and a hearing opportunity. This affirmative act by the court effectively rebuts the "presumption" of non dischargeability that is suggested in *Hood* and the Senate Report.

In an issue not raised below, and therefore not properly before this Court, the United States argues that the terms of 11 U.S.C. 523(a)(8), mean that a confirmed plan has no impact upon whether a student loan can be, or even *has been* discharged. The United States argues that such meaning should be derived from the fact that the language of section 523(a)(8) differs from that of other subsections of 523(a) as well as from that of other Code sections. But 11 U.S.C. 523(a)(8) differs from other sections only because it is the only obligation the discharge of which is subject to an exception based upon the debtor's financial condition. It does not magically insulate the student loan obligation from the plan's explicit order discharging obligations.

3. United's due process argument is defeated at the outset by the fact that it had received "actual notice." This Court and lower courts have held that when a party has actually received notice, due process is not implicated.

4. United makes the same argument here that Judge Kozinski properly rejected. Even though the Constitution in and of itself does not require a summons and service of process to discharge student loan debt, United nonetheless contends that where the Code and Rules require a "heightened degree of notice," due process entitles a party to receive such notice before it can be bound by the resulting order. This is incorrect.

To begin with, neither 11 U.S.C. 523(a)(8) nor any other provision of the Code mandates the use of adversary proceedings to determine dischargeability of student debt; only the rules do. Therefore, even if

Congress could dictate the requirements of due process, it did not do so in this instance. Secondly, such an argument contradicts *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004), which held that the Constitution does not mandate the use of adversary proceedings and the summons process to give a creditor notice of proposed discharge of a student loan.

The notice given by Espinosa complied with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Given that the notice related to a plan confirmation hearing, the notice specified in the Rules for plan confirmation hearings was "appropriate in the circumstances." The notice was full and complete. It contained the actual wording of the plan's discharge provision. It was given four months before the hearing date.

United contends that due process requires an adversary summons because of the high volume of mail that it and other creditors must contend with, apparently to demonstrate why only a summons for an adversary proceeding could be reasonable notice under the circumstances. United claims it may, in effect, ignore any notice of a Chapter 13 case except pleadings for an adversary proceeding. These arguments are unpersuasive. As a loan guaranty agency, United owes duties to the United States Department of Education to act diligently and to take various actions related to a student loan Chapter 13 case. Moreover, United's argument that it risks missing a notice of plan confirmation is unpersuasive. United has never explained why it did not object to Espinosa's plan or appeal from it.

ARGUMENT

I

BECAUSE UNITED SOUGHT RELIEF UNDER FEDERAL CIVIL RULE 60(b)(4), THE ONLY ISSUE IS WHETHER THE CONFIRMATION ORDER WAS VOID.

When United filed its response to Espinosa's motion to enforce the injunction, it relied on Rule 9024 and Civil Rule 60(b)(4). Espinosa argued to the District Court that United's motion had not been brought within the 180 days permitted by Section 1330 and Rule 9024 for a motion to revoke a plan. E.R. 174 In response, United expressly disavowed any intention to seek revocation of the plan under Section 1330, and relied exclusively on arguments that the plan was void either because United had not received constitutional due process or because the Bankruptcy Court lacked subject matter jurisdiction to confirm a plan containing provisions contrary to sections of the Code.[3]

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[3] *Amicus curiae* Professor Rafael I. Pardo suggests that United's Rule 9024 and Civil Rule 60(b)(4) motion for relief from the confirmed plan was actually a motion to revoke the plan. Br. at 6. Thus, he contends, the Bankruptcy Court may have lacked subject matter jurisdiction over United's motion for relief from the confirmation order because the 180-day time limitation is jurisdictional. Br. at 7. Espinosa does not disagree with Professor Pardo's discussion of the issue. But in any event, United's disavowal of any attempt to revoke the plan, or of any basis for relief except through Civil Rule 60(b)(4), limits the issue of this case to whether the order of confirmation was void. Nevertheless, Professor Pardo's argument underscores how United has tried to do an end run around the basic rules of finality in its challenge to a plan to which it never objected.

E.R. 186, 187.

United's motion for relief of judgment made the only argument it could eleven years after a judgment was entered – that under Rule 60(b)(4) the judgment was void. Unless and until it can prevail in setting aside the judgment, United's merits–based arguments are irrelevant. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978); 12-60 Moore's Federal Practice – Civil § 60.68. Even if United has a valid basis to attack the judgment, it cannot be considered unless United obtains relief under Rule 60(b)(4) from a void judgment. The merits arguments would then be ripe for consideration in further proceedings. But United and its *amici* make irrelevant merits-based arguments, nonetheless. Great portions of the Briefs of United and its supporting *amici curiae* make merits arguments – albeit dressed up in voidness clothing – which do not support a finding that the confirmation order was void. Such arguments include:

- That a student loan cannot be discharged unless not to do so would impose an undue hardship upon the student. 11 U.S.C. 523(a)(8). Br. at 17 – 20. That allowing a discharge without the undue hardship finding is "inconsistent with the background and purposes" of the section. Brief of United States, at 23 – 26. And that "treating an undue hardship finding as a precondition to discharge is fair to both debtors and creditors." *Id.* at 26 – 29.

- That Congress has several times amended the Code to restrict the dischargeability of student loans. Br. at 20 – 23, and that a sentence from a Senate Report related to the 1978 Bankruptcy Reform Act

emphasize Congress's intent that student loans not be easily dischargeable. Br. at 23 – 25. These arguments emphasize Congressional intent for 11 U.S.C. 523(a)(8). They hardly imply that the final confirmation order was void.

- That a confirmed plan discharging student loan obligations without making an undue hardship finding conflicts with several Code sections, such as 11 U.S.C. 1322, establishing what should and may be included in a plan, and also requiring a plan to conform to the Code; and 11 U.S.C. 1325(a), mandating that a plan must conform to the Code. Br. at 25 – 30. These arguments and these Code sections mean simply that – unless waived – a plan not having a finding of undue hardship which nevertheless discharges student loan obligations should not be confirmed.

- That 11 U.S.C. 1327's dictate of finality does not apply where the plan does not conform to Code provisions like 11 U.S.C. 523(a)(8), 1322, and 1325 "because doing it ignores the clear intent of Congress and the Judicial Conference to require proof of undue hardship through an adversary proceeding." Br. at 41 (although no statute imposes a requirement for adversary proceedings). But once a plan becomes final section 1327 does apply, irrespective of error in its contents. This is simply an argument of error that should have been raised in the Bankruptcy Court and then by appeal, and an argument that could be, and was, waived.

- That policy reasons underlie the requirement of Rule 7001 that discharge determinations, including undue hardship determinations, occur in adversary proceedings. Br. at 43 – 51. (The policy reasons are

said to arise from Congress's requirement of an adversary proceeding. Br. 43. But that is not true. No statute imposes a requirement for adversary proceedings.)

Here United must prove the plan to have been void, and none of the above arguments relate in any way to that issue.

II

THE PLAN WAS FINAL AND BINDING UPON UNITED WHETHER OR NOT PROVISIONS IN IT CONTAINED LEGAL ERRORS, INCLUDING OF SUBJECT MATTER JURISDICTION.

A. The plain language of the confirmed plan and of 11 U.S.C. 1327 compel a holding that the unpaid student loan obligations were dischargeable.

Espinosa's Chapter 13 plan said:

> "(4) Any amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26.

The Bankruptcy Court confirmed the Plan. JA 43.

Code section 1327(a) says:

> "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has

> objected to, has accepted, or has rejected the plan."

United had its opportunity to object to the above-quoted term in the Plan, by objecting before the confirmation hearing, by three different available post-hearing motions, and by appeal. It chose none of them. It is bound by the plan, including the above-quoted term.

B. A plan confirmed by a final order is binding even if it contains errors of law, a basic tenet of law supported by long-established precedent, which this Court reaffirmed in *Travelers Indemnity Co. v. Bailey,* 129 S.Ct. 2195 (2009).

"[T]he finality of the Bankruptcy Court's orders following the conclusion of direct review generally stands in the way of challenging the enforceability of the injunction." *Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2198 (2009). That principle applies here without exception. *Travelers* involved a Bankruptcy Court order confirming a Chapter 11 reorganization plan, specifically considering the validity of the injunction against collection action against debtors and related persons. It came to this Court as an action to enjoin actions that would violate the order. The Second Circuit had concluded that it could determine for itself whether the original order fell outside the scope of the Bankruptcy Court jurisdiction, and decided that it did. This Court reversed, saying that "where the plain terms of a court order unambiguously apply as they do here, they are entitled to their effect." 129 S. Ct. at 2204. "[O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy

court jurisdiction and power), they became res judicata to the parties . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction. For even subject-matter jurisdiction . . . may not be attacked collaterally." *Id.* at 2205, (internal quotes and cites omitted.) So, too here. *Travelers* recognized that "The rule is not absolute, and we have recognized rare situations in which subject matter jurisdiction is subject to collateral attack." *Id.* at. 2206 n. 6, But as more fully explained below, p. 25, this case does not present one of those "rare situations."

Travelers reaffirmed a well established rule, specifically for bankruptcy cases. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940).

In *Taylor*, the debtor claimed proceeds of a lawsuit were exempt from inclusion in the bankrupt's estate, under 11 U.S.C. 522. The trustee made no objection within the time specified by Rule 4003(b), and indeed no objection at all. The trustee later sought to exclude some of the proceeds from exemption, arguing a narrow interpretation of section 522. *Taylor*'s arguments are just like those made by United. Taylor argued that enforcing the terms of section 522 and the time limit in Rule 4003(b) would "create improper incentives. He asserts that it will lead debtors to claim property exempt on the chance that the trustee and creditors, for whatever reason, will fail to object to the claimed exemption on time. He asserts that only a

requirement of good faith can prevent what the Eighth Circuit has termed 'exemption by declaration.' "503 U.S. at 644.

Taylor attacked the debtor's action as "exemption by declaration," *id.* at 244, using the same pejorative term commonly used by student loan creditors.[4] *Ibid.* But this Court concluded that:

> "This concern, however, does not cause us to alter our interpretation of § 522(1). Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See, *e.g.,* 11 U.S.C. § 727(a)(4)(B)(authorizing denial of discharge for presenting fraudulent claims); Rule 1008 (requiring filings to 'be verified or contain an unsworn declaration' of truthfulness under penalty of perjury); Rule 9001 (authorizing sanctions for signing certain documents not 'well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law'); 18 U.S.C. § 152 (imposing criminal penalties for fraud in bankruptcy cases.)" 503 U.S. at 644.

Just as in *Taylor,* the possibility that a lawyer or a client engaged in possibly sanctionable conduct has no bearing on finality. Moreover, in this case, after a hearing, JA 41, the Bankruptcy Court confirmed the

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[4] *See* United brief at 14, 24; Brief of Educational Credit Management Corp. at 5, 35; Brief of National Council of Higher Education Loan Programs, Inc. at 3, 20; Brief of States at 3.

plan in an order that explicitly found the plan to have been proposed in good faith. JA 42. United does not now, and has never, contended that Espinosa's plan was offered in bad faith or was accomplished through fraud.

The rule that United is bound by the terms of the confirmation order is also made clear by *Chicot County Drainage Dist. v. Baxter State Bank.,* 308 U.S. 371 (1940). The Drainage District conducted a proceeding in the District Court to effect a plan of readjustment. The District Court's jurisdiction arose under a statute providing municipal debt readjustments. A plan of readjustment was confirmed, under which the Bank had one year to present claims for payment. Later the federal statute upon which the municipal debt readjustment bankruptcy regime was based was held unconstitutional. For that reason the Court of Appeals held the plan to be void and did not deem its one year limit binding on the Bank when it claimed on its bonds. The Court reversed. It held that 1) all required elements for making the plan binding on the Bank were present, such as notice, the Bank being a party to the readjustment, and the like; 2) although no question had been raised in the readjustment case to the constitutionality of the jurisdictional statute, such a challenge *could have* been made; 3) therefore, even though later the statute was held unconstitutional, the judgment of the District Court was binding upon the Bank. This Court found the order confirming the plan not to be void, but to be binding.

Knowing that it needs to convince this Court that the Bankruptcy Court acted in an extraordinary excess of its statutory powers to conduct bankruptcy proceedings, United, aided by *amici curiae*, makes four

different arguments to get around the finality that 11 U.S.C. 1327(a) imposes upon it, and the limitation of Rule 60(b) relief to void orders. First, United argues that, indeed, the Bankruptcy Court's action was so far outside its statutory authority as to make the order void. Second, it argues that because there is a sentence in a Senate Report related to the Bankruptcy Reform Act of 1978, describing 11 U.S.C. 523(a)(8) as "self executing," a Chapter 13 plan could not have any impact on the issues of discharge and undue hardship in section 523(a)(8), even if the parties wanted it to. Third, the United States argues that the phrasing of 11 U.S.C. 523(a)(8) itself also immunizes student loan discharges from any treatment by a Chapter 13 plan. This argument was not raised by the parties below and therefore is not before this Court. Finally, United argues that because the erroneous 1997 discharges controls, the finality of the plan is immaterial. Each is incorrect.

C. The Bankruptcy Court did not depart so significantly from its statutory authority that its order should be treated as void.

United argues that the confirmation order was void because it was not within the powers granted to the Bankruptcy Court by law. Br. p. 31. Such was not the case.

This issue is resolved by *Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2206 n. 6 (2009), a case ignored by United. *Travelers* demonstrates that the order of confirmation here cannot be voided on this basis.

After having found the confirmation order at issue in *Travelers* binding this Court observed that the rule

espoused in *Chicot County Drainage Dist. v. Baxter State Bank.,* 308 U.S. 371 (1940) "is not absolute, and we have recognized rare situations in which subject-matter jurisdiction is subject to collateral attack." 129 S. Ct. at 2206 n. 6. Examples were cited, such as for sovereign immunity, or state court actions where a federal statute expressly divested the state court of jurisdiction. *Ibid.* While stating that "This is no occasion to address whether we adopt all of these exceptions," the Court cited the Restatement (Second) of Judgments § 12 p. 115 (1980) for three potential exceptions to the rule that even subject matter jurisdiction may not be collaterally attacked. 129 S. Ct. at n. 6. One of them might theoretically be considered here:

> "(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction." *Ibid.*

A hypothetical following this quotation of the Restatement clarified its potential meaning. The Court said: "This is not a situation, for example, in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters 'so plainly beyond the court's jurisdiction' that a different result might be called for." *Ibid.*

This is not a case where the Bankruptcy Court was acting in a judicial arena completely foreign to it. The court was acting in a Chapter 13 case. Its order dealt

with payment of debts, and discharge. The order affected the debtor, Espinosa, a trustee, and Espinosa's only creditor, United. United's reliance upon an "error" because it had no express finding of undue hardship hardly constitutes a dispute over subject matter jurisdiction, let alone an issue of subject matter jurisdiction "'so plainly beyond the court's jurisdiction' that a different result might be called for." *Ibid.*

United ignores the considerations in *Travelers* just discussed. Instead it cites *United States ex. rel. Wilson v. Walker,* 109 U.S. 258 (1883) for its statement that if a court enters a decree "not within the powers granted to it by law," the decree is void even though that court has jurisdiction of the parties as well as subject matter jurisdiction. *Id.* at 266. Br. at 31. The cited statement by the Court applied to a probate proceeding in the District of Columbia. The surety on the administrator's bond was sued when the administrator refused to pay over a sum of money. This Court held that the probate court had power to order an administrator to pay or deliver property of the decedent which had not yet been administered, but not to decree that the administrator pay money which had been received and held personally. The Court held that an order to turn over monies held personally was beyond the power conferred by the statute, not within the jurisdiction of the court, and was, therefore, void." But the holding of *Wilson* that a court lacked jurisdiction to deal with particular property does not obtain here. Clearly the Bankruptcy Court had jurisdiction over the United student loans. *E.g. Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 447 (2004)(bankruptcy an *in rem* proceeding having jurisdiction over debts and assets….)

Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920), cited by United, Br. at 31, is more instructive. There, this Court held that where Congress had explicitly excluded insurance companies from administration in federal Bankruptcy Court, any such administration was void, even where the company had not only been aware of the case but assisted the trustee. But *Vallely* involved both lack of jurisdiction over the party, an insurance company, and of the subject matter, bankruptcy administration of an insurance company. Here, regardless of whether the Bankruptcy Court correctly or incorrectly confirmed a plan granting partial discharge of a student loan, the Bankruptcy Court had jurisdiction of Espinosa, his debts including student loans, and the dischargeability of such debts. The court was not exceeding its authority.

Finally, United also cited *Wilcox v. Jackson,* 38 U.S. 498 (1839), in which the Court held that if land service registrars, who had the power to grant "pre-emption rights" in certain lands, and were said to be acting "judicially," granted such preemptions to lands not identified in federal legislation as qualifying for such treatment, orders granting the preemptions were void. *Wilcox* is of little assistance in deciding this case.

D. The Bankruptcy Court correction of the clerical error in the discharge order is not before this Court, and in any event was correct.

United contends that the order correcting the clerical error was improper because it changed the "substance" of the discharge order, and therefore

cannot "relate back" to the plan confirmation order. Brief p. 42.

The United States contends that United did not have to appeal the confirmation order because the discharge in fact excluded any debt for a student loan. Brief of the United States, p. 21. Further, the United States contends, notwithstanding that the Bankruptcy Court in 2008 found a clerical mistake, that it is equally plausible that the Bankruptcy Court when issuing its discharge order in 1992 recognized, "perhaps belatedly" that a student loan could not be discharged without a finding of undue hardship, and thus issued the discharge with the exception still included. Br. at 22.

Educational Credit Mgmt. Corp. argues that the order conforming the discharge order to the confirmed plan was error because it made a "substantive change." Br. at 24.

None of these contentions can be considered, because after the Bankruptcy Court corrected the clerical error, United made no objection to it in the court of appeals, and did not raise it as an issue for this Court to decide until its opening brief. Thus, this issue may not be considered by this Court. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n. 4 (1991)(Court does not normally consider issues raised by an *amicus curiae*). In any event, the correction of the clerical error was proper.

"Rule 60(a) applies when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another." 12-60

Moore's Federal Practice - Civil § 60.11 [1][a]. As the Seventh Circuit has said: "If the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction . . ." *United States v. Griffin*, 782 F.2d 1393, 1396-1397 (7th Cir. 1986).

Invocation of Rule 60(a) is proper so long as the court's correction is intended to conform the judgment to the original intention of the court. *Harman v. Harper*, 7 F.3d 1455, 1457 (9th Circuit 1993) *Harman* further explained that use of Rule 60(a) is proper to correct a "ministerial mistake" or to correct "blunders in execution" as opposed to "instances where the court changes its mind." *Ibid*. The Bankruptcy Court did precisely that. It conformed the discharge order to the intent of the plan. The argument of the United States, that perhaps the Bankruptcy Court had belatedly changed its mind and denied the discharge, is directly contrary to the finding of the Bankruptcy Court. J.A. 48.

United argues that the order correcting the clerical mistake "could not relate back" to the confirmation order, citing *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator, Co.*, 344 U.S. 206 (1952). Br. 42. *Minneapolis-Honeywell* simply held that amending a judgment in the court of appeals did not start anew the time within which to seek certiorari. How that proposition bears on the issue before this Court is not apparent.

E. Characterizing 11 U.S.C. 523(a)(8) as "self executing" is not relevant to the decision whether Espinosa's confirmed plan is binding upon United.

When Congress adopted the Bankruptcy Reform Act of 1978, The Senate issued a report summarizing the act. In its summary of 11 U.S.C. 523(a)(8) the Senate Report said: "This provision is intended to be self executing and the lender or institution is not required to file a complaint to determine the dischargeability of any student loan." S. Rep. No. 95-989 p. 79 (1978). Taken at face value, this says nothing different than does the language of the statute itself – a student loan is not to be discharged unless not to do so would impose an undue hardship.

This snippet from the Senate Report gained considerably more currency when, in *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004), the Court said: "Section 523(a)(8) is 'self executing.' [3 W.] Norton [Bankruptcy Law and Practice 2d] § 47:52, at 47-137; see also S. Rep. No. 95-989, p. 79 (1978). Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." 541 U.S. 450. That statement was apparently included because the creditor argued that this statement "singled out" student loans, and the Congress thereby "authorized a suit against the state." *Ibid.* It is clear from the ultimate resolution of the case, which turned upon the Court's holding that neither Congress nor the Constitution mandated the use of an adversary proceeding, that the Court placed no great significance upon the "self executing" phrase. *Id.* at 453. Nor should this Court now hold that this one sentence from

a Senate Report, which does not purport to explain or add meaning to any specific language in the section, means that either Congress or the Court in *Hood* intended that a section 523(a)(8) issue could not be waived, nor affected in any way – positively or negatively – by a confirmed plan having express language dealing with student loan discharges.

From the Senate report and the short statement in *Hood, supra,* United concludes that a creditor has no duty to object to a plan containing discharge language but no undue hardship finding, and can ignore a Chapter 13 case completely because there was no summons for an adversary proceeding. Br. at 33 – 36.[5] The logic invoked by United is this: Based upon a single sentence in a Senate Report for one of a series of Bankruptcy Code amendments, this Court should hold that 1) the Code requires the use of an adversary proceeding; 2) Such a requirement necessarily means that student loan discharges *cannot* be dealt with in a plan, absent an adversary adjudication of undue hardship; 3) a creditor can entirely disregard actual notice, need not read a notice or plan, and has no duty to object and bring error to the attention of a Bankruptcy court for it to remedy even when its filed claim is partially rejected; and 4) debtor and creditor cannot agree to waive the requirement of an undue hardship hearing; indeed under United's view the parties could not enter into a formal, written stipulation to that effect.

United's reliance upon the characterization of section 523(a)(8) as "self executing" cannot support a

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[5] The United States makes the same argument, Br. p. 13,

finding that the confirmation order was void. Rather, it is one of the ordinary arguments of error that could have been included in an objection to the plan, or in an appeal. Further, citing the "self executing" label cannot justify holding that a confirmed plan which expressly dealt with student loan discharge, and to which a creditor waived any objection, is not covered by the finality provision of 11 U.S.C. 1327.

F. The terms of 11 U.S.C. 523(a) and (a)(8) do not support a unique interpretation, the effect of which is to nullify plain language in a plan calling for discharge.

The United States raises an issue that United has not, and which was neither addressed below nor included as a question presented in this Court. It contends that a student loan discharge is an issue completely divorced from plan confirmation proceedings, such that the creditor can ignore a plan and its confirmation hearing, and has no duty to object to a plan which does not contain a finding of undue hardship. It bases this contention on an issue of statutory interpretation argument not raised by United below, or in its petition for certiorari. The issue is waived because it was not raised below, *TRW*, Inc. *v. Andrews*, 534 U.S. 19, 34 – 35 (2001), and even now is raised only by an amicus, not a party. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n. 4 (1991).

The United States says, first, that because 11 U.S.C. 523(c) places the burden to prevent a discharge of certain obligations on the creditor, and the snippet from the Senate Report imposes a duty on the debtor to seek discharge of a student loan, the "self executing"

nature of section 523(a)(8) divorces treatment of undue hardship from plan confirmation. Br. at 18.

Second, says the United States, the first clause of 11 U.S.C. 523(a) reads that "a discharge . . . *does not discharge* an individual from any debt [enumerated in sub-parts (1) through (19)]," (emphasis added), and that the wording of section 523(a)(8), which begins with the proviso "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor . . . " is only found in 523(a)(8). Therefore, says the United States, that unique wording makes paragraph (a)(8) mean that the discharge of a student loan – but only that kind of obligation – must stand separately from plan confirmation proceedings. But the distinction exists because section 523(a)(8) is the only paragraph under 523(a), and the only non-dischargeable debt, which is subject to an exception for debtor hardship. There should be no other significance than that, given to the "unless" language of (a)(8).

Third, the United States say that the intention that 523(a)(8) discharges stand apart from confirmation proceedings is demonstrated by the fact that the "does not" wording of section 523(a) is different from language used by other provisions of the Code, covering such disparate subjects as the award of attorneys fees, or acts that bankruptcy courts "shall not" or "may not" do. Br. at 17 – 19 and nn. 6, 7. But such word comparisons are irrelevant. There is no logical connection between these language comparisons and the conclusion that the United States wishes the Court to draw. The various sections deal with various circumstances. That section 523(a) uses

the phrase "does not" simply applies to exceptions from discharge.

There is no dispute that if United had wanted an undue hardship determination, and had wanted it in an adversary process, it could have objected, and would have gotten it. But it didn't. Why the differing statutory wordings that the United States discusses imply that United couldn't waive that right, and conversely could totally ignore the plan confirmation litigation, is not explained.

III

THIS IS A WAIVER CASE, NOT A DUE PROCESS CASE. UNITED RECEIVED ACTUAL AND TIMELY NOTICE OF THE PLAN AND THE DATE OF THE CONFIRMATION HEARING, FILED A PROOF OF ITS CLAIM, AND THEN DID NOTHING.

When a party actually receives notice of proposed action and the time and place where its objection may be heard, procedural due process is not implicated.

As both the Bankruptcy Court and the Ninth Circuit found, United received actual notice. The notice was timely. It occurred more than four months before the hearing to confirm the plan. E.R. 28. United was expressly warned that the plan would pay $13,250.00 of its claim of $17,832.15, but discharge the rest, as well as any further obligations. E.R. 25. United's entire argument is about the *quality* of the notice it received, notwithstanding that it received actual notice. *See, e.g.* Br. at 53 (notice merely went to P.O. Box); at 54 (complaining that Espinosa did not

give "heightened notice" required by Rule, and erroneously contended by United to be required by the Code). However, the fact remains: United had not only actual notice, but knowledge.

This is not a constitutional due process case. How could it be, when United's legal department received notice months before the hearing and knew exactly what it had to do? It is a waiver case.

The Ninth Circuit correctly held that where a party has received actual notice, there is no issue of due process. Pet. App. 21. This is consistent with cases of this Court and lower courts.

This Court has recognized that no due process issue arises where actual notice was received. *City of West Covina v. Perkins,* 525 U.S. 234, 241 (1999)(Individual received actual notice of property seizure, "Accordingly, we need not decide how detailed the notice of the seizure must be or when the notice must be given."); *National Equipt. Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315 (1964)("we need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice . . ."); *Nelson v. City of New York,* 352 U.S. 103, 107 (1956)(no due process issue where actual notice received, but was concealed by employee, and where managing agent carelessly overlooked notice).

The notion that a party who had actual notice and an opportunity to be heard was nonetheless denied due

process seems to be virtually non-existent outside of these student loan cases. Since it is true that "due process does not require actual notice," *Dusenbery v. United States,* 534 U.S. 161, 171 (2002);[6] *Jones v. Flower,* 547 U.S. 220 (2006), the issue normally is whether the notice given comported with the due process clause even though not actually received.

Cases from the lower courts also hold that actual notice vitiates any argument of denial of due process. *See, e.g.*:

- *Andersen v. UNIPAC-NEBHELP,* 179 F.3d 1253 (10th Cir. 1999).[7] The lender received actual notice. "Therefore, it appears that due process has been afforded." *Id.* p. 157 fn. 6.

- *In re Pence,* 905 F.2d 1107, 1109 (7th Cir. 1990)(Chapter 13 case. "Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice.")

- *Burda Media, Inc. v. Viertel,* 417 F.3d 292, 302-303 (2d Cir. 2005)(due process requirement of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) satisfied by actual notice even though service in

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[6] Espinosa uses the term "actual notice" to mean "*receipt* of notice," just as this Court did in *Dusenbery.* 534 U.S. at 170 n. 5.

[7] *Overruled on other grounds* by *Educational Credit Management Corp v. Mersmann,* 505 F.3d 1033 (10th Cir. 2007).

foreign country did not comply with Hague Convention)[8];

- *United States v. Casciano,* 124 F.3d 106, 112-113 (2d Cir. 1997) *cert. den.* (1997)(due process requirement of notice of protection order satisfied by actual notice even though service was invalid);

- *Sullivan v. Choquette,* 420 F.2d 674, 676 (1st Cir. 1969) *cert. den.* (1970)(service of process of writ improper but due process satisfied by wife informing party of its existence);

- *Grammenos v. Lemos,* 457 F.2d 1067, 1070 (2d Cir. 1972)("The standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in which the party has received actual notice.").

United, joined by supporting *amici curiae*[9] argues that *City of New York v. New York, New Haven & Hartford RR.*, 344 U.S. 293 (1953) supports its argument that irrespective of whether it had notice of Espinosa's case, it was entitled, as a matter of constitutional law, to the kind of notice specified for adversary proceedings. Br. 54, 56, 57. The statement

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[8] This case demonstrates why the United States' argument, Br. at 15, and some of the cases there cited, blur the difference between service of process to acquire jurisdiction for a law suit, and due process notice.

[9] Briefs *amicus curiae* of United States, p. 15; Educational Credit Management Corp., p. 12; State of Oregon, *et. al.,* pp. 26, 35; *International Municipal Lawyers Association,* pp. 10, 13.

relied upon from *City of New York* is that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." 344 U.S. at 297. But the case is not relevant here. *City of New York* involved a reorganization. The city was aware of the reorganization. But the city was not aware of a court order barring claims unless filed before a cutoff date. The city had been given no notice of any kind – mail or otherwise – of the order. The Court held that creditors had no duty to "inquire for themselves *about possible court orders* limiting the time for filing claims." *Ibid.* (emphasis supplied.) Here, United did have notice of a possible court order limiting its rights. Moreover, *City of New York* did not discuss what particular notice might be required. The issue was whether any kind of notice at all was required.[10]

[10] Here, as in others of its arguments, United expresses yet again the erroneous contention that "the Bankruptcy Code and the Rules establish heightened procedural protections for the discharge of student loan debts . . ." United then argues that *City of New York* compels the giving of those "heightened procedures." Br. at 54. The Code does *not* prescribe any procedural matters for student loan discharge. And *City of New York* did not adjudicate what notice was required – just whether notice was required.

IV

DUE PROCESS IS NOT OFFENDED WHEN DISCHARGEABILITY OF STUDENT LOAN DEBT OCCURS THROUGH A PROPERLY NOTICED PLAN CONFIRMATION INSTEAD OF AN ADVERSARY PROCEEDING.

Even if the record in this case did not demonstrate that United had received actual notice, the confirmation order would not be void for lack of due process notice. Rules adopted by this Court do not establish the parameters of constitutional procedural due process. *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 454 (2004)(The Bankruptcy Rules shall not abridge, enlarge, or modify any substantive right.) Neither do acts of Congress establish the scope of due process, although that is irrelevant, since Congress has not required adversary proceedings to determine dischargeability of student loan debts. Therefore whether Espinosa should have served a summons and complaint for an adversary proceeding about undue hardship is immaterial to any due process challenge.

A. Congress has not required a debtor to use an adversary proceeding for an undue hardship determination.

To an amazing degree, the arguments of United and its supporting *amici* rest on a completely mistaken notion that 11 U.S.C. 523(a)(8) or some other provision of the Code mandate that an undue hardship finding *must* come about through an adversary proceeding – even, it seems, when the debtor and the creditor both want to waive it. This misperception underlies both

United's statutory interpretation argument and its due process argument.

But that is not so. Congress adopted no such provision, and this Court has made that plain: "The text of § 523(a)(8) does not require a summons . . . " *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 453 (2004). There is nothing in the plain language of 11 U.S.C. 523(a)(8) from which it could even be suggested that the section mandates use of an adversary proceeding.

B. The due process clause of the constitution did not require Espinosa to employ an adversary proceeding.

There is no due process violation merely because an adversary proceeding was not invoked. *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 453 (2004).

In *Hood,* the Court considered whether a debtor's proceeding in Bankruptcy Court to discharge a student loan owed to a state implicated the Eleventh Amendment. If it did, the Court would have to decide whether, under the Bankruptcy clause of the Constitution, Article I, § 8, cl. 4, Congress abrogated state immunity for such a proceeding, thus avoiding a violation of the Eleventh Amendment. *Hood, supra,* p. 443. The Court did not reach the issue of Congressional abrogation, because it held that a Bankruptcy Court determination of dischargeability was an *in rem* proceeding, *id.* p. 447, and therefore was not "a suit against the state." *Id.* at 450.

The Tennessee Student Assistance Corporation contended that the proceeding to determine dischargeability established by Bankruptcy Rule 7001 *did* demonstrate that the dischargeability determination was a suit against the state, and that service of the summons constituted an infringement upon the sovereignty of the state. *Id.* at p. 452. This Court rejected that argument, by (1) holding that there was no statutory requirement for an adversary proceeding to determine dischargeability, let alone a constitutional dictate for doing so; (2) recognizing that dischargeability could be determined through use of the motion procedure which did not require service of a summons; and (3) holding that the possible use of a summons was irrelevant to the question of infringement upon a state's sovereignty, because an adversary proceeding was *not mandated,* either by constitution or by statute. *Id.* at 453-54. The Court was very clear. It said:

- "The text of [11 U.S.C.] § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern." *Id.* p. 453;

- "To conclude that the issuance of a summons, which is required only by the Rules, precludes Hood from exercising her statutory right to an undue hardship determination would give the Rules an impermissible effect. 28 U.S.C. § 2075 ('[The Bankruptcy Rules] shall not abridge, enlarge, or modify any substantive right')." *Id.* p. 454.

United and its supporting *amici curiae* argue that because United was not served with a summons and adversary complaint it was denied constitutionally-

guaranteed due process. They argue that although the Constitution does not expressly require use of the procedures found in rules or statutes, nonetheless because Espinosa did not use the "heightened procedures" called for by the Rules, and (it thought) by Congress, he did not comply with the due process clause. United Br. at. 54. This argument is simply incorrect. It conflicts with the basic proposition that neither Congress nor rules promulgated by this Court establish the due process guarantees of the Fifth Amendment

C. Notification by mail of the proposed plan and a hearing date to confirm it fulfilled *Mullane*'s requirement of "notice reasonably calculated under the circumstances."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) provides a very simple test of what notice must be given under the due process clause. The government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The Court has held that "mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 490 (1988). Here, United received mail notice – as authorized by the Rule for giving notice of plan confirmation proceedings – of a *plan confirmation proceeding.*

United's quibbles about the address to which the notice was given is unavailing, not only because of the fact that it thereby obtained actual knowledge, but

because the mailing addresses used here, first by the Clerk in mailing the plan and notice, and then by the Trustee in mailing the follow up notice, were proper. *E.g. In Re King,* 290 B.R. 641, 645 (Bankr. C.D. Ill. 2003)("[A] notice of filing mailed to mortgagee's payment address is sufficient."); *In re Kleather,* 208 B.R. 406, 410 – 12 (Bankr. S.D. Ohio 1997)(forwarding notice to processing address as opposed to service address was sufficient for due process purposes); *DaShiell v. Ohio Citizens Bank*, 124 B.R. 242, 249 (Bankr. N.D. Ohio 1990)(service at post office box proper because debtor made his loan payments to the post office box.)

United ignores the fact that the required notice to be measured against the requirements of *Mullane* is that to give notice of a hearing to confirm a plan. The notice given for the plan confirmation hearing complied with Rule 2002(b), both in giving notice by mail and giving sufficient advance notice.

United argues that the importance of the subject of discharging a student loan constitutionally required the use of an adversary proceeding, and service of a summons. But *Hood* says that is not required, so the confirmation order was not void. Notwithstanding *Hood*, United wants this Court to hold that the amount of process that is due to confirm a plan depends upon the issues contained in the plan. To do so would create a brand new approach to procedural due process. It would establish a precedent of broad application and create pervasive uncertainty about the finality of confirmation orders.

United rests its argument that it is entitled to "heightened notice," upon all manner of statements

about the special nature of student loans, and the intent of Congress to restrict the dischargeability of student loans. It argues that, therefore, it is entitled to "enhanced due process" because of the importance of the interests involving discharge of student loans. Implicit in that argument is that the policy interests related to the discharge of student loans are more substantial or more important than the policy interests behind the non-dischargeability of other obligations enumerated in 11 U.S.C. 523(a). In part United presents this point by simply not attempting to distinguish the importance of the other non-dischargeable obligations from those behind 523(a)(8). There are numerous obligations specified in 11 U.S.C. 523(a) for which a debtor is denied a discharge. Each and every one of them has strong policy reasons prompting the denial of a discharge. United's argument that due process is offended when an adversary proceeding is not used to determine dischargeability only of student loans fails because student loans are not unique in implementing policies Congress found important. Indeed, if anything, the policy denying a discharge for student loans probably has less vigor than all the rest. To begin with, student loan discharges are the only obligations for which an exception can be made if denying a student loan discharge would impose an undue hardship upon the debtor. 11 U.S.C. 523(a)(8). In addition, Congress created the exception for student loans after most of the other exceptions were in effect; and even then it begun with significant limitations and then gradually expanded them. See the description of Congress's continuing amendments to the Code on the subject of student loans, Brief at 20 – 23; Brief of the United States at 23 -- 25.

Because there is really no basis to create a special "enhanced due process" rule solely for student loans based upon their supposed greater importance, logic would dictate that if a constitutional rule of "enhanced due process" is to be created, it should cover all other instances where strong policy reasons militate against discharge. But why should the "enhanced due process" rule be limited situations involving important policies related to discharges? There is no reason to give student loans special treatment and raise a higher due process barrier for them

If it was a violation of due process not to use an adversary proceeding in this case, then the logic of the rule sought by United would expose every plan granting a discharge that was confirmed, without an adversary proceeding, to a creditor motion that such a plan is void. A creditor could move under Rule 60(b)(4) to open up any such plan, no matter how long ago confirmed, and no matter how far into the future the creditor waits to bring its motion. This would put in jeopardy every single such Chapter 13 plan, not to mention Chapter 11 plans. Nor would this potential effect be limited to the discharge of student loans. *See In re Forrest,* 2009 Bankr. LEXIS 2732 (Bankr. N.D. Ill. 2009)(lien stripping).

D. That United must administer a large number of Chapter 13 cases is not one of those "circumstances" that define the process that is due.

United and its *amici* argue that the particular "circumstances" which this Court should consider in deciding whether *Mullane* was satisfied include several claimed to be unique to student lenders. It

claims these considerations justify what is a most astounding conclusion. Because of these "special considerations" United and its *amici* argue that a student loan creditor should be able to entirely ignore mailed notice – actually received – of a Chapter 13 plan (and presumably mailed notice under Chapter 7 or any other chapter of the Code as well.)[11] This Court should disagree.

United and its *amici* complain of their heavy burden in dealing with a flood of notices in Chapter Thirteen cases. Br. at 39. United argues that the high volume of mailed notice it receives justifies ignoring all of that mail except summonses for adversary proceedings. Espinosa can find no case involving due process under *Mullane* that considers, in its determination of what notice is "reasonable under the circumstances," any of the following, which United says justifies ignoring the mailed notice:

- how an organization deals with (or has problems dealing with) a given notice once received;

- how many pieces of mail a notice recipient may receive at the same time as the particular notice being challenged;

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[11] *E.g.* Brief of States at 32 (if rules say notice should come in a blue envelope, creditor need not open a white one); Brief of National Council of Higher Education Loan programs, Inc. at 33 (nothing in the Code or Rules imposes a duty upon a creditor holding non-dischargeable obligation to read a plan, and public policy suggests a student loan guaranty agency should not have to incur the expense to do so).

- how many notices for how many similar cases may be given;

- whether it is reasonable to allow the notice recipient to ignore the notice;

- whether notice was "unreasonable under the circumstances" because United should not be put to the burden of having to make "needless objections."

- whether the notice recipient would have to retain counsel to respond to the notice, Br. at 48; Brief of Educational Credit Mgmt. Corp. at 34, a problematic proposition, given that the Code expressly permits a creditor like United to use non-lawyer staff to present its position and claims at a first meeting of creditors, 11 U.S.C. 341(c) ; and

- whether the notice recipient's response would invariably be an objection, Br. at 48, 49 (i.e. notice should just be dispensed with based upon the likelihood of such unvarying objections).

None of the foregoing special circumstances argued by United is relevant to whether the notice was "reasonably calculated" to provide notice.

Mullane says that the reasonableness of notice is also measured by whether it is of a kind which would be chosen by one "desirous of actually giving notice." 339 U.S. 315. It is suggested that Espinosa's choice to give notice of a plan and its confirmation was not such

notice.[12] This is unpersuasive for three reasons. First, Espinosa did not choose the form of notice required for plan confirmation, the Bankruptcy Rules did. Second, given that Espinosa was proposing that United waive the need for a separate undue hardship hearing, Espinosa's use of the plan confirmation process was a reasonable alternative. Third, Espinosa furnished *four* different addresses, related to the student loans, to which notice should be given.

Even were United's "special considerations" germane to what notice is reasonable under the circumstances, its arguments about them are unpersuasive.

To begin with, while United and its amici make much of the "tidal wave of mail" they receive, they also furnish no facts, statistics or information about the pervasiveness of plans proposing waiver of undue hardship. Other than to add up the number of circuit and district court cases involving waiver of undue hardship – which would be a minuscule number compared to the entire volume of bankruptcy cases – there is no way of knowing whether this is a "problem" of any significance at all.[13] Curiously, United has never

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[12] Brief of Educational Credit Mgmt. Corp. at 14; Brief of National Council of Higher Education Loan Programs, Inc. at 39.

[13] It is entirely unclear that there is any significant abuse to be addressed. "[T]he National Bankruptcy Review Commission concluded that the anecdotal concerns about the abuse of the educational loan system are not supported by the empirical evidence. National Bank Rev. Comm'n, Bankruptcy: The Next Twenty Years § 1.4.5 (Oct 20 1997) *cited in In re Hornsby,* 144

explained the circumstances surrounding its actions in this case. It received the notice. It filed a proof of claim. But it ignored the plan hearing and made no objection. If United's actions were a result of its problems with a "tidal wave of mail," one would think United would have said so. But the record is devoid of any such information. Similarly, while amici speak generally about their problems in identifying plans that propose waiver of undue hardship findings, they, too, fail to provide any data or statistics about plans "missed" because of the flood of mail. What really is happening here is that student loan creditors simply want the privilege of ignoring proper notice, accepting payments under a plan, then proceeding with collection as though no bankruptcy proceeding and plan had ever occurred. They want the proverbial privilege of "having their cake and eating it, too."

Next, United's protestation of difficulty in identifying plans with undue hardship waiver provisions not only suffers from the lack of factual support. It also ignores modern practice, which allows United to insure that efficient notice of proposed plans and confirmation hearings are directed to precisely the person or entity within the organization that should see such notices. A recent amendment of 11 U.S.C. 342, greatly streamlines the notice process. Section 342 outlines the manner of giving notice under various circumstances. As a result of a 2005 amendment to section 342, United may now identify for all bankruptcy courts the name of a "person, or an organizational subdivision of such creditor to be

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F.3d 433 (6th Cir. 1998)" Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer, eds., 15th ed.) ¶ 523.14[1] & [2] fn. 1b.

responsible for receiving notices." 11 U.S.C. 342(g)(1). A creditor like United "may file with *any* Bankruptcy Court a notice of address to be used by *all* the Bankruptcy Courts . . . " (emphasis supplied.) 11 U.S.C. 342(f)(1). This very simple and efficient procedure for establishing reliable and prompt notice does two things.

First, it obviates any genuine concern that notice given to a payment address – although acceptable – may not find its way to the proper person (although in this case, it obviously did). Further, using this notice procedure should alleviate concerns expressed by United and *amici* that they are prejudiced in responding to notices in a Chapter 13 case, if presented with the shortest time limits for the various steps in a Chapter 13 case.[14] Such concerns are unrealistic in light of current modes of rapid electronic notice. Moreover, they are not relevant to whether the particular notice satisfied *Mullane*.

Finally, United's contention that it should be excused from having to "open the envelope," because it would have no other reason to do so, ignores the requirements imposed upon student loan lenders and guaranty entities by Department of Education regulations.

The regulations impose obligations upon lenders, and guaranty agencies like United, when a student borrower files bankruptcy proceedings. These include:

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[14] Brief of United Stats at 26, 27; Brief of Educational Credit Mgmt. Corp. at 3; Brief of National Council of Higher Education Loan Programs, Inc. at 3, 10 – 11, 17 – 19.

- For a lender to file a claim with a guaranty agency for payment of the loan the lender must "determine that a borrower has filed a petition . . . on the basis of receiving a notice of the first meeting of creditors or other proof of filing provided by the debtor's attorney or the bankruptcy court." 34 CFR 682.402(f)(3).

- A lender's claim must include "a statement of any facts of which the lender is aware that may form the basis for an objection or exception to the discharge of the borrower's loan obligation in bankruptcy and all documents supporting those facts." 34 CFR 682.406(g)(1)(v)(B).

- The required guaranty agency participation in bankruptcy proceedings includes consideration of undue hardship. The guaranty agency must "determine whether repayment under either the current repayment or any adjusted repayment schedule authorized under this part would impose an undue hardship on the borrower and his or her dependents." 34 CFR 682.406(i)(1)(ii).

- If the guaranty agency determines that repayment would not impose an undue hardship, it "must then determine whether the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs [in which event] it may, but is not required to engage in the activities described paragraph (i)(1)(iv)." 34 CFR 682.406(i)(1)(iii).

- Finally, the obligation of the Department of Education to make a reinsurance payment upon a student loan is conditioned upon the exercise of due diligence of the lender or guaranty agency in attempting to collect the loan. 34 CFR 682.406(a)(3),(11). Surely failing to object to a plan proposing waiver of undue hardship would be a failure of due diligence, unless of course it was a considered decision for reasons already discussed.

Given these obligations, a guaranty agency like United cannot ignore an envelope from the bankruptcy clerk containing notice of a filing, a plan, and hearing dates. It is unreasonable to conclude that it really would. But in any event, these considerations really have nothing to do with whether the notice given here was "reasonable under the circumstances."

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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