No. 08-1134

In the Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC., PETITIONER

v.

FRANCISCO J. ESPINOSA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
WILLIAM KANTER
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the confirmation and subsequent completion of respondent's plan under Chapter 13 of the Bankruptcy Code had the effect of discharging his student loan debt, notwithstanding his failure to initiate an adversary proceeding to determine dischargeability and the lack of any determination by the bankruptcy court that "excepting [the] debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8).

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation and rules:

Statutes, regulation and rules—Continued: Page

Statutes, regulation and rules—Continued: Page

Statutes, regulation and rules—Continued: Page

In the Supreme Court of the United States

No. 08-1134

UNITED STUDENT AID FUNDS, INC., PETITIONER

v.

FRANCISCO J. ESPINOSA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States is both a direct lender and a guarantor of student loans. The government's current loan portfolio is worth approximately $618 billion. The Court's resolution of this case also may have implications for various other debts that are owed to the federal government and are non-dischargeable in bankruptcy, including taxes or customs duties; non-tax fines, penalties, and forfeitures; and restitution orders. The United States therefore has a significant interest in this case.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code permits "individual debtors [to] obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court." *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 327 (1993). To proceed under Chapter 13, a debtor must have "regular income" and his indebtedness must be below certain statutory limits. 11 U.S.C. 109(e).

A debtor initiates a Chapter 13 proceeding by filing a petition with the appropriate bankruptcy court, 11 U.S.C. 301(a), and he must file a proposed plan within 15 days after filing the petition, 11 U.S.C. 1321; Fed. R. Bankr. P. 3015(b). The bankruptcy court holds a confirmation hearing, 11 U.S.C. 1324, and must confirm the plan if it satisfies certain criteria, 11 U.S.C. 1325. The debtor must then make all payments required under the plan, 11 U.S.C. 1326, a process that takes between three and five years. 11 U.S.C. 1322(d), 1325(b)(4). If the debtor completes the plan, the bankruptcy court enters a discharge order under 11 U.S.C. 1328(a), which "operates as an injunction against" efforts to "collect, recover or offset any * * * debt" that was "discharged under [that] section." 11 U.S.C. 524(a)(1) and (2).

b. A full-compliance discharge under Chapter 13 "is broader than the discharge received in any other chapter" of the Bankruptcy Code. 8 *Collier on Bankruptcy* ¶ 1328.01, at 1328-5 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. Sept. 2005) (*Collier*). Certain debts, however, remain non-dischargeable even in a Chapter 13 proceeding. In particular, Chapter 13 incorporates 11 U.S.C. 523(a)(8), which provides that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such

debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." See 11 U.S.C. 1328(a)(2).[1]

c. The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) establish certain procedures for "determin[ing] the dischargeability of a debt." Fed. R. Bankr. P. 7001(6). "Because student loan debts are not automatically dischargeable," those Rules "require the debtor to file an 'adversary proceeding' against" the relevant creditor in order to obtain a discharge. *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 451 (2004) (*Hood*).

Although an adversary proceeding "is considered part of the original bankruptcy case," *Hood*, 541 U.S. at 452, it "has all the trappings of civil litigation," *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (en banc). The debtor initiates an adversary proceeding by filing a complaint, Fed. R. Bankr. P. 7003, which must satisfy the requirements of Federal Rule of Civil Procedure 8, see Fed. R. Bankr. P. 7008, and must be served on the creditor along with a summons issued by the clerk. Fed. R. Bankr. P. 7004. In addition to the methods of service permitted by the Federal Rules of Civil Procedure, the Bankruptcy Rules also authorize service by mail. Fed. R. Bankr. P. 7004(b). If the creditor is a corporation, service must be made on "a managing or general agent, or * * * any other agent authorized by appointment or

---

[1] At the time of the discharge order in this case, Section 523(a) also provided for discharge of any student loan debt that first became due more than seven years before the filing of the bankruptcy petition. 11 U.S.C. 523(a)(8)(A) (1994). That provision is not at issue here because respondent filed his bankruptcy petition less than five years after receiving his first student loan. Pet. App. 60-61.

by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3). If the federal government is a creditor, as often is the case with student loan debts, service must be made on the Attorney General, the local United States Attorney, and the appropriate federal agency. Fed. R. Bankr. P. 7004(b)(4) and (5).

The procedures for providing notice of a Chapter 13 plan are considerably less rigorous. The clerk must give all parties in interest at least 25 days' written notice of the deadline for filing objections and the date of the confirmation hearing. Fed. R. Bankr. P. 2002(b). That notice need not include a copy of the plan itself; "a summary of the plan" is sufficient. Fed. R. Bankr. P. 3015(d). In addition, unlike an adversary complaint, notice under Bankruptcy Rule 2002(b) need not be directed to an agent authorized to receive service of process. Instead, notice may be "mailed to the address shown on the list of creditors or schedule of liabilities" filed by the debtor along with the bankruptcy petition. Fed. R. Bankr. P. 2002(g)(2).

2. During 1988 and 1989, respondent obtained four federally guaranteed student loans that totaled $13,250 and accrued interest at varying rates. Pet. App. 52, 60-61. On December 7, 1992, respondent filed a Chapter 13 petition and a proposed plan. *Id.* at 61. The only specific indebtedness identified in respondent's bankruptcy petition was his student loan debt. J.A. 15-20. The plan proposed to repay only the principal on that debt, and it stated that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." J.A. 26. The plan did not assert that failing to discharge the interest on respondent's student loan debt would impose an "undue hardship" on respondent and his dependents, nor

did it suggest that plan confirmation would constitute an "undue hardship" finding by the bankruptcy court.

Respondent did not initiate an adversary proceeding in order to determine the dischargeability of the interest on his student loan debt. Instead, the clerk of the bankruptcy court mailed a one-page notice form and a copy of respondent's proposed plan to petitioner at the post office box. Pet. App. 14 n.4, 71; J.A. 34 (copy of notice). Immediately below the caption, the plan stated: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." J.A. 23. The plan also listed the deadline for filing a proof of claim, J.A. 26–27, and stated that "[o]bjections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of [the] Plan." J.A. 26.

The clerk's notice was stamped "REC'D" by petitioner's litigation department on December 18, 1992. J.A. 34. On January 8, 1993, petitioner filed a proof of claim for $17,832.15, which represented both the principal and accrued interest on respondent's student loans. J.A. 35 & n.**; Pet. App. 62 n.2. Petitioner did not object to confirmation of the plan, and respondent did not object to petitioner's proof of claim. *Id.* at 62, 72.

On May 6, 1993, the bankruptcy court entered an order stating that respondent's "Chapter 13 plan is approved and the Debtors are ordered to comply therewith." J.A. 43. The court made no finding that failing to discharge the interest on respondent's student loan debt would impose undue hardship on respondent and his dependents. Petitioner was not provided with a copy of the bankruptcy court's confirmation order. Pet. App. 62.

A month after the bankruptcy court entered its confirmation order, the Chapter 13 Trustee mailed petitioner a pre-printed form labeled "TRUSTEE'S NO-

TICE TO CREDITOR." J.A. 44. That form had a box checked stating that "[t]he amount of the claim filed differs from the amount listed for payment in the plan" and that "[y]our claim will be paid as listed in the plan." *Ibid.* The form also stated that "[i]f an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to address the dispute" by notifying the trustee. *Ibid.* Petitioner did not respond to that notice. Pet. App. 63.

Respondent completed all payments provided for in the plan, including the $13,250 designated for payment to petitioner. Pet. App. 63. On May 30, 1997, a second bankruptcy judge entered a one-page order stating that respondent was "discharged from all debts provided for by the plan or disallowed under 11 [U.S.C.] § 502, *except*" for six specified categories of debt. J.A. 46 (emphasis added). The third category listed included "any debt * * * for a student loan." J.A. 46. Respondent neither sought reconsideration of the discharge order nor filed a notice of appeal. Pet. App. 52.

3. Pursuant to a reinsurance agreement, respondent's loans were assigned to the United States Department of Education, which commenced collection efforts. Pet. App. 63. In 2003, respondent reopened his bankruptcy case, and he later filed a motion asking the bankruptcy court, *inter alia*, to order various entities, including petitioner, to cease all collection efforts. C.A. E.R. 39-43. Petitioner opposed that motion and filed a cross-motion for relief from the bankruptcy court's confirmation order, arguing that the order had been entered in violation of the Bankruptcy Code and Rules and that respondent's student loan debt had not been discharged. Pet. App. 6; C.A. E.R. 72-87. Petitioner also requested a recall of respondent's loans from the Department of

Education, which was completed on June 3, 2004. Pet. App. 63.

On August 12, 2004, a third bankruptcy judge granted respondent's motion in relevant part, denied petitioner's cross-motion, and ordered all claimants to "cease and desist all collection activity against" respondent. Pet. App. 79.

Petitioner appealed to the district court, which reversed. Pet. App. 60-70. The district court concluded that the bankruptcy court's confirmation order was "void," and it remanded "for an adversary hearing to determine whether [respondent] qualifies under the 11 U.S.C. § 523(a)(8) exception for the discharge of his student loan." *Id.* at 60.

4. The court of appeals reversed and remanded. Pet. App. 1-27.

a. In an initial per curiam opinion, the court of appeals remanded the case to the bankruptcy court for the limited purpose of addressing whether its discharge order—which, as noted above, specifically excluded student loan debt from discharge—"was entered as a result of a clerical error and, if so, whether to correct it so as to conform to [respondent's] Chapter 13 plan." Pet. App. 59. The court of appeals observed that such a limitation on discharge was "inconsistent with" the confirmed plan's terms, and it hypothesized that the clerk of the bankruptcy court may have generated the discharge order without tailoring it to "the facts of [respondent's] case." *Id.* at 57-58 (internal quotation marks and citation omitted).

b. On remand, the bankruptcy judge who had ruled on the 2003 motions issued a new order. The bankruptcy court found that the language excepting respondent's student loan debt from discharge "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 and completed the Plan." J.A. 48. The bankruptcy court ordered the relevant paragraph stricken from the discharge order, and further ordered that respondent "be * * * discharged from all obligations of any nature whatsoever arising from or relating to the Student Loans listed in" respondent's bankruptcy petition. *Ibid.*

c. Following the remand, the court of appeals reversed the district court's decision and remanded the case to the bankruptcy court with directions to reinstate its order enjoining any attempt to collect the unpaid portion of respondent's student loan debt. Pet. App. 26-27. The court framed the issue as "[w]hether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan." *Id.* at 5. It concluded that such a discharge was consistent both with the Bankruptcy Code and Rules, *id.* at 8-18, and with the Due Process Clause, *id.* at 18-25.

The court of appeals determined that its previous decision in *Great Lakes Higher Education Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999) was "on all fours with our case" and "foreclose[d]" petitioner's statutory argument. Pet. App. 8. The court observed that petitioner could have "insist[ed] on the special procedures available to student loan creditors by objecting to the plan on the ground that there ha[d] been no undue hardship finding," but that petitioner had raised no such objection. *Id.* at 10; see *id.* at 14-15. The court also stated that "[a] bankruptcy discharge order is

a final judgment" and that "[e]rrors committed during the course of litigation must be corrected by way of a timely appeal." *Id.* at 11.

The court of appeals also rejected petitioner's argument "that the discharge order is void because [petitioner] was denied due process." Pet. App. 18. The court stated that a party who "is adequately notified of a pending lawsuit * * * is deemed to know the consequences of responding or failing to respond." *Id.* at 20. Because petitioner "receive[d] actual notice of [respondent's] bankruptcy case," the court of appeals concluded that it had suffered no violation of its rights under the Due Process Clause. *Id.* at 21.[2]

SUMMARY OF ARGUMENT

Respondent's student loan debt has not been discharged because petitioner did not waive or forfeit its right to contest discharge and the bankruptcy court has not made the undue hardship finding that is an essential prerequisite to discharge of such debt.

A. The court of appeals held that petitioner had waived its objection to discharge of a portion of respondent's student loan debt by failing either to object to the discharge in the bankruptcy court proceedings or to appeal the confirmation or discharge order. Under the Bankruptcy Code, however, the debtor must affirmatively secure an undue hardship finding in order to ob-

[2] The court of appeals noted that some bankruptcy judges had announced that they would not confirm plans that purported to discharge student loan debts and that one bankruptcy judge had suggested that including such provisions in a proposed plan might subject a debtor's counsel to sanctions. Pet. App. 25-26. The court disapproved both practices, stating that "student loan debts can be discharged by way of a Chapter 13 plan" and that bankruptcy judges "have no business standing in the way" if a creditor fails to object. *Id.* at 26.

tain a discharge of student loan debt. The Bankruptcy Rules establish a procedure for obtaining such a finding, and the debtor is responsible for initiating that procedure. The court of appeals' waiver analysis has the practical effect of shifting to the creditor the burden that the Code and Rules place upon the debtor. By contrast, another provision of the same statutory section provides that certain non-dischargeable debts—but not student loan debts—are covered by a discharge order unless a creditor requests a hearing. The court of appeals' approach effectively subjects student loan debt to the same procedural regime, notwithstanding Congress's evident intent that the two categories of debt be treated differently.

Petitioner was not required to appeal from the confirmation or discharge order to preserve its right to seek repayment of respondent's remaining student loan debt after the plan was completed. The Bankruptcy Code states that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a) and (8). This provision is framed as a self-executing limitation on the effect of a discharge order rather than as a directive to bankruptcy courts about what plans to confirm. By contrast, numerous other provisions of the Bankruptcy Code are framed as directives to the bankruptcy court. To the extent that Section 523(a) is ambiguous in this regard, construing that provision as a limitation on the legal effect of a discharge order serves Congress's purposes by preventing debtors from circumventing statutory bans on the discharge of other categories of debt, such as domestic support obligations.

B. Discharge of student loan debt without an undue hardship finding is inconsistent with the background and purposes of Section 523(a)(8). For more than 30 years, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy, both to prevent abuses of the student loan system by debtors and to safeguard the financial integrity of the government entities and nonprofit institutions that participate in it.

C. Treating an undue hardship finding as a precondition to discharge is fair to both debtors and creditors. Because student loan debt is presumptively non-dischargeable, it makes sense to place the onus on debtors to request an undue hardship determination rather than on creditors to scrutinize every one of the vast number of Chapter 13 plans that they receive. There is no reason to believe that involved proceedings will be necessary every time a debtor seeks an undue hardship determination. Requiring a debtor to obtain such a determination in order to discharge a student loan debt also avoids creating ethical quandaries for debtors' attorneys.

D. Because respondent did not initiate an adversary proceeding and the bankruptcy court made no undue hardship finding in this case, respondent's student loan debt has not been discharged, and petitioner did not violate the discharge injunction by seeking to collect that debt. The Court therefore need not address the question whether or under what circumstances the waiver rule announced by the Ninth Circuit might violate the Due Process Clause.

ARGUMENT

THE BANKRUPTCY COURT'S DISCHARGE ORDER DID NOT DISCHARGE RESPONDENT'S STUDENT LOAN DEBT BECAUSE THE COURT DID NOT FIND, PURSUANT TO THE PROCEDURES SPECIFIED IN THE BANKRUPTCY RULES, THAT FAILURE TO DO SO WOULD CREATE UNDUE HARDSHIP FOR THE DEBTOR AND HIS DEPENDENTS

A. Petitioner Was Not Required To Demand An Adversary Proceeding Or To Appeal From The Confirmation Or Discharge Order To Preserve Its Right To Collect The Remainder Of Respondent's Student Loan Debt After Respondent's Chapter 13 Plan Was Completed

Respondent's Chapter 13 plan proposed to pay $13,250 to petitioner in satisfaction of respondent's student loan debt and to discharge the remainder of that debt. J.A. 26. Respondent did not contend, however, that a failure to discharge the remaining debt would subject him to undue hardship; he did not initiate the adversary proceeding that the Bankruptcy Rules specify as the required mechanism for resolving issues of dischargeability; and the bankruptcy court made no undue hardship finding. In holding that the bankruptcy court's discharge order nevertheless precluded petitioner from attempting to collect the remaining debt, the court of appeals found that petitioner had forfeited its right to insist that the statutory prerequisite to discharge be satisfied by failing (a) to object to the plan during the bankruptcy court proceedings and (b) to appeal from the confirmation and discharge orders. Pet. App. 10-11, 14-16. That analysis is erroneous.

1. Petitioner did not waive its right to an undue hardship determination by failing to object to respondent's plan or to demand an adversary proceeding

The court of appeals stated that, when a creditor receives notice of a proposed Chapter 13 plan that provides for the discharge of student loan debt, the creditor can "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." Pet. App. 10. The court further indicated that a creditor who fails to "insist" on an adversary proceeding in these circumstances thereby "waive[s] or forfeit[s]" any objection to discharge of the debt. *Ibid.* That analysis is inconsistent with the Bankruptcy Code, the Bankruptcy Rules, and this Court's decision in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004).

a. Section 523(c) provides that "the debtor shall be discharged" from debts that fall within three of the 19 categories of non-dischargeable debt specified in Section 523(a) "unless" the creditor requests a hearing to determine whether a particular debt falls within a relevant category. 11 U.S.C. 523(c).[3] Student loan debt, however, is not among the categories of debt to which Subsection (c) applies. The logical inference is that a creditor need not request a hearing in order to prevent student loan debt from being discharged in the absence of an undue hardship finding. Accord S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978) (*Senate Report*) (stating that,

[3] The three categories are debts for things obtained by fraud or false pretenses (11 U.S.C. 523(a)(2)), debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" (11 U.S.C. 523(a)(4)), and debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" (11 U.S.C. 523(a)(6)). See 11 U.S.C. 523(c).

under Section 523(a)(8), "[t]he lender or institution is not required to file a complaint to determine the nondischargeability of any student loan"). The court of appeals' approach, which treats a student loan creditor's failure to "insist" on an adversary proceeding as a waiver of the creditor's objection to discharge, effectively subjects student loan debt to the same procedural regime that applies to the debts specified in Section 523(c), notwithstanding Congress's evident intent to distinguish between the two categories.

b. The Bankruptcy Rules specify the procedures for resolving questions of dischargeability, including questions as to the presence or absence of "undue hardship" in student loan cases. Those Rules place the burden on the *debtor* to initiate an adversary proceeding through the filing of a complaint and service of the complaint and a summons. Fed. R. Bank. P. 7003, 7004. The practical effect of the court of appeals' approach is to reverse that burden by requiring the *creditor* either to demand an adversary proceeding or to forfeit his objection to discharge. Unlike notice of the plan itself, moreover, the summons and complaint must be specifically directed to an agent of the creditor who is "authorized by appointment or by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3); see pp. 3-4, *supra*. Like the requirement that the debtor initiate the adversary process, that heightened notice requirement is effectively negated if providing notice of the plan to some *other* agent transfers to the student loan creditor the burden of objecting to the discharge.

The court of appeals found that, so long as petitioner had constitutionally adequate notice of respondent's Chapter 13 plan, its failure to demand an adversary proceeding could appropriately be treated as a waiver of

any challenge to the dischargeability of respondent's student loan debt. Pet. App. 21. But the fact that an interested party has actual knowledge of pending legal proceedings does not mean, in and of itself, that the party's failure to assert its rights can be treated as a waiver. Rather, the determination whether a waiver has occurred may depend on whether the party has received the *type* of notice required by applicable law. See *City of New York* v. *New York, New Haven & Hartford Railroad*, 344 U.S. 293, 297 (1953) (holding, under the former Bankruptcy Act, 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"); *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989) (Under the Federal Rules of Civil Procedure, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."); *Ruehle* v. *Educational Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679, 685 (6th Cir. 2005) (positing a hypothetical situation in which a plaintiff purported to commence a civil action by filing a motion and mailing it to the defendant). That principle applies with particular force here, where the Bankruptcy Rules squarely place the burden of initiating an adversary proceeding upon the debtor, and the effect of the court of appeals' waiver analysis is to shift that burden to the creditor.

c. This Court's decision in *Hood* confirms that it is the debtor's obligation to obtain an undue hardship finding rather than the creditor's obligation to insist on one. The Court in *Hood* held that "a proceeding initiated by a debtor to determine the dischargeability of a student

loan debt [owed to a State] is not a suit against the State for purposes of the Eleventh Amendment." 541 U.S. at 443. In reaching that conclusion, the Court observed that, because a student loan debtor must "affirmatively secure[] a hardship determination" in order to obtain a discharge, "the major difference between the discharge of a student loan debt and the discharge of most other debts" is that student loan creditors who decline to participate in the bankruptcy proceedings "might still receive some benefit: The debtor's personal liability on the loan may survive the discharge." *Id.* at 450. The Court also noted, with apparent approval, the debtor's concession that "even if [the creditor] ignores the summons and chooses not to participate in the proceeding the Bankruptcy Court cannot discharge her debt without making an undue hardship determination." *Id.* at 453-454.

The Court in *Hood* thus recognized that an actual undue hardship finding by the bankruptcy court is an essential prerequisite to discharge of a student loan debt, even when the debtor properly initiates an adversary proceeding and the creditor does not object to discharge. It follows *a fortiori* that a debtor who does *not* initiate an adversary proceeding cannot obtain a discharge of his student loan debt without an undue hardship finding simply because the creditor does not "insist" on a proceeding that it is the debtor's duty to invoke.[4]

---

[4] The court of appeals cited *Hood*'s observation "that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan." Pet. App. 17-18 (internal quotation marks and citation omitted); accord *Hood*, 541 U.S. at 453 ("The text of § 523(a)(8) does not require a summons, and absent [Federal Rule of Bankruptcy Procedure]

2. Petitioner was not required to appeal the confirmation or discharge order to preserve its right to collect respondent's remaining debt because, under the terms of the applicable Bankruptcy Code provisions, a discharge order does not discharge student loan debt in the absence of an undue hardship determination

The court of appeals also suggested (Pet. App. 10-11) that petitioner's failure to appeal either the confirmation or discharge order independently precluded it from seeking to collect respondent's remaining debt after the completion of respondent's plan. An appeal was unnecessary, however, because the discharge order ultimately entered in this case did not have the effect of discharging respondent's student loan debt.

a. The Bankruptcy Code provides that a discharge order "does not discharge" a covered student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the

---

7001(6) a debtor could proceed by motion."). But while the details of the procedural scheme are set forth in the Rules rather than the Code, the Court in *Hood* made clear that the *statute* imposes the basic requirement that the debtor must "affirmatively secure[] a hardship determination." *Id.* at 450. The court of appeals' approach, under which the debtor's submission of a plan that provides for discharge of student loan debt shifts to the creditor the burden of objecting, is thus inconsistent with the Code as well as with the Rules. In addition, the heightened notice requirements described above still would apply even if the Bankruptcy Rules *did* permit a debtor to seek to discharge a student loan debt by filing a motion rather than commencing an adversary proceeding. See Fed. R. Bankr. P. 9014(b) (providing that a "motion shall be served in the manner provided for service of a summons and complaint by Rule 7004").

debtor's dependents." 11 U.S.C. 523(a) and (a)(8).[5] This provision is not framed as a directive to the bankruptcy court. Instead, it is a "self-executing" limitation on the effect of a discharge order. *Hood*, 541 U.S. at 450; accord *Senate Report* 79 (describing Section 523(a)(8) as "self-executing"). Accordingly, the most natural reading of Section 523(a)(8) is that, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 450; see *id.* at 444 (describing Section 523(a)(8) as providing that covered student loans "are not included in a general discharge order unless the bankruptcy court" makes an "undue hardship" finding).

Unlike Section 523(a), other provisions of the Bankruptcy Code *are* framed as directives to the bankruptcy court. Another provision in the same statutory Section provides that "the court shall" award costs and fees to the debtor in certain circumstances and "shall not award" costs and fees in other circumstances. 11 U.S.C. 523(d). Other provisions of the Bankruptcy Code, including provisions in Chapter 13, also provide that bank-

---

[5] Section 523(a)(8) is not by its terms directly applicable to Chapter 13 cases in which the debtor successfully completes performance under a confirmed plan. Instead, Section 523(a)(8) is incorporated via Section 1328, which provides that "the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt * * * of the kind specified in" eight enumerated paragraphs of Section 523(a). 11 U.S.C. 1328(a) and (a)(2). "The effect of this [provision] is to exclude from the full-compliance discharge [under Chapter 13] those debts for educational loans that are nondischargeable under section 523(a)(8)." 8 *Collier* ¶ 1328.02[3][h], at 1328-20; accord Br. in Opp. 6 n.3 (describing Section 1328(a)(2) as "making § 523(a)(8) applicable in Chapter 13 cases").

ruptcy courts "shall not"[6] or "may not"[7] do certain things. Another provision states that an action "does not" have a certain effect "[u]nless the [bankruptcy] court, for cause, orders otherwise." 11 U.S.C. 349. In contrast, Section 523(a)(8) states that a discharge order "does not" have a certain effect "unless" a particular condition is satisfied.

That difference is significant. As the court of appeals explained, a final judgment is ordinarily binding, and an injunction must be obeyed, even if the issuing court has exceeded its authority or has committed legal error in the course of adjudicating the suit. Pet. App. 10-11. "[A] final judgment cannot be ignored or set aside just because it was the result of an error," but rather "must be corrected by way of a timely appeal." *Id.* at 11; see *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2205 (2009). Under the statutory provisions governing discharge of student loan debt, however, petitioner was not required to appeal either the confirmation or the discharge order in order to preserve its right to collect respondent's debt after the Chapter 13 plan had been completed. Such an appeal was unnecessary because, in the absence of an undue hardship finding, a bankruptcy discharge "does not discharge an individual debtor from any debt" (11 U.S.C. 523(a)) for student loans covered by Section 523(a)(8).

The court of appeals emphasized that a "discharge injunction" comes "into force by operation of law upon entry of the discharge" and "preclud[es] the creditor, on

---

[6] 11 U.S.C. 330(a)(4)(A), 366(c)(1)(B), 1328(f) and (g)(1).

[7] 11 U.S.C. 105(b), 326(b), 341(c), 505(a)(2), 706(c), 707(b)(1), (b)(2)(D) and (c)(3), 904, 921(e), 1112(c), 1129(d), 1222(c), 1225(b)(1), 1228(f), 1229(c), 1307(f), 1322(d)(2), 1325(b)(1), 1328(h), 1329(c), 1501(d), 1521(d).

pain of contempt, from taking *any* actions to enforce the discharged debt." Pet. App. 13. As the court of appeals' own description recognizes, however, the discharge injunction under the Bankruptcy Code is limited by its terms to "actions to enforce the *discharged* debt." *Ibid.* (emphasis added); see 11 U.S.C. 524(a)(1) (referring to "any debt discharged under section * * * 1328 of this title"), 524(a)(2) (discharge "operates as an injunction against" any act "to collect, recover or offset any such debt"). Because the effect of Section 523(a)(8) was to prevent the discharge from encompassing respondent's student loan debt in the absence of an undue hardship finding, the discharge injunction likewise did not cover that debt.

b. To the extent that the statutory language is otherwise ambiguous, this reading of Section 523(a) effectuates the intent of Congress by preventing debtors from evading statutory prohibitions on the discharge of other categories of debt. For example, Section 523(a)(1)(B)-(C) provides that a discharge order "does not discharge" specified types of tax debt; Section 523(a)(5) provides that it "does not discharge * * * any debt * * * for a domestic support obligation"; and Section 523(a)(9) provides that it "does not discharge" debts "caused by" the debtor's unlawful operation of a motor vehicle while impaired by drugs or alcohol. See 11 U.S.C. 1328(a)(2) (making those provisions applicable to Chapter 13 proceedings such as this one). As with student loan debt, those debts are not among the categories for which Section 523(c)(1) requires the creditor to object to discharge.

By rendering certain debts completely non-dischargeable, those provisions reflect Congress's determination that the compelling societal interests in the

satisfaction of such obligations should take precedence over the debtor's interest in obtaining a fresh start in bankruptcy. The Ninth Circuit's analysis, however, invites debtors to attempt to escape liability for debts within those categories as well as for student loan debt (which can lawfully be discharged if the debtor initiates an adversary proceeding and the bankruptcy court makes an undue hardship finding). As here, the debtor could include language in a proposed bankruptcy plan stating that confirmation of the plan would extinguish the relevant debts. Then, if the creditor did not object and the plan was confirmed and subsequently completed, the debtor could argue that the debts had been discharged and that the discharge (though illegal) was not subject to later reexamination. In a prior decision, the Ninth Circuit acknowledged that possibility but stated only that it "d[id] not address any of the public policy concerns that might impact the dischargeability of such obligations as alimony or child support." *Great Lakes Higher Educ. Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083, 1087 n.6 (1999). In contrast, no such difficulties arise if Section 523(a) is understood to limit the legal effect of a discharge order rather than to provide direction to bankruptcy courts about what plans to confirm.

c. On the facts of this case, it is particularly clear that petitioner's failure to take an appeal did not effect a forfeiture of its right to collect the unpaid portion of respondent's student loan debt after the completion of the plan. The discharge order entered in May 1997 expressly *excluded* "any debt * * * for a student loan" from the categories of debts being discharged. J.A. 46. A different bankruptcy judge subsequently concluded that this exclusion was a "clerical mistake," J.A. 48, and

the court of appeals accepted that characterization. It is at least equally plausible, however, that the bankruptcy court in issuing the discharge order recognized (perhaps belatedly) that, in the absence of an undue hardship finding, any unpaid student loan debt could not be discharged. In any event, petitioner's failure to appeal a discharge order that specifically excluded the debt at issue here cannot reasonably be viewed as a waiver of its right to pursue continued collection efforts.

d. The court of appeals relied (Pet. App. 35) on 11 U.S.C. 1327(a), which states that "[t]he 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." The issue before the Court, however, does not involve whether the plan was binding on petitioner and respondent, since respondent does not contend that petitioner violated the plan's terms while it was in effect. Instead, the question here involves the legal effect of the discharge order that the bankruptcy court entered upon respondent's completion of the plan. With respect to that question, Section 523(a)(8), not Section 1327(a), is the controlling provision.

In any event, any possible tension between Section 523(a)(8) and Section 1327(a) is properly resolved by the "commonplace of statutory construction that the specific governs the general." *Morales* v. *TWA*, 504 U.S. 374, 384 (1992). Section 523(a)(8) is the more specific provision because it directly addresses the circumstances under which a bankruptcy court's discharge order discharges a particular type of presumptively nondischargeable debt. In contrast, Section 1327(a) prescribes the general effects of plan confirmation as be-

tween the debtor and creditor, and it does not address any limits on the legal effect of a bankruptcy court's discharge order.[8]

B. Permitting Discharge Of Student Loan Debt Without An Undue Hardship Finding Is Inconsistent With The Background And Purposes Of Section 523(a)(8)

Until 1977, student loans were dischargeable in bankruptcy on the same terms as other debts. See 11 U.S.C. 35 (1976) (listing non-dischargeable debts). Since then, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy. The history and purposes of those enactments confirm that a discharge order does not discharge a student loan debt unless the bankruptcy court finds that failure to do so will result in undue hardship to the debtor and his dependents.

1. In 1976, Congress enacted legislation "making it more difficult for debtors to discharge student loans guaranteed by States." *Hood*, 541 U.S. at 449. That statute provided that such debt "may be released by a discharge in bankruptcy * * * only if" (1) the loan had been outstanding for more than five years as of the discharge date, or (2) "the court in which the proceeding [was] pending determine[d] that payment from future income or other wealth w[ould] impose an undue hardship on the debtor or his dependents." Education

---

[8] Neither the court of appeals nor respondent has relied upon Section 1327(b) or (c), which together provide that confirmation of a Chapter 13 plan generally "vests all of the property of the estate in the debtor" and does so "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. 1327(b)-(c). Like Section 1327(a), these provisions do not specifically address debts that are excepted from discharge by Section 523(a).

Amendments of 1976, Pub. L. No. 94-482, § 439A(a), 90 Stat. 2141.

In 1978, Congress replaced the Bankruptcy Act with the Bankruptcy Code, which contained a provision whose wording closely paralleled current Section 523(a)(8). That provision stated that "[a] discharge under" three specified sections of the Bankruptcy Code "d[id] not discharge an individual debtor from any debt * * * to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless" one of two conditions was met. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2590-2591. The first basis for discharge under the original Bankruptcy Code was that the "loan first became due before five years * * * before the date of the filing of the petition." 11 U.S.C. 523(a)(8)(A) (1982). The second basis was worded identically to current Section 523(a)(8): "unless * * * excepting such debt from discharge * * * will impose an undue hardship on the debtor and the debtor's dependents." *Ibid.*

Since 1978, Congress has consistently expanded the scope of non-dischargeability of student loan debt. In 1990, Congress extended Section 523(a)(8)'s restrictions to discharge orders entered under Section 1328(a), which governs discharges (like the one at issue here) entered following completion of a Chapter 13 plan. Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-28. That same year, Congress also increased the required waiting period in the absence of undue hardship from five years to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(1)-(2), 104 Stat. 4964-4965. In 1998, Congress eliminated the provision authorizing time-based discharge of student loan debt,

thus creating the current regime under which all discharges of such debt require an undue hardship finding. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837.[9]

2. The consistent direction of these changes and the reasons underlying them refute any suggestion that debtors can obtain a discharge of student loan debt without an undue hardship determination. "[S]tudent loans are enabling loans [that] allow[] individuals to improve their own human capital and increase their income potential." *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1042 (10th Cir. 2007) (en banc) (internal quotation marks and citation omitted). Because the principal benefit of student loans—that is, an education—cannot be seized in the event of a default, policymakers feared that, without federal guarantees, "most lenders would * * * refuse to fund a student's pursuit of higher education." *Ibid.* (quoting Seth J. Gerson, *Separate Classifications of Student Loans in Chapter 13*, 73 Wash. U. L.Q. 269, 280 (1995)). As a result, the United States "insures or guarantees lenders and guarantors that the government will repay student loans in the event of a borrower's default." *Ibid.*

The current restrictions on dischargeability of student loan debt in bankruptcy thus serve two fundamental purposes. First, they "prevent[] abuses of the educational loan system by restricting the ability to discharge a student loan shortly after a student's graduation." 4 *Collier* ¶ 523.14[1], at 523-101 (June 2007). Second, they "safeguard[] the financial integrity of governmental

---

[9] Because the bankruptcy court's discharge order was entered in 1997, see J.A. 47, the 1998 amendments are not directly applicable to this case. There is no dispute, however, that respondent was ineligible for a time-based discharge under the pre-1998 version of the statute.

entities and nonprofit institutions that participate in educational loan programs." *Ibid.*

Permitting debtors to discharge student loan debt without obtaining the undue hardship determination mandated by Section 523(a)(8) is inconsistent with both purposes. So long as the immediate creditor fails to object, the Ninth Circuit's approach would permit a debtor to obtain a binding discharge of student loan debt immediately upon his graduation and without any determination of undue hardship. Indeed, respondent appears to be precisely the sort of debtor for whom Congress did not intend to authorize a discharge of student loan debt. Respondent sought bankruptcy protection less than five years after he *obtained* his first student loan. Pet. App. 60-61. At the time he filed for bankruptcy, moreover, respondent was employed, J.A. 21, did not assert that he had any dependents, and identified no specific debts beyond his student loans, J.A. 7.

C. Treating An Undue Hardship Finding As A Precondition To Discharge Is Fair To Both Debtors And Creditors

1. Requiring a Chapter 13 debtor to "affirmatively secure[] a hardship determination" (*Hood*, 541 U.S. at 450) in order to discharge a student loan debt makes sense because, as a practical matter, student loan creditors cannot conduct a timely and thorough review of every Chapter 13 plan that they receive. See *Ruehle*, 412 F.3d at 681 (noting that student loan creditors "receive tidal waves of mail"). We are advised that Chapter 13 plans often are mailed only to payment service subcontractors, and that those subcontractors cannot practicably forward those plans promptly enough to permit timely scrutiny by knowledgeable staff members before the date of the confirmation hearing. See Fed. R.

Bankr. P. 2002(b) (providing that notice must be given "not less than 25 days" before the deadline for filing objections). And even when those staff members do timely receive Chapter 13 plans for review, thorough scrutiny of the plan may be impracticable because "there is no fixed form that [the] plan must take, and debtors are allowed to tailor their plans to meet their own needs and circumstances." 8 *Collier* ¶ 1322.01, at 1322-6 to 1322-6.1 (Sept. 2006). In contrast, the procedures for commencing an adversary proceeding are designed to ensure that the appropriate individuals receive prompt and effective notice of the debtor's intent to seek discharge of a presumptively non-dischargeable student loan debt. See, *e.g.*, Fed. R. Bankr. P. 7004(b)(3) (requiring service on "an officer, a managing or general agent, or * * * any other agent authorized by appointment or by law to receive service of process"); Fed. R. Bankr. P. 7008 (incorporating Federal Rule of Civil Procedure 8, and thus requiring that an adversary complaint contain "a short and plain statement of the claim" (Fed. R. Civ. P. 8(a)(2) and "a demand for the relief sought" (Fed. R. Civ. P. 8(a)(3)).

Requiring the debtor to seek an undue hardship determination will not necessitate lengthy or complicated proceedings. A creditor may choose not to contest undue hardship once the issue properly is raised if it concludes that such a finding is warranted or that the costs of contesting the existence of undue hardship would exceed the benefits. Cf. 34 C.F.R. 682.402(i)(1)(iii) (Department of Education regulation permitting, but not requiring, a guaranty agency to refrain from opposing an undue hardship determination if it concludes that "the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the

loan"). The Federal Rules of Bankruptcy Procedure do not forbid stipulations, and they expressly authorize requests for admission, Fed. R. Bankr. P. 7036, default judgments, Fed. R. Bankr. P. 7055, and summary judgment, Fed. R. Bankr. P. 7056. Although the bankruptcy court must make an explicit undue hardship finding to discharge student loan debt even if the creditor does not object (see p. 16, *supra*), that finding can be made expeditiously.

2. The conclusion that debtors may not discharge a student loan debt simply by including language in a proposed Chapter 13 plan also avoids creating ethical difficulties for debtors' attorneys. As this Court stated in *Hood*, the Bankruptcy Rules "require[] the debtor to file an 'adversary proceeding' against [a creditor] in order to discharge his student loan debt," and the Bankruptcy Code provides that a "Bankruptcy Court cannot discharge [such a] debt without making an undue hardship determination." 541 U.S. at 451, 453-454.

The Ninth Circuit's approach encourages debtors' attorneys to seek to evade both of those requirements by including "plainly illegal provision[s]" in bankruptcy plans. *Ruehle*, 412 F.3d at 681. Doing so, however, would implicate Federal Rule of Bankruptcy Procedure 9011(b)(2), which states that, by presenting a document to a bankruptcy court, an attorney certifies that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." In addition, the approach approved by the court of appeals depends for its success on the prospect that the bankruptcy court will not become aware of the illegal provisions in time to perform its independent duty to confirm only those plans that "compl[y] with the provi-

sions of" the Bankruptcy Code. 11 U.S.C. 1325(a)(1); see *Johnson* v. *Home State Bank*, 501 U.S. 78, 87 (1991) (stating that "[a] bankruptcy court is authorized to confirm a [Chapter 13] plan *only* if the court finds" that it complies with the requirements set forth in Section 1325(a)) (emphasis added). The Bankruptcy Code should not be construed to encourage "practice by ambush." *Whelton* v. *Educational Credit Mgmt. Corp.*, 432 F.3d 150, 153 (2d Cir. 2005) (citation omitted).

3. The principle that "student loan debt remains due until there is a determination that the loan is dischargeable," 4 *Collier* ¶ 523.14[2], at 523-102, is fair to the debtor's other creditors and to the debtor himself. Because a debtor does not receive a discharge under Chapter 13 until after performance under the plan is complete, 11 U.S.C. 1328(a), a subsequent determination that the discharge order did not effectively discharge the debtor's student loan debt will not affect payments made under the plan to other creditors. The Bankruptcy Code, moreover, imposes no time limit within which an undue hardship determination must be made. Accordingly, a debtor who legitimately qualifies for a discharge of student loan debt but has failed to secure the necessary hardship determination need only do what he should have done in the first place: return to the bankruptcy court and commence an adversary proceeding. See Pet. App. 60 (district court remanding to the bankruptcy court for an undue-hardship determination). In contrast, a debtor who cannot demonstrate undue hardship is prevented from obtaining a windfall to which he is not entitled.

D. Because Respondent Did Not Initiate The Appropriate Procedure For Securing An Undue Hardship Finding And The Bankruptcy Court Made No Such Finding In This Case, Respondent's Student Loan Debt Has Not Been Discharged And The Court Need Not Address The Constitutional Question Presented In The Petition

This Court need not address petitioner's additional contention (Br. 51-58) that the notice it received of respondent's Chapter 13 plan failed to satisfy constitutional due process requirements. Consistent with the Constitution, Congress could have included student loan debt among the debts listed in Section 523(c)(1), for which a creditor must either raise or forfeit its objection to dischargeability. See p. 13 & n.3, *supra*. Had Congress done so, it also could have provided that mailing a student loan creditor notice of a proposed plan at an appropriate address is sufficient to trigger the creditor's duty to contest discharge. See *Jones* v. *Flowers*, 547 U.S. 220, 225-226 (2006) (stating that "due process does not require actual notice" and noting "this Court's ample precedent condoning notice by mail"). Thus, the procedural regime that effectively results from the court of appeals' ruling here would raise no substantial constitutional concerns if Congress had enacted it into law, thereby giving student loan creditors fair warning of the steps needed to preserve their rights to payment.

As explained above, however, the Bankruptcy Code does not require creditors to object to the debtor's plan to preserve the non-dischargeability of student loan debt, but rather places upon student loan debtors an affirmative duty to secure an undue hardship finding as a prerequisite to discharge. In addition, the Bankruptcy Rules require a particular type of notice (service of an

adversary complaint upon specified agents of the creditor) in order to commence proceedings to adjudicate the dischargeability of a student loan debt, and they provide that a creditor's obligation to respond within the context of such a proceeding does not arise until a complaint "is duly served." Fed. R. Bankr. P. 7012(a). The Code and Rules thus assure student loan creditors that their right to full payment will not be placed at issue unless and until the creditor is informed, in compliance with the Rules' heightened notice requirement, that the debtor has sought an undue hardship finding. The gravamen of petitioner's constitutional challenge is that respondent's failure to initiate an adversary proceeding as required by the Code and Rules deprived petitioner of the process it was due. See Pet. Br. 54-55.

The Code and Rule provisions on which petitioner relies make clear, however, that petitioner did not waive its right to pursue continued collection efforts by failing to insist on an adversary proceeding. See pp. 13-16, *supra*. And under Section 523(a)(8), the proceedings in the bankruptcy court did not effect a discharge of respondent's unpaid student loan debt. See pp. 17-23, *supra*. It is therefore unnecessary for the Court to decide whether petitioner would have suffered a deprivation of constitutional magnitude if its right to seek further repayment had been abrogated without the notice and procedures that the Code and Rules require for a discharge of student loan debt.

This Court's usual practice is to avoid deciding constitutional questions whenever possible, see, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508, 2513 (2009), and there is no reason to depart from that practice here. To the contrary, withholding decision on any constitutional issue would be

particularly appropriate because of the atypical facts of this case. It is undisputed that petitioner's litigation department received *actual* notice of respondent's Chapter 13 plan, the deadline for filing objections, and the date of the confirmation hearing. Pet. App. 21; see J.A. 34. In many other cases, however, it will not be possible to show that the creditor received actual notice. See pp. 26-27, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
WILLIAM KANTER
PETER R. MAIER
Attorneys

SEPTEMBER 2009