No. 08-1134

In The Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Debtor gave notice of a Chapter 13 plan by United States Mail to the address given him to make his loan payments. The proposed plan gave plain and detailed notice that the outstanding principal balance of the Student Loan would be paid but all other charges would be discharged.

Petitioner's Litigation department received the mailing, filed a proof of claim, but did not object to confirmation. Petitioner did not appeal, and collected its entire due under the plan. Petitioner then ignored the bankruptcy court injunction against collection, engaging in self help. When Espinosa sought to enforce the injunction, Petitioner sought relief under Rule 60(b)(4) which required proof that the confirmation order was void, thus requiring a showing of a constitutional due process violation. The questions presented:

1. Does the 5th Amendment make void an order about which Petitioner had actual knowledge, but chose to ignore?

2. Does the fact that Espinosa proposed to have a portion of a student loan discharged without an adversary proceeding, which Petitioner chose not to dispute, render the enforceability of the discharge order under 11 U.S.C. 1327(a) inapplicable?

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CASE OVERVIEW

Respondent Espinosa opposes the grant of *certiorari*. This is a case in which the court of appeals recognized that Petitioner United Student Aid Funds had been aware of the proposal to discharge a minor portion of the debt owed to it without a formal adversary proceeding, but chose to do nothing except take advantage of the plan of arrangement by collecting money from Espinosa for years. The court of appeals appropriately concluded that the Due Process clause is irrelevant to deciding whether a creditor can waive its right to insist upon a full-blown adversary proceeding, for a Chapter 13 plan of which it was aware, participated in and received the benefits of, and later attempted to renounce. It also held that simply because the confirmed plan was not the result of an adversary hearing on "undue burden" – which Espinosa proposed be waived and Petitioner chose not to disagree with – was no reason to make an exception to the binding nature of plans under 11 U.S.C. § 1327(a). The result applied fundamental principles of notice and the finality of judgments. To reverse it will raise great uncertainty in the jurisprudence of both subjects.

The opinion below does not conflict with *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004), nor with any other case of this Court. It properly distinguishes other circuit precedent or explains why that precedent is unpersuasive. The Court of Appeals logically and justly decided this case on its facts. The opinion below is the one that got it right, and there is no sense in disturbing it.

There is a key fact which petitioner ignores here, as it did below, and which the Court of Appeals found determinative. Petitioner had actual knowledge of the proceeding and the specific proposal that the plan would call for Espinosa to pay the principal sum of $13,250.00 due petitioner on his student loan, but discharge $4,582.15 of interest. Petitioner did nothing. That fact distinguishes this case from those with which petitioner claims it conflicts. It also makes this case peculiarly ill suited for a grant of certiorari.

STATEMENT OF THE CASE

Espinosa filed a proposed Plan for relief from creditors under Chapter 13 of the Code on December 2, 1992. E.R. 22[1]

Petitioner had an established post office box for the receipt of loan payments. This was furnished to the Bankruptcy Clerk by Espinosa, under Fed. R. Bankr. P. 1007, for the Clerk to use for giving notice. E.R. 15.

Notice of Espinosa's bankruptcy was mailed to Petitioner as required by 11 U.S.C. § 341.[2] Petitioner's litigation department received the notice on December 18, 1992. E.R.28. The notice advised that Espinosa would seek Bankruptcy Court confirmation of his plan on April 15, 1993. The plan accompanied the notice. The Plan prominently featured on top of its first page, in bold letters, the legend "WARNING IF YOU ARE A

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[1] Reference is to the Excerpts of Record filed in the Court of Appeals.

[2] Further references to the Bankruptcy Code will be by section number only, for simplicity.

CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." E.R. 22.

Not only did the plan contain the above-quoted warning, it spelled out plainly and in detail its proposal that the principal of specific education loans, from specific lenders, in specific amounts, would be fully paid, and that all other amounts claimed owing by the debtor, of any nature, not paid under the plan, would be discharged. E.R. 25.

The notice was successful and complete. Petitioner received actual notice of the bankruptcy, of the proposed plan, and of the proceedings scheduled for confirmation of the plan on April 15, 1993, from the Clerk of the Bankruptcy Court, as specified by Fed. R. Bankr. P. 2002(b). E.R. 28. Proof that the actual notice was in fact successful arises from the fact that Petitioner filed a Proof of Claim on January 8, 1993, more than three months before the scheduled hearing to confirm the plan. E.R. 36 (Trustee's Notice to Creditor, reflecting receipt of objection on January 8, 1993.)

Moreover, the notice went exactly where it needed to in order for Petitioner to be advised in the premises, and take action in the Bankruptcy proceeding. A stamped legend on the Proof of Claim demonstrates that the litigation department of the Petitioner received notice. E.R. 28. No better notice could have been given for the purpose of this case.

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

On June 10th, within the time available to Petitioner to file an appeal, Trustee served notice of the Trustee's objection to Petitioner's proof of claim upon Petitioner. E.R. 36. Service was accomplished by mail to the address specified in Petitioner's proof of claim. The objection notified Petitioner that its claim "differs from the amount listed in the plan [and] will be paid as listed in the plan," which reduced it to $13,250.00. The plan also advised Petitioner that "any amounts or claims for student loans unpaid by this plan shall be discharged. E.R. 25. Petitioner still did not appeal.

The Trustee's notice provided thirty days to object to this treatment of its claim. Petitioner did nothing.

Petitioner bypassed yet another remedy available to it. Petitioner did not file any motion under Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(1), (2) or (3) within the one year permitted by the rule for the bringing of such motions. Under those parts of Rule 60, petitioner could have challenged the order of confirmation on the grounds of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct. Instead, petitioner collected its due under the plan, waited for seven years after that, and then began unilaterally intercepting government payments belonging to Espinosa. Then, eleven years after the plan was confirmed, it filed a Rule 60(b)(4) motion, but only after Espinosa forced the issue by reopening the Bankruptcy and moving to enforce the injunction against these kinds of acts by petitioner.

Petitioner argued that the confirmation order was void because unless it had been served with process for an adversary proceeding under Bankruptcy Rule

7001(6), it had been denied due process under the 5th Amendment. Alternatively, it argued that the generally binding nature of a confirmed plan, established by § 1327(a) should be inapplicable where no adversary proceeding had occurred, even though it had never chosen to claim its right to have such an adversary proceeding. The Court of Appeals rejected both contentions.

The Court recognized that Rule 60(b)(4), invoked by Petitioner, restricted the grounds upon which Petitioner could challenge the confirmation order. Pet. App. 11, 12. Because Petitioner had invoked Rule 60(b)(4) the only basis upon which it could gain relief was by proving the confirmation order was "void."

The Court addressed the Petitioner's due process claim in light of the Petitioner's invocation of Rule 60(b)(4), as of course it had to do. App. 18. It recognized, as again it of course had to do, that the due process issue was governed by *Mullane v. Cent. Hanover Bank & Trust Co,* 339 U.S. 306 (1950). *Mullane,* of course, requires "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." *Id.* p. 314. Recognizing that "due process does not require actual notice,"*Jones v. Flowers,* 547 U.S. 220, 225 (2006), the court logically concluded that "it follows a fortiori that actual notice satisfies due process." *Ibid.*

Because, as the record makes abundantly clear, App. 21, Petitioner had had notice not only of the pending proceeding but of the potential adverse impact on its claim and what it must do to avoid the adverse

treatment, the Court concluded that Petitioner had been more than adequately accorded due process.

Addressing the statutory argument, the Court concluded that what occurred in this case, by debtor proposing that the hardship hearing be waived, and the creditor acquiescing, presented no conflict between the existence of the statutory provisions about student loan discharge, on the one hand, and § 1327(a)'s establishment that a confirmed plan is binding upon creditor, on the other. The Court said "We see no such conflict; both provisions can operate fully, within their proper spheres." App. 9. As the court further explained, the creditor "can object to the plan until the debtor shows undue hardship in an adversary proceeding." *Ibid.* The Court found no interference with the operation of the statutes which would control how and when a student loan discharge is obtained[3] merely by the later enforcement of the finality of a plan pursuant to §1327(a):

> "[W]hen 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. Rights may, of course, be waived or forfeited, if not raised in a timely fashion. This doesn't mean that these rights are ignored, or that a judgment that is entered after

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[3] §§ 523(a)(8) (requiring finding of undue hardship for discharge), 1328(a)(2) (making § 523(a)(8) applicable in Chapter 13 cases) and § 1325(a)(1) requiring a Chapter 13 plan to conform to the requirements of the Code.

a party fails to assert them conflicts with the statutory scheme or is somehow invalid.

"The Bankruptcy Code's finality provision comes into play much later in the process, after the bankruptcy proceedings come to an end." App. pp. 10, 11.

Petitioner and the *Amici* come to this Court asking it to hold that actual notice – more precisely "knowledge" of the entire situation – does not satisfy due process unless Bankruptcy Rule 7001(6) is followed, regardless whether they requested that it be. They also ask this Court to hold that if an order is confirmed by a process omitting a procedure, their right to which they knowingly waived, the terms of the confirmed plan cannot be enforced by the Bankruptcy Court's injunctive powers.

REASONS TO DENY CERTIORARI

1. This is a case that, correctly, turned upon the fact that petitioner waived its right to an adversary proceeding by doing nothing, in the face of its knowledge of the plan. It is a waiver case – not a due process case.

This case is a poor candidate for *certiorari* because the fact that Petitioner had full knowledge and chose to waive its rights is incontrovertible and was the major premise for the decision below. The Court correctly observed:

"It makes a mockery of the English language and common sense to say that [Petitioner] 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 right the creditor has under the Bankruptcy Code – a long-form *Miranda* warning for bankers." App. p. 16.

This case, and the questions Petitioner asks this Court to review, are cabined by the procedure that brought it here. Having slept on its rights for eleven years, petitioner could only move for relief from the stay under Fed. R. Civ. P. 60(b)(4)("That the judgment is void.") Unless petitioner could prove that the order confirming the plan was void, it could not obtain relief. If Petitioner could not prove that it was denied due process, it could not prove that the order of confirmation was void. Petitioner *could not* prove a due process violation, because it not only received notice, that notice more than satisfied the requirements of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). It had knowledge of the hearing date to confirm the plan, and its proposal that, if the plan was confirmed the principal of its debt would be paid, and the remainder discharged.

Petitioner's entire argument in this case has been about the *quality* of the notice it received, notwithstanding that it received actual notice. *See, e.g.* Petition p. 4, (notice was given "only by mail," and not by "service"); p 12, ("notice . . . was given . . . no adversary proceedings were commenced"); p. 21 ("Espinosa's plan . . . was merely mailed . . . to the post office box . . ."); p. 24 ("USA Funds never had 'proper notice' . . .). *See, e.g.* Ninth Cir. Ans. Br. p. 4

(Espinosa gave "no particularized notice of the Plan"); p. 11 (notices went to P.O. Box instead of a "person authorized to accept service of process"); p. 16 (notice "merely satisfied the lower notice threshold of Bankruptcy Code Section 1324 and Bankruptcy Rule 2002(b)"); p. 17 (conceding that Espinosa gave "good *notice*" but complaining that "he did not *serve* a complaint and summons as required by Rule 7001 and 7004")(emphasis in original).

It is understandable that Petitioner poses its argument thusly, because those cases which arguably conflict with this one (which almost *none* do because of the pivotal fact that Petitioner here had full knowledge, *See* ¶ 4 *infra*) conclude that because the issue of discharge of student loans is such a public policy favorite, due process *does* require "super notice." However, the fact remains: Petitioner had not only good notice, but knowledge. So this case is a poor vehicle in which to decide whether for certain claims or issues, embodying arguably more important policy reasons than others, due process notice can *only* be furnished through the summons and adversary process.

2. Constitutional due process really isn't at issue in this case because of petitioner's actual knowledge of the proceeding.

Before this Court might reach the issue of whether student loan discharges involve such important policy that as a matter of constitutional law notice of a proposal for such a discharge must occur with the service of a summons, it must first decide whether a party can be found to have been denied due process even though it had full knowledge of the case, the plan,

what the plan would do to its claim, and when plan confirmation would be considered. Unless this Court were to so hold, the type of notice given is irrelevant.

The notion that a party who had actual knowledge 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," *Jones v. Flower*, 547 U.S. 220, 225 (2006), the issue normally is whether the notice given comported with the due process clause even though not actually received. Probably because of the logic observed in the opinion below, that "a fortiori actual notice satisfies due process," cases holding that actual notice vitiates any argument of denial of due process are not abundant. But they exist. *See, e.g.*:

- *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005)(due process requirement of *Mullane v. Central Hanover Bank & Trust Co*, satisfied by actual notice even though service in foreign country did not comply with Hague Convention);

- *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.")

That informal notice satisfies due process even if "formal written notice" is lacking has been recognized in the context of a Chapter 13 plan confirmation proceeding. *In re Pence,* 905 F.2d 1107, 1109 (7th Cir. 1990)("Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice.")

So the due process dispute disappears when a party has knowledge. Nothing more is required.

3. The opinion below does not conflict with *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004).

What the Constitution requires is different from what a statute or a court rule provides. There is no due process violation merely because the adversary process was not involved. *Tennessee Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004) says as much. Petitioner and the *amici* claim that the Ninth Circuit opinion conflicts with *Hood*, but they ignore or misunderstand its holding: that the acceptable form of notice for a proceeding to discharge a debt is not limited to the issuance of a summons in an adversary proceeding, and that failure to use the adversary proceeding is not a constitutional violation. *Id.*, 541 U.S. at 453.

In *Hood,* this Court considered whether a debtor's proceeding in bankruptcy court to discharge a student

loan he 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 had abrogated state immunity for such a proceeding, thus avoiding a violation of the Eleventh Amendment. *Hood, supra,* p. 443. This 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.* p. 450.

The Tennessee Student Assistance Corporation contended that the adversary 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) recognizing that there is no statutory requirement for an adversary proceeding to determine dischargeability, let alone a constitutional dictate for doing so; (2) by recognizing that therefore dischargeability could be determined through use of the motion procedure which did not require service of a summons; and (3) that the possible use of a summons was thus irrelevant to the question of infringement upon a state's sovereignty, because an adversary proceeding was *not mandated,* either as a matter of constitutional requirement or of statutory dictate. *Id.* at pp. 453-54. This 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.

A leading commentator on Chapter 13 bankruptcy proceedings has explained quite well how the holding of *Hood* controls:

> "Admittedly, sovereign immunity, not the preclusive effect of confirmation, was the issue in *Hood;* but the point remains that the Supreme Court recognized in *Hood* 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. Many of the cases taking issue with *Pardee*[4] and *Andersen*[5] declare the contrary view that the discharge of a student loan by any procedure other than adversary

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[4] *Great Lakes Higher Educ. Corp. v. Pardee,* 193 F.3d 1083 (9th Cir. 1999). The opinion in this case reaffirmed *Pardee.*

[5] *Andersen v. UNIPAC-NEBHELP,* 179 F.3d 1253 (10th Cir. 1999). Following the lead of other circuits which had concluded that the adversary proceeding of Bankruptcy Rule 7001(6) was enshrined in the Due Process Clause, the Tenth Circuit overruled *Andersen* in *Educational Credit Mgmt. Corp. v. Mersmann,* 505 F.3d 1033 (10th Cir. 2007).

> proceeding violates due process. This premise is not consistent with *Hood.*" Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 346.1, p. 346-33, (2000 & Supp. 2007).

The case that would control here – *if* this was a due process case – is *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). 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." This 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, Petitioner received mail notice – as authorized by the Rule for giving notice of plan confirmation proceedings – of a *plan confirmation proceeding.*[6]

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[6] Petitioner's quibbles about the address to which the notice was given is unavailing, not only because of the fact that it obtained actual knowledge anyway, 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 (Bnkr. 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); *In re DaShiell,* 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.)

4. The holding in this case does not conflict with the cases Petitioner argues that it does, for either of two reasons: (1) the "conflicting" cases did not consider whether "actual knowledge" mooted the dispute about "what method of notice" is required; or (2) the notice in the conflicting cases did not "reasonably convey the required information" which due process requires.

The opinion below and the precedent it reaffirmed, *Great Lakes Higher Educ. Corp v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999), stood upon long – established precedents "recogniz[ing] the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions." 193 F.3d 1086. *Pardee* also held that "If a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, 'it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code.'" *Ibid.* *Pardee* stands upon *In re Gregory,* 705 F.2d 1118 (9th Cir. 1983).

The opinion here reaffirmed and followed the principles of *Pardee* and *Gregory,* which embody the non-remarkable proposition that when a judgment has been entered, has become final, and no appeal has been taken from it, the judgment is binding and cannot be ignored, nor can any arguable errors inherent in that judgment be revisited.

Petitioner claims a conflict between this case and some from other Circuits which hold discharges contained in plans to be void if no adversary

proceeding was conducted. Some of those cases are clearly distinguishable because the creditor did not receive the plan itself as part of its notice, and the notice of a hearing to confirm a plan was held by itself not adequate to inform the creditor that the plan intended to discharge student loan obligations. Others are not in conflict because the "conflicting" case holding did not decide whether the fact of "actual knowledge" mooted the issue of "what method of notice" due process requires. Moreover, they should not be followed because their holdings erroneously find the use of the plan confirmation process to discharge a loan, instead of the adversary proceeding, to be a denial of due process. This case stands apart from Petitioners claimed "conflicting" cases principally because it is based upon the indisputable fact that Petitioner had full knowledge and information about the plan, its confirmation, and the effect upon its claim. None of the others focus on that fact.

These are the cases Petitioner claims conflict with this one:

Ruehle v. Educ. Credit Mgmt. Corp. 412 F.3d 679 (6th Cir. 2005). The *Ruehle* court found that the case before it, "unlike *Andersen* and *Pardee* fails to reflect that the original creditor or its successor . . . had reasonable notice of the proposed plan or an opportunity to be heard prior to the confirmation." *Id.* at p. 683. By contrast, here Petitioner both had actual knowledge and a full opportunity to be heard. In addition, however, *Ruehle* concluded that a discharge obtained without filing an adversary proceeding was void because it was said to ignore the clear intent of congress, and the Judicial Conference, to require an adversary proceeding. Actually, Congress has *not*

mandated an adversary proceeding, instead only requiring that there be a finding of hardship, which Petitioner could have easily required had it voiced a simple objection to the plan. Further, as this Court made plain in *Hood*, the court rules (i.e. *Ruehle*'s reference to the Judicial Conference-adopted Bankruptcy Rules) can neither expand nor contract rights, and thus cannot be enshrined into the due process clause.

Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150 (2d Cir. 2005). The creditor "had received" the notice. 432 F.3d at 152. Further, *Whelton* draws the same erroneous conclusion as *Ruehle, supra. Whelton* adopted the *Ruehle* analysis, and both cases have the same flawed reasoning.

Hanson v. Educ. Credit Mgmt. Corp., 397 F.3d 482 (7th Cir. 2005) was a case where creditor "received" notice. *Id.* at 443. But the Seventh Circuit did not base its decision on such "receipt," thus not conflicting with *Espinosa*. *Hanson* then proceeded to hold that "due process entitles creditors to the heightened notice provided for by the Bankruptcy Code [once again misunderstanding the lack of such a provision in the Code, *see, Hood*] and Rules . . . ." *Id.* at p. 486.

Banks v. Sallie Mae Servicing Corp., 299 F.3d 296 (4th Cir. 2002) found that the creditor did "not dispute that it received the proposed plans, the hearing notice, and the confirmation order." *Id.* at 299. Like *Whelton* and *Hanson*, *Banks,* too, errs both in thinking that the Bankruptcy Code specifies the required notice for a proceeding to determine dischargeability of a student loan, and in enshrining into the constitutional due process clause the Bankruptcy rule which *Hood* later

found not to be the exclusive method of determining student loan discharges. The Fourth Circuit did not have the benefit of this Court's *Hood* opinion, which drains *Banks* of any vitality, and renders it further irrelevant as a purported "circuit conflict."

Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann), 505 F.3d 1033 (10th Cir. 2007). For named debtor Mersmann the creditor "received notice, but failed to object."*Id.* at 1039. For creditor Seiwert, whose case was also decided in *Mersmann,* the scope and clarity of the notice, and whether it could be concluded that the creditor did in fact have knowledge of the proceeding, was not mentioned in any way. *Id.* at 1040. *Mersmann* based its decision in part in reliance upon *Banks, supra,* and *Ruehle, supra,* including their erroneous perceptions that the Bankruptcy code mandated use of an adversary proceeding. 505 F.3d at 1046. It based its disagreement with its own *Andersen* case, and *Pardee,* also on the erroneous belief that the bankruptcy code required adversary proceedings. *Ibid.* And it overlooked the importance of the point in *Whelton, supra,* that giving notice as part of plan confirmation is only insufficient if the terms affecting the student loan creditor "were not sufficiently evidenced in a plan to provide adequate notice to the creditor." *Id.* at 1047.

Mersmann based its holding upon *dictum* from *Hood* describing the "self executing" nature of the Code section on discharge of student loans. *Id.* at 1048. It also relied upon the *Ruehle* court mis-apprehension that Congress required student loan discharges to occur in an adversary proceeding, when of course it does not. *Ibid. Mersmann* also found a conflict between § 1327(a) and those sections of the code

governing what, when and how discharges are granted.[7] *Ibid.* But all of *Mersmann*'s analysis of statutory conflict presume its major premise – that Congress has mandated a hearing, in an adversary proceeding, to determine hardship, and has also dictated that such a hearing cannot be waived by a creditor, as was done here. For if a creditor can waive the hardship hearing, none of the statues *Mersmann* found to be infringed upon by the rule of *Pardee* (and, now, this case) would in fact have been, because creditor simply waived them and agreed that the discharge order may include student loans. That is what the opinion below held, and it was correct.

The opinion below, the previous *Pardee* opinion, and the Tenth Circuit in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999)(before it reversed course) got it right. "*Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankruptcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a)." Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 229.1, p. 229-41, (2000 & Supp. 2007).

This case does not conflict with the above opinions because it bases its holding on the full, complete, information that Petitioner actually received, a fact

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[7] 11 U.S.C. § 523(a)(8)(requiring undue hardship to discharge student loan), § 1328(a)(2)(making § 523 applicable to Chapter 13 proceedings), and § 1325(a)(1)(requiring plans to conform to the Code).

upon which none of the erstwhile "conflicting" cases based its holding. Moreover, this case reasoned correctly in the legal analysis that it spoke about in common with the other cases.

5. To chisel the adversary proceeding rule into constitutional-due-process stone, or create an exception to the finality dictates of § 1327(a) based upon the importance of the policy underlying a particular Code section, would significantly disrupt bankruptcy administration.

The opinion below, and its predecessor *Pardee,* held that by its inaction, a Creditor waived its right to object. To grant *certiorari* in order to reverse this rule, allowing long-final judgments confirming plans of arrangement to be attacked for legal error, would work a major encroachment upon the highly important interest not only in finality of orders confirming plans or reorganization in Bankruptcy, but of judgments in general.

The specification of adversary proceedings to determine dischargeability of a debt is a creation of the Bankruptcy Rules. 7001(6). The rule is not unique to student loan discharges; it applies to all discharges. *Ibid.* There are numerous circumstances specified in 11 U.S.C. § 523(a) requiring denial of a discharge to the debtor. Each and every one of them has strong policy reasons prompting the denial of a discharge. Some of them are:

- Money or property obtained by fraud or false pretenses. § 523(a)(2);

- Fraud, embezzlement or larceny while acting as a fiduciary. § 523(a)(4)[8];

- Domestic support obligations. § 523(a)(5);

- Willful or malicious injury. § 523(a)(6);

- Fines, penalties or forfeitures that are not compensation for actual pecuniary loss. § 523(a).

If this Court were to accept Petitioner's argument that due process is offended when an adversary proceeding is not used to determine dischargeability of student loans, it would generate litigation throughout the Circuit, District and Bankruptcy courts, in one of two ways. A blanket rule requiring the same result for all discharge issues and other matters where the Rules call for an adversary proceeding inevitably would have to be confirmed for the various kinds of discharge. Or the courts would have to begin deciding which other issues implicate policy reasons strong enough to militate against discharge without an adversary proceeding, even where debtor proposes that such a hearing be waived, and creditor does not object. Then creditors would begin opening up old cases, invoking whichever version this Court chose. Is there, then, to be a due process violation if a debtor files a plan with his or her petition, listing one of the above non-dischargeable debts for discharge, the creditor does not object, and the plan is confirmed? We think not.

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[8] This was the provision involved in *In re Gregory* 705 F.2d 1118 (9th Cir. 1983). Petitioner's claim that *Gregory* is distinguishable from this case because upon presumptive dischargeability, or non-dischargeability, is not correct.

If it were to be a violation of due process not to use the adversary procedure, then every plan that was confirmed with a discharge (not even limited to student loan discharges) without an adversary proceeding is void. If it is void, there is no time limit under Rule 60(b)(4) within which a creditor may open up the plan. This puts in jeopardy every single such plan, extending for years into the past.

6. Adopting the rule Petitioner seeks would also have broad ramifications for due process and the finality of judgments.

Considering the breadth and scope of the impact of § 1327's finality on bankruptcy administration shows just how unwise it would be to accept Petitioner's arguments.

11 U.S.C. § 1327(a) provides:

> "Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the plan or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed or are allowable."

As Judge Lundin aptly described it in his authoritative treatise:

> "Confirmation is the bright line in the life of the Chapter 13 case at which all the important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with

reference to the plan. Once the confirmation order becomes final, the effect of confirmation is comprehensively defined in § 1327 of the Code." Lundin, *supra,* §228.1, p. 228-1.

As one court has said:

> "A Chapter 13 bankruptcy case, unlike the typical civil case, can involve several discrete disputes within it which are disposed of sometimes over the course of several years. It is important for the orderly and efficient administration of the case and for the curing of the rights of the parties to the case that the issues, including the issue of subject matter jurisdiction resolved by the order confirming a Chapter 13 plan, not be subject to reconsideration (except in the case of fraud) after the direct appeals process for the order has ended." *Lester Mobile Home Sales v. Woods (In re Woods)*, 130 B.R. 204, 208 (W.D. Va. 1990).

There is a long history of reported decisions recognizing the special finality of confirmation orders in reorganization cases. *E.g. Stoll v. Gottlieb*, 305 U.S. 165 (1938); *In re Robert L. Helms Constr. & Dev. Co.,* 139 F.3d 702, 704 (9th Cir. 1998) (*En Banc*)("A confirmed reorganization plan operates as a final judgment with res judicata effect."); *Multnomah County v. Ivory (In re Ivory)*; 70 F.3d 73 (9th Cir. 1995)(taxing authority failure to object to confirmation left it bound by a plan that redeemed property from a tax foreclosure judgment "even assuming that the order confirming the plan was in error.").

The binding nature of a plan, once confirmed, has long been a pivotal aspect in bankruptcy reorganizations in general, and of Chapter 13 cases in particular. *See, e.g. Factors Funding Co. v. Fili (In re Fili)*, 257 B.R. 370, 372 – 74 (B.A.P. 1st Cir. 2001)("Plan confirmation is a final order, with res judicata effect, and is imbued with the strong policy favoring finality");*In re Elstein*, 238 B.R. 747, 754 (Bankr. N.D. Ill. 1999)("The order confirming a chapter 13 plan . . . has res judicata effect as against the IRS with respect to the question of eligibility for chapter 13 relief."); *Marlow v. Sweet Antiques (In re Marlow)*, 216 B.R. 975, 979 (Bankr. N.D. Ala. 1998)("Pursuant to § 1327, the order of confirmation in a chapter 13 case constitutes res judicata as to all justiciable issues which were *or could have been* raised prior to confirmation." Therefore confirmation order allowing claims bars debtors' post confirmation preference action to avoid a judicial lien.)(emphasis added); *In re Brenner*, 189 B.R. 121, 128 (Bankr. N.D. Ohio 1995)("The doctrine of res judicata, equity, and the policies underlying the Bankruptcy Code" all preclude the IRS's challenge to a confirmed plan that treats it as a priority unsecured claim holder notwithstanding that the IRS filed a proof of claim assesrting secured status.); *McDonough v. Plaistow Coop. Bank (In re McDonough)*, 166 B.R. 9 (Bankr. D. Mass. 1994)(Bank precluded from objecting to avoidance of its lien after confirmation where the bank failed to object to confirmation of a plan that provided for same.)

A creditor cannot use a post confirmation motion for relief from the stay to collaterally attack the confirmed plan if the creditor failed to object or appeal the order of confirmation, notwithstanding that the confirmed plan contains provisions the creditor could

have defeated in a timely objection to confirmation. *E.g. Chevy Chase Bank v. Locke (In re Locke),* 227 B.R. 68, 71 (E.D. Va. 1998)(plan confirmed value of bank collateral lower than the amount contained in an approved proof of claim); *In re Walker,* 128 B.R. 465 (Bankr. D. Idaho 1991)(plan that modified creditor's rights in violation of 11 U.S.C. §1322(b)(2) is res judicata. Creditor received notice of confirmation and copy of plan, but did not object.); *Green Tree Fin. Corp. v. Garrett (In re Garrett),* 185 B.R. 620, 623 (Bankr. N.D. Ala. 1995)(confirmation bound creditor to accepting cure of defaults and the maintenance of payments through the plan, notwithstanding that creditor had been granted relief from stay prior to confirmation.)

The recognition of finality represented by this case and *Pardee* (which it merely applied) is not unique to student loans. *E.g. In re Harvey,* 213 F.3d 318 (7th Cir. 2000)(lien stripping):

> "It is a well-established principal of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. 11 U.S.C § 1327(a) . . . The reason for this mirrors the general justification for res judicata principles . . . This is especially true in the bankruptcy context, where a confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors. . . . It is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague, or ambiguous." 213 F.3d at 321, 22.

Confirmation orders containing terms conflicting with a variety of sections of the Bankruptcy Code have been held to be res judicata where the creditor did not object to the plan, or appeal from it. *E.g. In re Young,* 281 B.R. 74, 80 (Bankr. S.D. Ala. 2001)(confirmation occurred before expiration of redemption period under 11 U.S.C. § 108(b), an objection pursuant to 11 U.S.C. § 1325(a)(5) could have been raised and litigated, but plan is binding whether in fact it was); *In re Bonanno*, 78 B.R. 52 (Bankr. E.D. Pa. 1987)(plan gave co-signors broader rights than permitted under 11 U.S.C. § 1301); *Homebanc v. Chappell (In re Chappell,* 984 F.2d 775, 782 – 83 (7th Cir. 1993)(mortgage interest under 11 U.S.C. § 506(b)); *Nationsbanc Mortgage v. Williams (In re Williams),* 276 B.R. 899, 907 – 10 (C.D. Ill. 1999)(Bank failed to object to plan, of which it was given a copy and 25 days' notice of confirmation hearing, and was bound by plan that did not give it the protection of 11 U.S.C. § 1322(b), rejecting due process claim such as argued here); *In re Stewart,* 247 B.R. 515, 521 (Bankr. M.D. Fla. 2000)(Mortgage holder failure to object to plan that did not afford it arrearages, notwithstanding § 1322(b) prohibited such a plan, bound mortgage holder; rejecting due process claim like that asserted here); *In re Battle*, 164 B.R. 394, 395 – 99 (Bankr. M.D. Ga. 1994)(failure to object to plan that omitted arrearages, in contravention of 11 U.S.C. § 502(b)(2) made the plan binding)

In this case petitioner had full, detailed notice of the plan's proposal to discharge interest and bind debtor only to pay the principal of the student loans. It is thus distinguished from cases like *Piedmont Trust Bank v. Linkus (In re Linkous),* 990 F.2d 160 (4th Cir. 1993) where the confirmation notice was later determined to be insufficient to bind the creditor,

because the notice, consisting of a summary of the plan, did not "reasonably convey the required information" that debtor intended "to re-evaluaate the secured claims pursuant to § 506(a)". *Id.* at 162, 63, citing *Mullane v. Cent. Hanover Bank & Trust Co,* 339 U.S. 306, 314 (1950). Therefore the plan confirmation and discharge orders here are just as binding as in the myriad of cases just cited.

Obviously, if this Court were to grant *certiorari*, reverse, and hold that an order of confirmation is not *res judicata* because there may be erroneous or even illegal provisions in it, a very large number of cases to the contrary would be overruled or cast in doubt. "*Andersen* and *Pardee* are not aberrations – they are mainstream statements of the powerful binding effect of confirmation of a Chapter 13 plan under [11 U.S.C.] § 1327(a)." Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 229.1, p. 229-35 –36, (2000 & Supp. 2007).

Enforcing the finality of a plan of confirmation in the face of irregularities or errors in the terms of the plan is not a phenomenon restricted to student loans. Student lenders have not been "singled out" for unfair treatment. For Example:

- A creditor's failure to object to confirmation of a plan is fatal to a creditor's objection that it didn't provide the present value required by § 1325(a)(5). *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989).

- A taxing authority's failure to object to confirmation left it bound by a plan that redeemed property from a tax foreclosure judgment "[e]ven assuming that the order confirming the plan was in

error." *Multnomah County v. Ivory,* 70 F.3d 73, 75 (9th Cir. 1995).

- A plan which proposed a "zero" payment upon an embezzlement debt was binding because the notice of confirmation hearing, and summary of the plan, was adequate notice to creditor. *In re Gregory*, 705 F.2d 1118 (9th Cir. 1983).

- A creditor is bound by a provision prohibiting action against a cosignor notwithstanding that the confirmed plan is broader than the statutory protection of cosignors in 11 U.S.C. § 1301. *In re Bonanno* 78 B.R. 52 (Bankr. E.D. Pa. 1987).

This case does not conflict with the cases from other circuits, ¶ 4, which Petitioner raises. Rather, *those* cases are in conflict with the virtual flood of cases – of which those discussed here are but a fraction[9] – which hold that waiver by a creditor after notice of a plan to which it could have objected as containing terms not compliant with the Code, Rule or case, makes the plan binding, and requires the creditor to honor it and the bankruptcy court injunction that stands behind it.

To grant *certiorari* and reverse would embark this Court and all the other federal courts at every level on a wave of litigation to determine which "errors" in a plan make it "void;" or which notification procedures

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[9] *See* Lundin, § 229.1, p. 229-3 – 229-6 (2000 and Supp. 2007) which comprises one, long, four page, single-spaced footnote citing cases demonstrating just how far flung and important the principle of plan finality is.

carry the constitutional due process gloss and which do not. There is no reason whatsoever to do that, particularly for Petitioner whose legal department knew all about the bankruptcy proceeding, the plan, the proposal in the plan treating portions of the student loan as discharged, and when they could appear and object; but did not.

7. It is neither necessary nor desirable for this Court to grant *certiorari* in order to determine whether a constitutional rule and a fundamental interest in finality of judgments should be altered in order to impact the manner of practice by the bankruptcy bar.

Some of the cases involving the discharge of student loans by a debtor proposing waiver of a hardship hearing are critical of this aspect of Chapter 13 practice. Others, including the opinion below, are not. *See* App. 25 ("It is apparent that a number of courts in our circuit . . . are uncomfortable with the practice of some Chapter 13 debtors to seek to discharge their student debts by working them into their Chapter 13 plans.") *And see* App. 26 (For reasons explained above, we view matters quite differently. Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan . . .)

Petitioner and *amici* gang up on debtors and their counsel, attacking them with colorful phrases like "hid[ing] magic language in their" plans, and "set[ting] a trap for unwary courts, trustees, and creditors," or

"discharge by ambush."[10] As has already been shown, this case, at least, contains no taint of deception or an attempt to surprise or "ambush" a creditor. Counsel for Espinosa was completely open about his proposal, and provided full and complete disclosure by sending Petitioner the entire proposed plan, months in advance of the confirmation hearing. This was a procedure sanctioned by the Ninth Circuit. *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999).

There are several good and sufficient reasons that might prompt a debtor to prepare a plan that proposes to have the creditor waive its right to a hardship hearing and acquiesce in discharge of some part or all of a student loan, and a creditor to do so. The opinion below identified three:

- Creditor may believe debtor can make the required showing of undue hardship, and "thus see no point in wasting the debtor's money, and its own, litigating the issue." App. 9.

- Creditor may conclude that a Chapter 13 plan "presents its best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip." *Ibid.*

- Further, the creditor may hope to get some payments from debtor under a plan, with the prospect of collecting more if debtor is unsuccessful in performing the plan. Such

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[10] Brief of Educational Credit Management Corporation, p. 3, Brief of States of Oregon, *et. al.*, p. 3, respectively.

> failure occurs in *most* Chapter 13 cases. App. 10 n. 2.

There is an additional, very practical reason that both debtors and creditors may seriously consider waiving the conduct of a hardship hearing. As noted by *amici* States, "these are usually low dollar cases." Brief of the State of Oregon *et. al.* p. 10. The average payout to unsecured creditors – in the aggregate – is $4,500.00 per case. *Ibid.* The average fee paid to debtor's counsel for a case is $1,000.00. *Ibid* (calculated from figures). It is understandable that Espinosa and his counsel offered Petitioner a chance to waive a full blown adversary hardship hearing over the discharge of $4,582.15 of interest. And it is understandable that Petitioner's litigation department chose to acquiesce. What is not understandable is why petitioner should "have its cake and it eat, too."

This Court has already determined the unacceptability of writing substantive law in the complex bankruptcy field because of creditors' complaints or fears that debtors will flout the bankruptcy laws. *Taylor v. Freeland*, 503 U.S. 638 (1992). Rejecting an argument that § 522(l) should be interpreted to limit debtors' filing of claims of exemption because of fears of abuse, this Court said:

> "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

> 9011 (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). These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions to address the difficulties that Taylor predicts will follow our decision." 503 U.S. at 644, 645.

Making constitutional law, or tinkering with the finality of judgments, out of fear that the remedies noted above aren't sufficient, makes no sense.

8. There is no need, nor sense, in this Court granting *certiorari* to write a special rule for student lenders.

If the Court were inclined to grant *certiorari,* and rule in favor of the Petitioner, what would the opinion say?

First, this Court would have to dispose of the threshold issue by holding that, even though Petitioner had actual knowledge of the bankruptcy proceedings, of the scheduled hearing to confirm a plan, and of the plan itself including precisely how Petitioner's claim was to be treated, that Petitioner can claim that due process allowed it to ignore the plan because the paper bore a different title, or went to a different mailing address, than contemplated by the bankruptcy rules. This Court would then have to invoke due process, or an interpretation of § 1327(a) that opens up great

uncertainty about the uniformity and scope of its operation.

On the statutory issue, this Court would have to hold that even though the confirmed plan was a final judgment, which Petitioner did not appeal, nor challenge in any way until haled into court because it had flouted the injunction and confiscated debtor's property, that Petitioner should now be granted special privileges by virtue of its claimed exalted status as a student loan holder. Should Petitioner be allowed, by an opinion of this Court, to have acquiesced in the judgment, to collect its benefits, yet turn around, renounce the judgment, and begin taking Espinosa's money? Such a holding would eviscerate the bedrock principle of finality. It would sow seeds of uncertainty in determining the finality of judgments under various circumstances.

Because it is indubitably true that Petitioner did nothing in this case notwithstanding its complete knowledge of the proposed plan and its terms, trying to decide due process and plan finality issues here would be awkward at best. It would invite parties to begin litigating the sufficiency of notice notwithstanding their knowledge, and probable waiver, of the right to respond. This single fact suggests that after granting certiorari and grappling with the case more intensively, there is a good prospect that the result would be a dismissal as improvidently granted.

9. If this Court grants certiorari, it must determine whether its ruling should be prospective only, given that Espinosa relied upon a procedure that was acceptable at the time, and thereafter approved by the Ninth Circuit.

If this Court grants *certiorari*, Espinosa will urge this Court to make any reversal have prospective operation only. The Tenth Circuit so held in *Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007). Applying the factors impacting a decision whether a civil case decision should be prospective, from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Mersman* held that its ruling did not apply to one of the cases decided by that opinion, in which the debtor's action had been consistent with the Tenth Circuit's previous precedent, *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253 (10th Cir. 1999). If this Court grants certiorari, Espinosa, whose case was compliant with the Ninth Circuit precedent, *Great Lakes Higher Educ. v. PardeeCorp. (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999), will argue that any change should not be applied to him.

There would be strong reason for this Court to make any ruling prospective, because there are an undetermined number of old cases – doubtless numbering in the thousands – where student loan discharge occurred by waiver of the hardship hearing, in reliance upon the accepted practice of the day. On the other hand, this point highlights the undesirability of this case as a candidate for *certiorari*. Petitioner's complaint is "old news," now being addressed by many courts as a matter of practice or the enforcement of the "good faith" requirements of Chapter 13 adjudication,

explicit and implicit, in the Code. *See, e.g.* opinion below, App. 25, and cases cited.

CONCLUSION

This is a waiver case, not a due process case.

The opinion in this case correctly avoided stretching the due process clause into a tool by which litigants can either make up for their mistakes, or change tactics years after a judgment has become final and been performed. It follows and correctly applies *Hood.* It makes clear that those cases from other circuits which *might* actually be viewed as conflicting with it did not reach the right result.

Due process means the receipt of notice and an opportunity to be heard; neither more nor less. Petitioner received due process. That is the only issue this Court can review, inasmuch as the case arises from Fed. R. Civ. P. 60(b)(4) – that the judgment was "void."

The Petition should be denied.

Respectfully submitted

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