No. 08-1134

In the Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOZA,

Respondent.

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

BRIEF IN SUPPORT OF PETITIONER FOR *AMICUS CURIAE* EDUCATIONAL CREDIT MANAGEMENT CORPORATION

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Educational Credit Management Corporation, as *amicus curiae*, respectfully files this brief in support of Petitioner United Student Aid Fund's Petition for a Writ of Certiorari.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation and guaranty agency in the Federal Family Education Loan (FFEL) Program, one of two federally-backed student loan programs.[2] As of September 30, 2007, the total financial interest at stake in the two federal student loan programs approached $500 billion.[3]

ECMC guarantees or services approximately 65% of the total FFEL Program loan volume currently in bankruptcy. In the Ninth Circuit alone, ECMC manages the accounts of approximately 5,800 Chapter 13 bankruptcy debtors who have FFEL student loans,

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1 Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief by *amicus curiae*, and their consent letters are on file with the Clerk's Office. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

2 The Federal Government operates two student loan programs: The Federal Family Education Loan (FFEL) Program and the William D. Ford Federal Direct Loan (DL) Program. Both programs are regulated by the United States Department of Education (ED) and are federally-insured.

3 There is approximately $363 billion of student loans in the FFEL Program and $107.2 billion in the DL Program.

totaling over $135 million. ECMC also manages an additional 50,200 Chapter 13 bankruptcy cases involving FFEL Program loans, representing more than $1 billion in outstanding balances across the rest of the United States.[4]

The federal fisc at stake here is paramount. Since its inception in 1965, the FFEL Program has provided $735 billion in loans to postsecondary students and their parents. In the 2007-08 academic year, the FFEL Program served 6.5 million students and their parents, lending them approximately $54.7 billion. Between 1965 and 2004, the percentage of adults holding bachelor degrees more than tripled.

To ensure the integrity of the federal student loan program, Congress specifically excepted student loan debt from bankruptcy discharge absent proof by the debtor of undue hardship of the debtor and debtor's dependents. Over the last five decades, Congress has increasingly tightened the standard that debtors must prove to be relieved from repaying their student loans. Thus, as a federal guaranty agency, ECMC plays a vital, integral role in the student loan program and has an obligation to comply with Congress's mandate to maintain the viability of the federal student loan program.

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[4] These figures do not include any student loan accounts serviced and monitored by the United States Department of Education.

SUMMARY OF ARGUMENT

The circuit courts of appeal are sharply divided on whether debtors may discharge their student loan debt through the Chapter 13 bankruptcy plan confirmation process. Because entrenched disagreement in the courts of appeal has caused confusion and disuniformity of rulings in cases based on identical facts, certiorari is warranted to provide guidance for lower courts.

The Fourth, Sixth, and Seventh Circuits have held that confirmed plans with discharge-by-declaration provisions have no preclusive effect because they violate creditors' due process rights. The Second and Tenth Circuits prohibit debtors from discharging student loan debt through their Chapter 13 plans because this practice violates the bankruptcy code, and, therefore, the confirmation orders have no preclusive effect. The Ninth Circuit's *Espinosa*[5] decision outright rejected both of these analyses.

The Ninth Circuit's *Espinosa* decision is a legal charade. It stands against the universe of this Court's precedent, other circuits' decisions, and congressional mandate for the shocking proposition that debtors may discharge their nondischargeable student loan debt simply by hiding magic language in their Chapter 13 bankruptcy plans. *Espinosa* unjustifiably sets a trap for unwary courts, trustees, and creditors. Moreover, it reduces the bankruptcy process to gamesmanship and condones and

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[5] *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008)

encourages unethical, sanctionable practices by debtors' attorneys.

Allowing *Espinosa* to be the law—in the Ninth Circuit alone—has significant financial and practical consequences for the federal government, states government, student loan industry, and the processes of bankruptcy courts. It also sanctions a dangerous path for debtors to discharge other nondischargeable debts like child support, maintenance, tax, personal injury, and wrongful death through their Chapter 13 plans.

Only this Court can clarify its due process precedent, resolve the clear conflict between circuits, ensure the uniform application of the Bankruptcy Code, and protect the federal fisc and other socially-based, specially-excepted nondischargeable debt. Accordingly, ECMC urges this Court to grant USA Funds' Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Two early cases from the Tenth and Ninth Circuits initiated a decade of gamesmanship among debtors' counsel, bankruptcy courts, Chapter 13 trustees, and creditors' counsel. Four other circuits have specifically disavowed these opinions as a fundamental violation of due process, the statutory requirements of the Bankruptcy Code, and the requirements of res judicata.

In 2007, the Tenth Circuit repudiated what had been the initial decision in this line of cases, realizing it could no longer defend this practice. Although *Espinosa* squarely presented the Ninth

Circuit with the opportunity to right its earlier wrongs, the Ninth Circuit instead reasserted the requirement that bankruptcy courts engage in the procedural nonsense that allows debtors to include in a bankruptcy plan whatever they can get away with. When given a chance to review its opinion *en banc*, the court declined and thereby punted the issue directly to this Court.

I. *Espinosa* Created a Decisive Split: Five Circuits Have Banned Discharge-by-Declaration of Student Loan Debt through a Chapter 13 Plan, But the Ninth Circuit Permits It.

A. The Fourth, Sixth, and Seventh Circuits Maintain That Discharge-by-Declaration Violates Creditors' Due Process.

Three Circuit Courts of Appeal have held that discharge-by-declaration violates student loan creditors' due process rights. First, the Fourth Circuit held that "[w]here the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect." *Banks v. Sallie Mae Serv. Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002).

Following the Fourth Circuit's lead, the Seventh Circuit also held that discharge-by-declaration provisions are not entitled to preclusive effect because they violate a student loan creditor's due process rights. *Hanson v. Educ. Credit Mgmt.*

Corp. (In re Hanson), 397 F.3d 482, 487 (7th Cir. 2005) ("[D]ue process entitles creditors to the heightened notice provided for by the Bankruptcy Code and Rules, and the dictates of due process trump policy arguments about finality.") (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Next, the Sixth Circuit joined the "evolving majority view that a purported 'discharge by declaration' of student loan debt is not only invalid but void" because it violates a student loan creditor's due process rights. *Ruehle v. Educ. Credit Mgmt Corp. (In re Ruehle)*, 412 F.3d 679, 684 (6th Cir. 2005). The Sixth Circuit considered, and explicitly rejected, the finality rationale used by the Ninth Circuit, stating that this approach "ignores the clear intent of Congress and the Judicial Conference" to "require an adversary proceeding" and "it enriches and emboldens those who take what is not theirs and legitimizes it with court sanction." *Id.* (quoting and adopting the bankruptcy court's "astute analysis in this case").

On indistinguishable facts, only the Ninth Circuit disagrees. Certiorari is necessary so this Court may resolve this circuit split and provide guidance regarding its due process precedent and the intersection of the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code.

1. *This Court has specifically delineated the process that is due.*

Pursuant to 28 U.S.C. § 2075, this Court is mandated "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." In promulgating the Federal Rules of Bankruptcy Procedure, this Court specifically delineated the process that is due to student loan creditors before student loan debt may be discharged. It is this specific process—established by this Court—that the Ninth Circuit ignores, without legal or factual justification.

a. Mullane *establishes the process that is due.*

More than five decades ago, this Court held that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing ***appropriate to the nature of the case.***" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Critically, the Ninth Circuit misses or improperly dismisses this key phrase: "appropriate to the nature of the case." To accord finality to the confirmation order in the bankruptcy case below, *Mullane* requires that the notice be

> 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.
>
> ...
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one

desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 315.

Significantly, Congress expressly incorporated the *Mullane* standard in the Bankruptcy Code:

In this title—

(1) "after notice and a hearing", or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances;

11 U.S.C. § 102 (1). This provision, read together with 11 U.S.C. § 523(a)(8), leaves little doubt that the process due in student loan discharge matters is "heightened" to afford "greater procedural protections" to student loan creditors. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004) (Rehnquist, C.J.) ("Because student loan debts are not automatically dischargeable...the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection.")

b. **Hood** ***prescribes precisely which bankruptcy rules must be followed to satisfy*** **Mullane's** ***due process requirements in the student loan discharge context.***

In *Tenn. Student Assistance Corp. v. Hood,* Chief Justice Rehnquist unequivocally stated that, "unless the ***debtor affirmatively*** secures a hardship determination, the discharge order will not include a student loan debt." *Hood,* 541 U.S. at 449 (emphasis added) (Rehnquist, C.J.) (citing 11 U.S.C. § 523(a)(8)). As Chief Justice Rehnquist explained, § 523(a)(8) is "self-executing," requiring the debtor—not the creditor—to seek the dischargeability determination through an adversary proceeding as required by Fed. R. Bankr. P. 7001(6). *Hood,* 541 U.S. at 450.

Further, Chief Justice Rehnquist noted that, ***absent Rule 7001(6)***, debtors could affirmatively seek discharge of their student loan debt by motion under Rule 9014 without raising constitutional concerns. *Hood,* 541 U.S. at 453; *but see* Fed. R. Bankr. P. 9014(b) (requiring that Rule 9014 *motion* "shall be served in the manner provided for service of a summons and complaint under Rule 7004"). Under 7001(6), debtors must initiate an adversary, file a complaint, and serve a summons on the student loan creditor pursuant to Fed. R. Bankr. P. 7004. *Hood,* 541 U.S. at 450-51.

The notice provided by Espinosa to USA Funds was not "appropriate" given the unique "nature of the [bankruptcy] case" in student loan discharge matters. Burying illegal discharge language in a Chapter 13 plan and sending general notice of the plan to a payment lockbox address cannot be construed—at any level—as notice "appropriate to the nature of the case."

2. The Ninth Circuit's conclusion that notice under Fed. R. Bankr. P. 2002 satisfies a creditor's due process is contrary to this Court's decisions in *Mullane* and *Hood.*

Long ago, this Court recognized that "[e]ven 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." *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953). *Hood* specifically outlined what rules debtors must follow to satisfy the "greater procedural protection" student loan creditors enjoy in bankruptcy settings. *Hood,* 541 U.S. at 550-52. There is no dispute that the only notice Espinosa provided was under Fed. R. Bankr. P. 2002.

The Fourth Circuit explained the rationale behind the "heightened notice" requirement in student loan discharge cases:

> Fed. R. Bankr. P. 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. "[T]here are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of

> the case and all creditors generally, but none specifically." Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Fed. R. Bankr. P. 7003, 7004. Mailing the proposed plans, the hearing notice, and the confirmation order satisfies the "notice" requirement under Rule 2002, but not the service and summons requirements of Rule 7004.

Banks, 299 F.3d at 301 (internal citation omitted); *see also Ruehle,* 412 F.3d at 684; *Hanson,* 397 F.3d at 486-87; *Repp v. Educ. Credit Mgmt. Corp. (In re Repp),* 307 B.R. 144, 152-56 (B.A.P. 9th Cir. 2004) (holding that "notice less than that which results from compliance with Rule 7004's requirement for serving a complaint on a corporate defendant flunks due process").

Espinosa's assertion that the plan itself, which was mailed by the court to a general post office box, or the Trustee's general warning letter was sufficient notice falls wide off the *Mullane* mark. *See Espinosa,* 553 F.3d at 1200, n.4. That Espinosa did not hide the language in a footnote or put it in small print is not the relevant consideration under *Mullane.* That USA Funds received general notice or that "nobody-in-particular" at USA Funds may have received notice is also not the specific, appropriate notice this Court, the Bankruptcy Code, or the Bankruptcy Rules require.

Here, the process chosen by Espinosa was substantially less likely to "bring home notice" than the "feasible," "customary," and *legally required* alternative: summons, complaint, and delivery to a registered agent. *See Repp*, 307 B.R. at 149 ("The nub of the problem . . . is that the method chosen for notice was calculated to *minimize* the chance that it would come to the attention of persons in the position to make litigation decisions for the creditor.").

If Espinosa had actually *desired* to notify USA Funds of his intent to discharge his student loan, he could easily have served the corporate officer or registered agent of the student loan creditors with a summons and complaint as required by the Bankruptcy Rules. Instead, he simply mailed the Plan to USA Funds, addressed to nobody in particular at a post office box address. This practice places the student loan creditor in an unfair "Catch 22":

> It is black-letter law that [student loan creditors] are not required to respond per Rule 7012 until they have been "duly served" in accordance with Rule 7004 and need not fear a default judgment if they have not been "duly served." Yet—Catch-22—if they do not respond to notice of a plan mailed in accordance with Rule 2002 to nobody-in-particular at a payment lockbox, they stand to lose their rights by default to an "illegal" plan provision that they—double Catch-22—are entitled to expect the court, in the exercise of its independent duty, to reject in the first

place.

Repp, 307 B.R. at 153.

The form of notice Espinosa used was not "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." *Mullane,* 339 U.S. at 314. In this case, Espinosa never issued a summons or complaint and the issue of undue hardship was never litigated.[6]

While not every procedural rule violation offends due process, *Hood*'s explicit recitation of procedural requirements in student loan discharge matters is not mere *dicta* as Espinosa argued below. Rather, *Hood*'s discussion about the procedural rules at issue here is fundamental to all of the Bankruptcy Code, whether the issue is sovereign immunity or student loan discharge.[7] 11 U.S.C. § 102 embodies

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[6] Significantly, Espinosa did not attempt to plead or prove in his plan that payment of the full amount of his student loan debt would constitute an "undue hardship."

[7] Indeed, both Judge Kozinski and Judge Lundin appear to misread *Hood* by suggesting that, in the student loan context, *Hood* narrowly stands for the proposition that "an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to an adjudication of student loan discharge." *Espinosa*, 553 F.3d at 1202. Actually, *Hood*'s point is broader and simpler and certainly does not "undermine[] Fund's argument." In *Hood*, Tennessee Student Assistance Corporation (TSAC), a state-based guaranty agency, invoked sovereign immunity from the student loan discharge action. This Court disagreed that the discharge action was an affront to TSAC's sovereignty on the ground that the discharge action was an *in rem* action and the court's jurisdiction was premised on the *res* not the person or the State. Thus, the

the *Mullane* standard for notice. *Hood* reaffirms the specific notice "appropriate" in student loan discharge matters as required by § 102 and the Bankruptcy Rules. Under *Hood*, the appropriate notice is a "heightened notice," to afford a "greater procedural protection" to effect Congress's explicit intent to prevent discharge of student loan debt, except upon proof of undue hardship under § 523(a)(8). *Hood*, 541 U.S. at 451.

Given the circuits' conflicting and irreconcilable interpretations of this Court's due process precedent, certiorari is necessary to clarify whether a blatant violation of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure violates a student loan creditor's due process rights.

B. The Ninth Circuit Explicitly Rejects the Second and Tenth Circuits Holding that Chapter 13 Confirmation Orders Containing Discharge-by-Declaration Provisions Have No Preclusive Effect.

In its wholesale rejection of this Court's precedent and the creditor's due process concerns, the lower court relied primarily on its earlier plan language decision, *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999).

"form" of pleading by which the sovereign was brought into the proceeding, *i.e.*, a Summons and Complaint, did not change the fact that the bankruptcy proceeding was an *in rem* proceeding, and, therefore, the "undue hardship determination . . . is not a suit against a State for purposes of the Eleventh Amendment." *Hood*, 541 U.S. at 451 & n.5.

Although *Andersen*,[8] the early case that *Pardee* relied on had been reversed by the Tenth Circuit, the Ninth Circuit, refusing to sit *en banc*, determined that *Pardee* and the overruled *Andersen* were still the right approach. The Ninth Circuit concluded it had not "strayed off course" and reaffirmed its *Pardee* decision, holding that

> *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 Bankrutpcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a).

Espinosa, 553 F.3d at 1202. The Ninth Circuit's decision directly contradicts precedent in the Second and Tenth Circuits.

1. *Declaration-by-discharge provisions violate statutory principles.*

Both the Second and the Tenth Circuits have expressly rejected the Ninth Circuit's reliance on the preclusive effect of 11 U.S.C. § 1327(a). *Educ. Credit Mgmt Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (en banc); *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 155-56 (2d Cir. 2005). While acknowledging that 11 U.S.C. § 1327(a) generally binds a non-objecting party, the Second and

[8] *See Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999), *overruled by Educ. Credit Mgmt Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (en banc).

Tenth Circuits held that it cannot have preclusive effect in orders entered in violation of the rest of the Bankruptcy Code. *See Mersmann*, 505 F.3d at 1047 ("Discharge-by-declaration [in the context of student loans] deserves no preclusive effect under § 1327(a) because it fails to comport with the provisions of the Bankruptcy Code and Rules governing discharge."); *Whelton*, 432 F.3d at 154-55 ("[T]he Bankruptcy Court lacked the authority to grant a discharge of [the debtor's] student loan debt through the ordinary confirmation process.").

In a footnote, the Ninth Circuit dismisses the import of the Tenth Circuit's "statutory" ground because "it proves something that is both obvious and beside the point." *Espinosa*, 553 F.3d at 1199, n.3. While *Mersmann*'s holding is obvious, *it is also the "point"* the Ninth Circuit missed.

In concluding discharge-by-declaration provisions are not entitled to preclusive effect, the Tenth Circuit relied, in part, on the inherent statutory conflict between 11 U.S.C. § 1327(a) and 11 U.S.C. § 1328(a)(2). In overruling its earlier *Andersen* case, the Tenth Circuit noted that "[g]iving preclusive effect to the [general] discharge-by-declaration through § 1327(a) renders [the specific exception] of § 1328(a)(2) nugatory." *Mersmann*, 505 F.3d at 1048. Statutory construction principles require that, when general and specific statutory provisions contradict, the "specific pronouncement [of § 1328(a)(2)] must be read as limiting § 1327(a) broad res judicata effect." *Id.* In other words, the specific language of the § 1328 discharge order that specifically excepts student loan debt from bankruptcy discharge limits the broader reach of the confirmation order that binds creditors who fail to object to illegal plan language.

The Tenth Circuit also noted that discharge-by-declaration language violates 11 U.S.C. § 1325's requirement that Chapter 13 plans comply with the Bankruptcy Code. Therefore, allowing a plan with illegal language to be confirmed "violates the general maxim that the Bankruptcy Code and Rules 'be construed so that their provisions are harmonious with each other.'" *Id.* The Tenth Circuit further explained that "[t]o give preclusive effect to a confirmation order based solely on § 1327(a) deprives the Bankruptcy Code and Rules of a coherent reading, fails to give full effect to all of their provision, and undermines the clear will of Congress." *Id.*

2. *A confirmation order is not res judicata to issues that were not actually litigated.*

The Second and Tenth Circuits also rely on a res judicata analysis to conclude that a confirmation order has no preclusive effect on an issue that could not or should not have been litigated at the confirmation hearing. As a general matter, this Court has stated that res judicata will be invoked when there is (1) an adjudication on the merits, (2) the parties are identical or in privity, and (3) the claims were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1989); *see also Mersmann*, 505 F.3d at 1049; *Whelton*, 432 F.3d at 154-55.

Discharge-by-declaration provisions fail res judicata elements for at least two reasons: First, failure to provide specific notice under Fed. R. Bankr. P. 7004 effectively denies the student loan creditor a full and fair opportunity to litigate the claim. *Mersmann*, 505 F.3d at 1049. Second, plan confirmation is a narrow forum, limited to confirming those plans specified in 11 U.S.C. § 1325(a)(1) ("court shall confirm a plan if the plan complies with the provisions of this chapter").

Student loan debt is specifically excepted from the discharge under 11 U.S.C. § 1328(c) unless the debtor makes "a specific factual showing" of undue hardship. *Whelton*, 432 F.3d at 155. Inserting illegal language into a Chapter 13 plan violates these provisions because undue hardship cannot and is not proved through the Chapter 13 plan itself. Moreover, in the plan confirmation process, the court never actually adjudicates the issue of undue hardship on the merits. *Mersmann*, 505 F.3d at 1050; *Whelton*, 432 F.3d at 155. Under the bankruptcy code, the dischargeability of student loan debt cannot be litigated at the plan confirmation stage; plan provisions purporting to discharge by declaration are "mere trespassers" and cannot and do not enjoy the statutory res judicata effect of § 1327. *Educ. Credit Mgmt. Corp. v. Whelton*, (*In re Whelton*), 299 B.R. 306, 315 (Bankr. Vt. 2003) ("The Confirmation Order enforces only those provisions of the Plan that are required or permitted to be there by the Bankruptcy Code and cannot be usurped to validate or enforce provisions that were never properly lodged in the Plan.")

The Ninth Circuit, however, considered and rejected this res judicata analysis, stating that the *Mersmann* and *Whelton* decisions do not offer any persuasive reasons why the discharge-by-declaration provisions should not be given full preclusive effect. *Espinosa*, 553 F.3d at 1200. Foremost, the Ninth Circuit rejected the application of res judicata principles because a "discharge injunction does not operate by way of res judicata," but is "an equitable remedy." *Id.*

Even following the Ninth Circuit's fractured analysis to its conclusion, however, violates this Court's precedent. That is, even if res judicata principles do not apply because a discharge injunction is an equitable remedy, that equitable remedy is still confined to the Bankruptcy Code. As this Court stated in *Norwest Bank Worthington v. Ahlers*, "[w]hatever equitable powers remain in the Bankruptcy Courts must and can only be exercised within the confines of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206-07 (1988). Thus, a discharge injunction cannot be exercised in contravention of another section of the Code. *Id.*

Espinosa erred by continuing to follow the *Pardee* rationale, a case that has become an outlier. *Pardee* cannot stand on res judicata grounds because the issue of undue hardship—or even the broader issue of the dischargeability of student loan debt of any sort—cannot, should not, and was not litigated at the confirmation hearing. This irreconcilable circuit split is based primarily on disagreeing interpretations of the Bankruptcy Code and Rules and this Court's precedent, resulting in the inconsistent application of bankruptcy law. Without resolution by this Court, lower courts will continue to disagree over whether discharge-by-declaration provisions are entitled to preclusive effect. As such, this Court should grant certiorari.

II. The Ninth Circuit's Decision Paves the Path for Debtors to Discharge Child Support, Maintenance, Tax Debt, and Wrongful Death Judgments Through Chapter 13 Bankruptcies.

The disagreement in the Circuits over whether the creditor of a presumptively nondischargeable debt is entitled to the level of process prescribed in the Federal Bankruptcy Rules of Procedure prior to discharge is particularly significant because it could easily extend beyond the context of student loan "undue hardship" cases into other presumptively nondischargeable debts. The danger of allowing *Espinosa* to stand is immeasurable. Under the lower court's rationale, debts such as child support, maintenance, tax debt, court-ordered restitution, criminal fines and penalties, and others would all be susceptible to discharge via plan language in the Ninth Circuit. *See generally* 11 U.S.C. §§ 523(a); 1328(a).

This result directly contravenes the important public policy choices Congress made in declaring these debts presumptively nondischargeable. *See Cohen v. De La Cruz,* 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.") (*citing Grogan v. Garner*, 498 U.S. 279, 287 (1991)). *Espinosa* allows debtors in the Ninth Circuit to circumvent rules promulgated by this Court pertaining to notice and service in initiating dischargeability proceedings for other types of nondischargeable debt. It also undermines the stability that these rules are meant to provide, Congress's intent that these debts be nondischargeable in bankruptcy proceedings, and the uniform application of bankruptcy laws.

III. The Ninth Circuit's Decision Makes a Mockery of Bankruptcy Process and Encourages Unethical Conduct.

Even as limited to the student loan context, the decision below will have an enormous impact on the uniform application of the Bankruptcy Code, the student loan industry, the federal fisc, and the efficiency of bankruptcy courts' process. In giving preclusive effect to discharge-by-declaration plan language, *Espinosa* encourages every student loan debtor in the Ninth Circuit to attempt it. Indeed, it would cost nothing for the debtor to insert an additional paragraph in a Chapter 13 plan purporting to discharge student loans. Debtors and their counsel would not even be subject to sanctions if they modified their plans within 21 days of the sanction motion, even though, as the Ninth Circuit acknowledges, the provision is undoubtedly illegal. Fed. R. Bankr. 9011; *see also Espinosa*, 553 F.3d at 1202. Bankruptcy attorneys would face an ethical conundrum between zealous advocacy on behalf of their clients and ensuring that their clients meet the elements of an "undue hardship" in good faith. *See Mersmann*, 505 F.3d at 1050 ("Bankruptcy attorneys may be caught on the horns of a dilemma between aggressively pursuing a discharge-by-declaration on behalf of clients and ensuring that their clients meet the elements of an 'undue hardship' in good faith.").

In contrast, student loan creditors would be required to hire local counsel to file objections to every Chapter 13 plan in which a student loan is involved. The attorney fees and costs incurred by creditors would be extraordinary. The system would be clogged with plan objections, withdrawals of motions to modify, and sanctions requests. Yet the bankruptcy system would enjoy no benefit or gain from this meaningless procedure.

This futile process will only inundate the bankruptcy courts with pointless objections that would always be successful because there is no question that student loan creditors are entitled under the Bankruptcy Code and Rules to an adversary proceeding to determine undue hardship, as the lower court acknowledged. *See Espinosa*, 553 F.3d at 1202 (stating that if the creditor were to object, the bankruptcy court would be required to force the debtor to initiate an adversary proceeding and amend his plan).

Espinosa will cause bankruptcy courts and creditors to be overly burdened in a futile exercise of entertaining and granting countless objections to confirmation. Even within the Ninth Circuit, some loans will be discharged by use of plan language. Some loans will not. Some attempts will be caught by the trustee. Some will be caught by the court. Some will be held to their statutory burden of proof of establishing undue hardship. Some will not have to prove anything. The better outcome would be to prohibit this practice rather than rewarding it.

Without a definitive resolution, the Bankruptcy Code and Rules, designed to promote uniform treatment of like situations, will instead spawn inconsistent results. This Court's review is warranted to prevent such disparity.

CONCLUSION

Only this Court can say whether the Ninth Circuit is wrong to stand against the universe of this Court's precedent, congressional mandate, and a decade worth of contrary circuit-level caselaw. Unless this Court resolves the matter, the certain consequences will be the rise of gamesmanship, the mockery of bankruptcy process, and harm to the federal fisc. To countenance the practice of discharge-by-declaration, at any level, erodes the fundamental processes that embody this Court's jurisprudence. This Court should grant USA Funds' Petition for a Writ of Certiorari to restore certainty and consistency to the bankruptcy process and uniformity in the application of the Bankruptcy Code.

Respectfully submitted,

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