No. _____

In The
Supreme Court of the United States

LORNA Y. CHANNER,

Petitioner,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the term governmental unit under title 11 include any entity created or organized pursuant to state law or only those that fit within the boundaries set by federal law?

PARTIES TO THE PROCEEDING

Petitioner Lorna Y. Channer appeals from the Second Circuit. Petitioner was a debtor and plaintiff in the Bankruptcy Court. Respondent Pennsylvania Higher Education Assistance Authority was the defendant in the Bankruptcy Court ad defendants-appellee in the Courts of Appeals.

RELATED CASES

The Bankruptcy Court's decision, No. 10-21232 (JJT), was entered on February 20, 2019 and is available at 2019 WL 856247.

The District Court's decision No. 3:19-CV-00319, was entered on December 11, 2019 and is available at 2019 WL 6726397.

The Second Circuit's decision No. 3:19-CV-00319, was entered on December 17, 2020 and is available at 833 F. App'x 502.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lorna Y. Channer respectfully petition for a writ of certiorari to review the judgments and opinions of the United States Courts of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit decision was issued on December 17, 2020 and is reported at 833 F. App'x 502. The United States District Court for the District of Connecticut, affirming the bankruptcy court's denial of the motion to reopen, was issued on December 11, 2019 and is reported at 2019 WL 6726397. The Bankruptcy Court's decision was entered on February 20, 2019 and is available at 2019 WL 856247.

JURISDICTION

The judgments of the courts of appeals was December 17, 2020. App. A, 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(8)(A) provides in relevant part

(a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)

(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

———♦———

STATEMENT OF CASE

A. STATUTORY BACKGROUND

The text of 11 U.S.C. § 523(a)(8) makes educational dets nondischargeable if and *only if* they fall into

one of three categories: (1) educational loans that meet the requirements of a qualified education loan as defined in 26 U.S.C. § 221(d); (2) a loan made, insured, or guaranteed by a governmental unit, or funded in whole or in part by a governmental unit or nonprofit institution; or (3) an obligation to repay funds received as an educational benefit, scholarship or stipend.

The first category concerns private educational loans that meet the definition of a "qualified education loan" and do not include loans made to unaccredited trade schools or loans made in excess of the "cost of attendance." The second category concern a narrow segment of conditional educational grants. And the third category concerns government-backed educational loans made under the Higher Education Act. If a student debt does fall into one or more of these three categories, then the borrower must show "undue hardship" before the student loan debt can be discharged. But if none of these categories applies to the debt, the debt is a dischargeable consumer debt like any other.

Critically, the creditor bears the initial burden to invoke and prove application of § 523(a)(8). If successful, the burden shifts back to the debtor to show that repayment of the debt constitutes an "undue hardship." *In re McDaniel*, 973 F.3d 1083, 1092 (10th Cir. 2020) ("Under § 523(a)(8), the lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters.").

However, this Court has repeatedly stated that "student loans are presumptively non-dischargeable." *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 441 (2004) ("Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt."); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275–77 (2010) ("§523(a)(8) requires a court to make a certain finding before confirming the discharge of a student loan debt."). *But see In re McDaniel*, 973 F.3d 1083, 1092 (10th Cir. 2020) ("*Espinosa* was clearly intended as a shorthand, rather than a judicial declaration that § 523(a)(8) excepts all educational loan debt from discharge."). This has led to considerable confusion in lower courts and is to this day cited by creditors to mean that Section 523(a)(8) exempts *any and all* student loans from bankruptcy discharge. See PHEAA Opening Brief ("The Debtor seems to be suggesting that a student loan is not presumptively nondischargeable if other elements of 11 U.S.C. §523(a)(8) are in dispute.").

B. FACTUAL BACKGROUND

Appellant Lorna Channer filed for bankruptcy in the District of Connecticut on April 16, 2010. Channer scheduled an "educational student loan" ("Debt" or "Loan") to AES/BONY US on Schedule F. JA at 182. On November 3, 2010, the court discharged the debtor On December 2, 2011, AES sent Channer a letter stating that AES had paid a default claim on her Loan for $52,642, was the legal owner of the Loan, and the

"lender/holder" was USEFG/BANK OF NY ELT. On or about August 6, 2012, AES sent Channer a letter containing no account number but warning that AES would begin garnishing her wages for a defaulted debt in the amount of $66,533.71. On August 29, 2013, the bankruptcy case was closed. On March 23, 2017, PHEAA sent debtor a letter for Account No. 899234788 stating that PHEAA was owed $67,950. On May 25, 2018, PHEAA sent the debtor a letter informing her employer that the order of withholding for garnishment had been withdrawn. On August 23, 2018, PHEAA sent Channer a letter for Account No. 8992314788, with the outstanding balance listed as $52,642 in principal, and $70,163 total, consisting of $27,789 in interest, and $11,202 in projected collection costs.

On September 17, 2018, Channer filed a motion for order to show cause. PHEAA filed its objection to the motion on October 2, 2018. On November 15, 2018, the court denied the motion without prejudice if the case was reopened. On January 2, 2019, Channer moved to reopen the case. Channer filed an amended motion on January 17, 2019, in which, in part, Channer argued that PHEAA was not a government agency under the bankruptcy law and was thus not entitled to such a nondischargeability exception. On January 31, 2019, PHEAA filed its objection claiming it was the legal owner of the loan, and the guarantor. On February 7, 2019 United States Bankruptcy District of Connecticut Judge James J. Tancredi heard the motion,

and denied it on February 20, 2019. *In re Channer*, No. 10-21232 (JJT) (Bankr. D. Conn. Jan. 2, 2019).

REASONS FOR GRANTING THE PETITION

A. THERE IS MASSIVE CONFUSION IN THE LOWER COURTS REGARDING THE SCOPE AND APPLICABILITY OF 11 U.S.C. 523(a)(8).

Although this Court has twice reviewed cases concerning 11 U.S.C. § 523(a)(8), neither of them have concerned the scope or meaning of the statutory language. This lack of guidance has led to disparate and unpredictable holdings in the bankruptcy courts, which conflicts with the Constitution's mandate that bankruptcy laws be applied uniformly. *In re Dumont*, 581 F.3d 1104, 1112 (9th Cir. 2009) ("It would raise serious constitutional questions for us to conclude that Congress affirmatively intended to promote the non-uniform system caused by the circuit split over ride-through."). Moreover, this confusion is causing massive harm to millions of debtors, and harm to millions more who have no idea whether they can exercise their rights under Title 11 to relieve themselves of their enormous student debts.

1. This Court's Errant Pronouncements in *Hood* and *Espinosa* Have Led To Faulty Legal Reasoning in The Lower Courts.

In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 441, (2004), this Court stated that "student

loan debt [is] presumptively nondischargeable." Six years later in *Espinosa*, this court repeated the statement. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010). Respectfully, in both Hood and Espinosa, this Court erred *Cf. Mader v. Experian Information Solutions, LLC*, 2020 WL 264396, at *1 (S.D.N.Y. 2020) ("Some student loans are eligible for discharge."). *Matter of Henry*, 944 F.3d 587, 589 (5th Cir. 2019) ("The Bankruptcy Code says that some—but not all—student loans are not dischargeable unless failing to discharge the loan would impose an undue hardship on the debtor and the debtor's dependents."). Repeated pronouncements "student loans are presumptively non-dischargeable" has been the formal and efficient cause of massive confusion in the lower courts.

The story begins in 1977, when Congress first made certain government-backed educational debt non-dischargeable. Over the next three decades, Congress gradually expanded section 523(a)(8) to include conditional scholarships and grants, and certain types of private education loans. Until 2004, the lower courts applied traditionally rules of statutory construction, and applied section 523(a)(8) narrowly and in favor of the debtors. See e.g., *In re Segal*, 57 F.3d 342, 346 (3d Cir. 1995) ("[E]xceptions . . . are to be narrowly construed against the creditor and in favor of the debtor [under] 523(a)(8)."); *In re Meinhart*, 211 B.R. 750, 753 (Bankr.D.Colo.1997).

Then in 2004, this Court stated that "student loan debt [is] presumptively nondischargeable." *Tennessee*

Student Assistance Corp. v. Hood, 541 U.S. 440, 441, (2004). That pronouncements cast an enormous shadow upon the 45 million student debtors in this nation and made it is nearly impossible to predict how any given court will rule on the question of discharge. Some courts conclude anything called a student loan is non-dischargeable as an "educational benefit," *In re Belforte*, No. 10-22742-JNF, 2012 WL 4620987, at *8 (Bankr. D. Mass. Oct. 1, 2012), whereas others continue to find only some types of student loans are non-dischargeable.

2. There Is Now a Circuit Split Between the Sixth Circuit and Second Circuit Concerning the Meaning of "governmental unit" under Title 1

One type of education loan that is non-dischargeable are those made, insured, guaranteed or funded by any "governmental unit." The Bankruptcy Code does not define "governmental unit." However, every circuit to have examined this question has turned to the legislative history, wherein Congress stated:

> "[G]overnmental unit" . . . does not include an entity that owes its existence to State action, such as the granting of a charter or a license but that has no other connection with a State or local government or the Federal Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function." S.Rep. No. 95–989, at 24

> (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; *see also* H. Rep. No. 95–595, at 311 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6268.

In re Stoltz, 315 F.3d 80, 89 (2d Cir. 2002). Despite this term being in existence for more than forty years, and despite this Court having resolved the issue of sovereign immunity under Title 11 in *Hood*, this Court has never defined the term. The leading lower court decision, *Las Vegas Monorail Co*., conducted an extensive factual analysis, including asking whether "the entity has any of the powers typically associated with sovereignty, such as eminent domain." *In re Las Vegas Monorail Co*., 429 B.R. 770, 788 (Bankr. D. Nev. 2010). Most recently, the Sixth Circuit in *Kentucky Employees Ret. Sys. v. Seven Ctys. Servs., Inc*., 901 F.3d 718, 730 (6th Cir. 2018) performed a complex statutory analysis and developed a multi-part test that turned upon a variety of fact-intensive issues.

In this case, however, the Second Circuit simply rubber stamped the lower court's finding that federal courts were bound to apply state law with respect to governmental units under Title 11; thus if Pennsylvania created the entity, it was *per se* a "governmental unit" under Title 11:

> PHEAA plainly qualifies as a governmental unit within the meaning of Section 523(a) because it is a government instrumentality of the Commonwealth of Pennsylvania. Indeed, PHEAA was created by statute as "a body corporate and politic constituting a public

> corporation and government instrumentality," and has been repeatedly recognized as such by the Pennsylvania courts. On appeal Channer offers no persuasive justification as to why we should disregard these decisions rendered by Pennsylvania's highest court. Accordingly, we conclude, as did the District Court, that the Bankruptcy Court did not abuse its discretion in rejecting Channer's argument that the PHEAA was not a governmental unit within the meaning of Section 523(a)(8) and in denying Channer's motion to reopen.

In re Channer, 833 F. App'x 502, 506 (2d Cir. 2020).[1] Respectfully, that is not only an errant statement of law, *see Grogan v. Garner*, 498 U.S. 279, 284 (1991) ("Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code."), it is a dangerous one. If states are allowed to unilaterally determine which of its instrumentalities or agencies are arms-of-the-state, then states can simply pass laws that recategorize their counties as non-governmental units under Title 11—which would enable counties to declare bankruptcy under Chapter 7 or chapter 11 and completely

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[1] Other courts have concluded that PHEAA was not an instrumentality of the state, but only an "independent political subdivision" which is not among the types of entities listed in the statutory definition of "governmental unit" under Title 11. *Pennsylvania Higher Educ. Assistance Agency v. NC Owners, LLC*, 256 F. Supp. 3d 550, 553 (M.D. Pa. 2017) ("Following exhaustive review of a massive factual record, the court held that PHEAA is an independent political subdivision, not an arm of the Commonwealth.")

destroy the municipal bond market. *See e.g.*, 11 U.S.C. § 101(13) ("The term 'debtor' means person or municipality concerning which a case under this title has been commenced.").

B. *HOOD* PRESENTS NO CHALLENGE BECAUSE IT WAS ULTRA VIRES AS THE SUPREME COURT NEVER ASSURED ITSELF OF ITS OWN JURISDICTION.

As referenced above, it is by no means clear that *Hood* was even a valid pronouncement of law because this Court never assured itself of its own jurisdiction and thus, the entire decision was ultra vires. "[S]ince standing was neither challenged nor discussed in that case, and we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 353 (1996). The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). *See also Allen v. Cooper*, 140 S. Ct. 994, 1008 (2020) (Thomas, J.) ("*Katz* was wrongly decided. The Court today rightfully limits that decision to the Bankruptcy Clause context, calling it a 'good-for-one-clause-only' holding. I would go a step further and recognize that the Court 's decision in *Katz* is not good for even that clause.").

Failing to assure itself of jurisdiction has frequently been referred to by this Court "drive by

jurisdiction." *Id.* at 91 (1998) ("We have often said that drive-by jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect."). And yet, that is precisely what this Court did in *Hood*. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004) ("Hood does not dispute that TSAC is considered a "State" for purposes of the Eleventh Amendment."). Whether or not Hood disputed it is entirely irrelevant.

It is almost certain that TSAC was not a state for purposes of the Eleventh Amendment; and in fact, the only court to have conducted a thorough analysis so concluded. *Lees v. Tennessee Student Assistance Corp.*, 264 B.R. 884, 889 (W.D. Tenn. 2001) (TSAC was not a governmental unit under Code). Every other similarly situated state guaranty agency under Title 20 has been denied sovereign immunity as an arm of the state. Moreover, the Solicitor General told this Court in 2015 that the administration had never considered the guaranty agencies to be state agencies let alone states. *See Pennsylvania Higher Educ. Assistance Agency v. Pele*, Brief of the United States of America, 2016 WL 7115007 (U.S. 2016) ("Solicitor General's Brief").

And therein lies the problem. If TSAC was not a state for purposes of the 11th amendment, then TSAC had no standing to raise the sovereign immunity defense that initiated the litigation. *In re Merry-Go-Round Enterprises, Inc.*, 227 B.R. 775, 777 (Bankr. D. Md. 1998) ("There is nothing in this record to establish that Oakland County has standing to raise the issue of sovereign immunity. The Eleventh Amendment's

protection of a State's sovereign immunity does not generally extend to a State's subdivisions. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 786 (4th Cir.1997).").

While the opinion noted that "Hood does not dispute that TSAC is considered a 'State' for purposes of the Eleventh Amendment," the Court did not itself investigate whether TSAC was a State or a government unit and thus had standing to argue the sovereign immunity argument. If in fact the Tennessee Student Assistance Corporation is not a governmental unit, there never was any subject matter jurisdiction to adjudicate any issue related to sovereign immunity. And thus, the decision in *Hood* would be totally void and without precedential effect.

C. THE QUESTION PRESENTED IS IMPORTANT

This question is of critical importance for at least three reasons.

First, this Court has a duty to correct its own errors, or else explain how section 523(a)(8) excepts from discharge all student loans. *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) ("The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity.").

Second, as the dissent noted in *Robison*, the student debt crisis is reaching a crescendo. *Robinson v. Dep't of Educ.*, 140 S. Ct. 1440, 1441–42 (2020) (articulating the importance of resolving issues related to the $1.6 trillion student debt crisis) (Kavanaugh, J., dissent). According to a recent study by the Federal Reserve, Americans—mostly the middle class—are carrying $1.6T in student loan debt. Trapped by impossible payments and skyrocketing interest rates, this debt contributes to poor credit scores and a decline in home-ownership rates. Further, in the last five years, more than one million student loan debtors filed for bankruptcy. [https://www.prnewswire.com/news-releases/reset-button-to-tackle-1-6t-student-loan-debt-crisis-through-bankruptcy-301003434.html] Of those, however, 99.9% failed to include their student loans in their filings. This misstep has left individuals on the hook for billions of dollars of educational debt that could have been discharged in bankruptcy.

Third, the lower courts need a working definition of "governmental unit." Without one, it seems beyond peradventure to anticipate that states will begin reclassifying their counties or other debt-ridden entities as non-governmental units in order to allow them to shed all their unsecured debts under Title 11.

These problems will get harder if not impossible to correct if this Court does not resolve them quickly. Now that a conflict has emerged, the Court should intervene.

D. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

These cases provide an especially suitable vehicle to resolve the questions presented. The dischargeability of certain educational loans based on the statute of PHEAA as a governmental unit was the only question considered by the panels below, and no antecedent issues could prevent this Court from reaching it.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: May 17, 2021

Respectfully submitted,

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