No. 18-CV-1281-JWB

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Defendant/ Appellant,

v.

VICKY JO METZ,

Plaintiff/Appellee,

Appeal from the United States Bankruptcy Court for the District of Kansas
No. 6:17-ao-5119

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

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STATEMENT OF INTERESTED PARTIES

Pursuant to Fed. R. Bankr. P. 8012, *amici curiae*, the National Consumer Bankruptcy Rights Center, National Association of Consumer Bankruptcy Attorneys, and National Consumer Law Center state that they are all nongovernmental corporate entities that have no parent corporations and do not issue stock.

Further, amici are not aware of any interested parties beyond those already disclosed by the parties to the case.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. Bankr. P. 8017(c)(4), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did any party or party's counsel contribute money intended to fund this brief and no person other than amici contributed money to fund this brief.

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STATEMENT OF INTEREST OF AMICI CURIAE

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is also a nonprofit organization whose members are attorneys across the country. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The National Consumer Law Center (NCLC) is a public interest, non-profit law office focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC operates a Student Loan Borrower Assistance Project, which provides information about student loan rights and

responsibilities for borrowers and advocates. The Project also seeks to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens, and make loan repayment more manageable

This case is of vital interest to NCBRC, NACBA, and NCLC. Since the enactment of the Bankruptcy Code in 1978, Congress has permitted debtors who can demonstrate undue hardship to obtain a discharge of student loans. But, the nature of student loan debt, the structure of student loan programs, and the Bankruptcy Code itself have all changed significantly since the undue hardship test was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). Creditor, ECMC, urges this court to turn the undue hardship analysis into an insurmountable barrier to a fresh start that is not consistent with the Bankruptcy Code, or the Tenth Circuit's decision in *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004). Amici argue that this court should reject ECMC's effort and affirm the bankruptcy court's decision.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals has adopted the *Brunner* test for determining when repayment of student loans constitutes "undue hardship" under 11 U.S.C. § 523(a)(8) of the Bankruptcy Code. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004). The *Brunner* test contains three elements. First, the debtor "must prove that he or she "cannot maintain a minimum standard of living while repaying the student loan debt." *Id*. Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." *Id*. at 1310. Third, the debtor must demonstrate "good faith in seeking the discharge." *Id*. at 1309.

In its *Polleys* decision, the Tenth Circuit emphasized that the *Brunner* test should not be applied harshly. The test must "be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged." *Id*. Regarding *Brunner's* second element, *Polleys* stressed that a court should examine a debtor's future prospects "on specific articulable facts, not unfounded optimism, and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan." *Id*. at 1310. Significantly, the *Polleys* court made clear that *Brunner's* undue hardship test does not require "a certainty of

hopelessness" before a debtor is entitled to a discharge of student loans in bankruptcy. *Id*.

In the proceedings below, the bankruptcy court applied the *Brunner* test as interpreted by the Tenth Circuit's *Polleys* decision and granted Vicky Jo Metz a partial discharge of her student loans. The court determined that requiring Metz to pay the full amount of her student loan debt would constitute an undue hardship under section 523(a)(8). Therefore, the court discharged the accumulated interest on Metz's loans, requiring her only to pay the principal, which is $16,613. The decision closely followed the analysis in *Murray v. Educational Credit Management Corporation*, in which the bankruptcy court granted a partial discharge of student loan debt—a decision that was upheld on appeal to a U.S. District Court. *Murray v. Educ. Credit Mgmt. Corp.* (*In re Murray*), 563 B.R. 52 (Bankr. Kan. 2016), *aff'd*, No. 16-2838, 2017 WL 4222980 (D. Kan. Sept. 9, 2017).

On appeal, Educational Credit Management Corporation (ECMC) argues that the bankruptcy court erred in his application of the *Brunner* test and that Metz should have enrolled in one of several income-driven repayment plans (IDR). This argument is similar to that made by ECMC in the *Murray* case, which was rejected by the district court on appeal. ECMC's position, that Metz should be

burdened by her student loans until she is 84 years old, is the very outcome the *Polleys* decision explicitly rejected as unnecessary.

Moreover, such an outcome is contrary to the Bankruptcy Code's "fresh start" policy, which the Tenth Circuit made clear was not nullified by the *Brunner* framework. *Id.* at 1309. Indeed, although ECMC does not state so explicitly, "its position would create a per se rule requiring enrollment in [an income-driven repayment plan] to satisfy the third *Brunner* prong and thus would, in effect, eliminate the discharge of student loans for undue hardship from the Bankruptcy Code." *Barrett v. Educ. Credit Mgmt. Corp*., 487 F.3d 353, 364 (6th Cir. 2007).

Long-term, income-driven repayment plans are an inappropriate alternative remedy for debtors like Metz who seek to discharge their student loans in bankruptcy. IDRs have three fundamental flaws. First, most debtors in IDRs will never pay back their student loans. Indeed, under many IDRs the debtor's loan balance grows significantly. Second, although debtors who fail to pay back their loans at the conclusion of their IDRs will have their loans forgiven, the amount of cancelled debt is taxable to them unless they are insolvent at the time the debt is cancelled. This is not the case for loan discharged in bankruptcy for which there is no tax liability. Third, IDRs impose heavy psychological stress on debtors who are burdened with long-term debt they will never repay.

Amici's position is wholly consistent with the "fresh start" policy of the Bankruptcy Code, which was not nullified by the "undue hardship" standard set forth in section 523(a)(8). Professor John Patrick Hunt's seminal law review article on income-based repayment plans and student loans in bankruptcy found "no indication that [the income-driven repayment program] was intended to increase the level of hardship required for discharge." On the contrary, Professor Hunt wrote, "such a result seems contrary to the main purpose of the program," which is "enabling students to pursue low-paying careers and making life easier for student-loan borrowers by reducing the burden of repayment." John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment In Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1318 (2018). In particular, Hunt noted, "negative amortization and potential tax liability in IDR should weigh in favor of discharge, even if IDR payments themselves are affordable." *Id*. at 1351.

ECMC argues that Metz should enroll in a long-term, income-based repayment plan. ECMC's push for an even harsher application of the *Brunner* test is contrary to the Tenth Circuit's *Polleys* decision, contrary to public policy, and contrary to numerous bankruptcy court decisions around the United States that have rejected student loan creditors' demands that bankrupt student loan debtors can be offered only IDRs, and not bankruptcy relief.

ARGUMENT

I. The Federal Student Loan Program is in Crisis

The federal student loan program is in crisis. As the Federal Reserve Bank reported earlier this month, outstanding student loan debt has tripled since 2006, and now totals $1.56 trillion. Bd. of Governors of Fed. Reserve Sys., *Consumer Credit-G.19 (Consumer Debt Outstanding)*, U.S. FED. RESERVE BANK (Jan. 8. 2019). On average, college graduates leave college owing $37,000 in student loan debt, a $20,000 increase from just 13 years ago. Abigail J. Hess, *How Much the Average Borrower Owes When They Graduate*, CNBC.com, Feb. 15, 2018.

A recent study by the American Enterprise Institute concluded that student loan debt is a significant contributor to the nation's declining birth rates. Lyman Stone, *Declining Fertility in America*, AM. ENTER. INST., Dec. 2018, at 3. The Federal Reserve Board released a study in January 2019 showing that student loans have made it more difficult for Americans to buy homes. Alvaro Mezza, *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, 1 CONSUMER & CMTY. CONTEXT 2, 3 (Jan. 2019) (a little more than 20 percent of declining home ownership among young Americans is due to the rising level of student loan debt); *accord* Rajashri Chakrabarti, *Press Briefing on Household Borrowing with Close-Up on Student Debt*. FED. RESERVE BANK OF N.Y., Apr. 3, 2017.

In a recent speech, Secretary of Education Betsy DeVos compared the federal student loan program to "a thunderstorm loom[ing] on the horizon." According to Secretary DeVos, only 24 percent of student loan borrowers are paying down both principal and interest on their loans; and 20 percent of all federal student loans are delinquent or in default. In fact, Secretary DeVos reported, 43 percent of all student loans are in distress. Prepared Remarks by U.S. Secretary of Educ. Betsy DeVos to Fed. Student Aid's Training Conference (Nov. 27, 2018).

Clearly, as Secretary DeVos emphasized, the student loan crisis is about more than numbers. "Behind all the slides and statistics I've shown," she stated in her speech, "are the faces of students who can barely peer over their mountain of debt. Behind the debt are dashed hopes, delayed adulthoods, and struggling families." *Id*.

As Secretary DeVos attested to in her recent speech, student loan default and delinquency rates are quite high. In addition, millions of student loan borrowers have obtained forbearances and deferments that excuse them from making monthly loan payments while interest accrues on their loan balances. According to a 2013 report by the Consumer Financial Protection Bureau, almost 9 million people were not making loan payments because they had been granted an economic hardship deferment or had loans in some sort of forbearance program. Rohit Chopra, *A*

Closer Look at the Trillion, CONSUMER FIN. PROTECTION BUREAU, Aug. 5. 2013.

Loan balances are increasing for borrowers in large part because their loans are in deferment while interest accrues or borrowers are in income-based repayment plans with loan payments so low that borrowers are not paying down interest as it accumulates and capitalizes. A 2015 Brookings Institution report found that 57 percent of federal student loan borrowers in the 2012 cohort saw their loan balances go up two years *after* beginning the repayment phase of their loans. Adam Looney & Constantine Yannelis, *A Crisis In Student Loans?, How Changes In the Characteristics of Borrowers and In the Institutions They Attended Contributed to Rising Loan Default Rates*, BROOKINGS INST., Fall 2015 at 49 (Table 8). Thus, for borrowers with loans in deferment or loans in income-based repayment plans, their loans are negatively amortizing, with loan balances growing larger by the month.

An independent analysis of DOE's student loan data released in 2017 provided further evidence that massive numbers of student borrowers are unable to manage their debt. That analysis found that half the students at more than 1000 colleges and schools had not paid down their student loans by even one dollar seven years after beginning the repayment phase of their loans. Andrea Fuller, *Student Debt Payback Far Worse Than Believed*, WALL ST. J., Jan. 18, 2017.

Millions of Americans take out student loans during the traditional college-attending years—late teens and early twenties. Nevertheless, as Ms. Metz's case illustrates, the burden of oppressive student loan indebtedness does not fall solely on the young. Researchers for the Federal Reserve Bank of New York examined the loan status of 37 million student loan borrowers in a 2012 report. According to that report, almost one delinquent borrower in six (17.7 percent) was in Ms. Metz's age group: fifty years old or older. And almost five percent of the people who were behind on their student loan payments were at least 60 years old. Meta Brown, *et al.*, *Grading Student Loans*, FED. RESERVE BANK OF N.Y, 2012.

According to the U.S. General Accounting Office in December 2016, student loan debt held by older Americans has gone up precipitously in recent years. In 2015, 870,000 Americans age 65 and older had outstanding student loans, an increase of 385 percent in just ten years. U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY OFFSETS: IMPROVEMENT TO PROGRAM DESIGN COULD BETTER ASSIST OLDER STUDENT LOAN BORROWERS WITH OBTAINING PERMITTED RELIEF 8-9 (GAO-17-45) (Dec. 2016). And the amount of debt held by elderly borrowers also grew enormously from $2 billion in 2005 to $22 billion in 2015—a ten-fold increase. *Id.* at 9.

Default levels for older borrowers have reached alarming rates. The General Accounting Office reported that 37 percent of student loan borrowers age 65 and

over are in default, with another 5 percent in offset (meaning borrowers are not making loan payments). *Id.* at 10. For borrowers in the 50-64 age group, almost one in three borrowers (31 percent) was either in default or in offset. *Id.*

In *Lockhart v. United States*, 546 U.S. 142 (2005), the U.S. Supreme Court ruled that Social Security benefits are subject to offset by the federal government to collect on defaulted student loans. In 2015, 173,000 Americans experienced offsets to their Social Security checks due to unpaid student loan debt, a 540 percent increase from 2002. U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY OFFSETS at 11.

In summary, millions of student loan borrowers are struggling to pay their student loans. Total indebtedness and average levels of individual indebtedness are rising, and default rates are high. Perhaps most disturbing, elderly borrowers are carrying increased levels of debt and have very high default rates. More than a third of borrowers age 65 or older with outstanding student loans are in default. *Id.* at 10.

II. The Department of Education's Push for Income Driven Repayment Plans

As the burden of student loan indebtedness became ever more evident, the federal government began encouraging borrowers to enter into income-driven repayment plans (IDRs) that lower student borrowers' monthly loan payments but

extend the repayment period from 10 years to as long as 20 and even 25 years. *See*, *e.g.,* Press release, U.S. Dep't of Educ., Education Department Launches 'Pay As You Earn' Student Loan Repayment Plan (Dec. 21, 2012). Enrollment in IDRs has risen dramatically since 2014, roughly doubling from September 2014 to September 2016. Press Release, U.S Dep't of Educ., Education Department Posts Quarterly Student Aid Updates (Dec. 20, 2016). By September of last year, 7.4 million Americans were enrolled in some form of IDR. Press Release, U.S. Dep't of Educ., Federal Student Aid Posts New Reports to FSA Data Center (Sept. 19, 2018).

There are several varieties of these income-driven repayment plans and the terms are confusing to many student borrowers.[1] As Secretary DeVos acknowledged in her recent speech, "With more than 30 variations of 10 different plans, each with their own set of burdensome requirements, it's no wonder this government maze doesn't work." DeVos, Prepared Remarks, 2018.

IDRs give struggling student borrowers short-term relief by lowering their monthly loan payments, but a high percentage borrowers in IDR plans never pay off their loans because monthly payments are so low that the loans negatively amortize due to accruing interest. The bankruptcy court recognized this problem

[1] The U.S. Department of Education maintains a web page that displays a matrix explaining the various terms and eligibility requirements for the Department's income driven repayment plans. *See* U.S. Dep't of Education, Repayment Plans. Available at https://studentaid.ed.gov/sa/repay-loans/understand/plans.

when it granted Vicky Joe Metz a partial discharge of her student loans. The court pointed out that Metz owed $67,277.88 in student loans at the time of her adversary proceeding. *Metz v. Educ. Credit Mgmt. Corp.* (*In re Metz*), 589 B.R. 750, 754 (Bankr. D. Kan. 2018). If she were to enter a 25-year income-driven repayment plan and faithfully make all her payments, she would owe $157,277.88 when the plan concludes—*nine times more than she borrowed*. *Id*. at 755.[2]

III. Forcing Debtor's Into Income Driven Repayment Plans Is Contrary to the "Fresh Start" Policy of the Bankruptcy Code

Forcing debtors into income driven repayment plans is contrary to the Bankruptcy Code's core purpose, which is to give honest but unfortunate debtors a fresh start. Research and case law demonstrate that IDRs have at least three serious drawbacks for Americans who enroll in them. First, a high percentage of people entering IDRs will never pay off their student loans. Second, borrowers who successfully complete their IDRs will see their loan balances forgiven, but the amount of the forgiven debt is taxable income unless they are insolvent at the time

[2] On pages 21-23 of its brief, Appellant makes much of the fact that Judge Nugent may have incorrectly computed accruing interest on Ms. Metz's student-loan debt were she to agree to a REPAYE program. According to Appellant, the Department "does not charge any accrued interest during negative amortization periods for the ***first three years*** of enrollment." Appellant Brief at 23 (emphasis added). Even if Appellant is correct, that fact does not change the substance of Judge Nugent's point, which is that interest on Ms. Metz's student debt will continue to accrue under a long-term, income-based repayment plan and the loan balance will increase, not decrease, over the length of the plan.

the debt is canceled. Third, as several federal courts have recognized, IDRs lock borrowers into long-term indebtedness, which puts them under serious psychological and emotional stress.

A. An IDR should not be required when it is clear the debtor will never repay his or her student loans

It might make sense for a student loan borrower in bankruptcy to enter an IDR when there is a realistic chance that the IDR will enable a borrower to repay her loans. But it makes no sense at all to force a struggling student loan debtor into an IDR as an alternative to bankruptcy relief when it is evident the debtor will never repay her student loans.

But in fact, ECMC and other student loan debt collectors have insisted that nearly all bankrupt student loan debtors enter IDRs, even under absurd circumstances. For example, Michael Myhre, a quadriplegic, sought to discharge $14,000 in student loans in bankruptcy over the opposition of the U.S. Department of Education. *Myhre v. U.S. Dep't of Educ.*, 503 B.R. 698 (Bankr. W.D. Wis. 2013), At the time of trial, Myhre was "paralyzed from the chest down." *Id*. at 699. He required an electric wheelchair to get around and relied on a full-time caregiver to assist him with all his daily needs, "including eating, dressing and bathing." *Id*. Although Myhre was working nearly full time, his salary did not allow him to meet

his monthly expenses; and both Myhre and his caregiver filed for bankruptcy in 2012. *Id.* at 701.

DOE argued that Myhre had not met the "good faith" prong of the *Brunne*r test because he had not enrolled in an income-based repayment plan, but the bankruptcy court disagreed and discharged Myhre's student loans.

Under facts almost as absurd, ECMC opposed bankruptcy relief for Janet Roth, a woman in her late sixties with chronic health problems, who subsisted entirely on Social Security income of less than $800 a month. ECMC argued Roth did not meet *Brunner's* good faith test because she had not enrolled in an income-based repayment plan and had not made a single voluntary payment. *Roth v. Educ. Credit Mgmt. Corp.*, 490 B.R. 908 (B.A.P. 9th Cir. 2013). But the Ninth Circuit's Bankruptcy Appellate Panel rejected those arguments, concluding that Roth had met the good faith test by making "good faith efforts to obtain employment, maximize income, and minimize expenses." *Id*. at 919.

In addition, the panel observed, putting Roth into a long-term, income-based repayment plan would be pointless. "The IBRP was set up to allow borrowers to pay an affordable amount toward retirement of their student loan debt," the court pointed out. "However, when absolutely no payment is forecast, the law should not impose negative consequences for failing to sign up for the program." This was

consistent," the court added, "with the general maxim that the law does not require a party to engage in futile acts." *Id*.

Likewise, in a 2013 opinion, the Seventh Circuit Court of Appeals injected a note of common sense into its interpretation of undue hardship under the *Brunner* test. *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013), In that case, Susan Krieger, an unemployed woman in her fifties who had never earned more than $12,000 a year, sought to discharge about $25,000 in student loan debt through bankruptcy. *Id*. at 883-84. An Illinois bankruptcy court granted Krieger a discharge and specifically found that she had handled her student loan debt in good faith. *Id*. at 883.

On appeal, an Illinois district court reversed the bankruptcy court's ruling on the grounds that Krieger had failed to demonstrate good faith as required by *Brunner*. In the district court's view, Krieger had not looked hard enough to find a job, and she had rejected a 25-year, income-based repayment plan.

Krieger appealed this ruling to the Seventh Circuit Court of Appeals, which affirmed the bankruptcy court's decision to discharge Krieger's student loans. The district court had erred, the Seventh Circuit panel ruled, in concluding that good faith "entails commitment to future efforts to repay." *Id*. at 884. If this were so, the Seventh Circuit reasoned, "no educational loan *ever* could be discharged, because it is always possible to pay in the future should prospects improve." *Id*.

Section 523(a)(8) does not forbid discharge of student loans altogether, the Seventh Circuit instructed. "[A]n unpaid educational loan is not treated the same as debt incurred through crime or fraud." *Id.* On the contrary, "[t]he statutory language is that a discharge is possible when payment would cause an 'undue hardship.' It is important not to allow judicial glosses . . . to supersede the statute itself." *Id.*

In short, the Seventh Circuit ruled, "[t]o the extent that the district judge thought that debtors always must agree to a payment plan and forgo a discharge," that is an incorrect proposition of law. *Id.*

Similarly, in a 2007 opinion, the Sixth Circuit Court of Appeals rejected ECMC's argument that a debtor fails *Brunner's* good faith test if he or she does not enroll in an income-driven repayment plan. *Barrett v. Educ. Credit Mgmt. Corp.*, 487 F.3 353 (6th Cir. 2007). This position, the court observed, "would create a per se rule requiring enrollment in [an income contingent repayment plan] to satisfy the third *Brunner* prong and thus would, in effect, eliminate the discharge of student loans for undue hardship from the Bankruptcy Code." *Id.* at 364. Moreover, requiring debtors to enroll in a long-term repayment plan "runs counter to the Bankruptcy Code's aim in providing debtors a 'fresh start.'" In essence, the Sixth Circuit concluded, a debtor forced into a long-term repayment plan is simply "trading one nondischargeable debt for another." *Id.*

More recently, the Eighth Circuit Bankruptcy Appellate Panel upheld a bankruptcy court's decision to discharge the student loan debt of Sara Fern, a 35-year-old mother of three who owed approximately $27,000 in student loans she acquired to pursue postsecondary programs that did not improve her income. *Fern v. FedLoan Servicing*, 563 B.R. 1 (B.A.P 8th Cir. 2017). Fern's take home pay, the court found, was only about $1,500 a month, which Fern supplemented with food stamps and public assistance. *Id*. at 5.

The Department of Education maintained that Fern should be put into an income-based repayment plan, arguing that the Eighth Circuit's *Jesperson* decision, *Educ. Credit Mgm't. Corp. v. Jesperson*, 571 F.3d 575 (8th Cir. 2009), required that outcome even though the Department conceded that Fern's income was so low that her monthly payments would be zero.

But the Eighth Circuit's Bankruptcy Appellate Panel rejected DOE's argument. "We do not interpret *Jesperson* to stand for the proposition that a monthly payment in the amount of zero automatically constitutes an ability to pay." *Fern,* 563 B.R. at 5.

Metz's circumstances are not identical to the student loan debtors in *Barrett*, *Fern*, *Krieger*, *Myhre, and Roth*. But she has this in common with them: she will never repay her student loans under an IDR. She is 59 years old, and has virtually no retirement savings. Indeed, the underlying rationale of all these decisions—four

by appellate courts (*Roth*, *Krieger*, *Barrett* and *Fern*)—surely applies to Ms. Metz. There is simply no point in putting Vicky Jo Metz in a 25-year repayment plans when it is virtually certain she will never pay off her student loans.

B. *Tax consequences of IDRs defeat the Bankruptcy Code's fresh start policy*

In its brief (pp. 23-24), ECMC downplayed the tax consequences of IDRs for borrowers whose student loans are forgiven after a 20- or 25-year repayment period. Tax consequences are speculative, ECMC argued, and should not have been considered by the bankruptcy court. Appellant brief at 25.

ECMC's position is not consistent with prevailing case law. As a recent law review article explained, "Four federal appellant courts have considered the issue, and three have decided for the debtor, giving significant weight to the possible tax liability [for forgiven-student loan debt]." Hunt, *Help or Hardship?*, 106 GEO L.J. at 1343. For example, the Sixth Circuit Court of Appeals ruled that a debtor's decision to forgo an income-contingent repayment plan was reasonable "in light of the significant tax consequences of enrolling in the ICRP due to his present and future inability to pay his student debt**."** *Barrett,* 487 F.3d at 365; *see also Educ. Credit Mgmt. Corp. v. Mosely*, 494 F.3d 1320, 1327 (11th Cir. 2007) (income-contingent repayment program not always a viable option due to tax consequences of forgiven debt); *Coco v. New Jersey Higher Educ. Student Assistance*, 335 F.

App'x 224, 228 (3d Cir. 2009) (because "discharged portion of her loan would be treated as taxable income at the time of the discharge, her participation in the ICRP could ultimately result in her simply trading a student loan debt for an IRS debt") .

Several lower courts have also considered the tax consequences of an IDR in granting a discharge of student loan debt. In 2015, a Missouri bankruptcy court took note of the tax consequences for a debtor should he successfully complete a 25-year income-based repayment plan. *Abney v. U.S. Dep't of Educ.*, 540 B.R. 681 (Bankr. W.D. Mo. 2015). "Thus, if the Debtor were able over the next 25 years to timely pay his IBRP payments, as well as pay his child support and other expenses, and to somehow accumulate reserves to fall back on for retirement or otherwise, he would then be rewarded with a tax bill based on the amount of principal, interest and other charges owed to the Department at the time of forgiveness, when the Debtor is likely to be at least 65 years old," the court observed. *Id*. at 689-90.

Likewise, a bankruptcy court in Ohio predicted the outcome of a long-term, income-based repayment plan for a man in his 50s. *Marshall v. Student Loan Corp.* (*In re Marshall*), 430 B.R. 809 (Bankr. S.D. Ohio 2010). "At the end of the 25-year repayment period, if the debt is cancelled, there are tax consequences for the Debtor. The Debtor would be 81 years old at the end of the 25-year repayment period, and likely still on a fixed income. The tax consequences for someone in that position could be devastating." *Id*. at 815.

Just last year, an Iowa bankruptcy court took note of the tax consequences of an income-based repayment plan for Janeese Martin, a 50-year-old student loan debtor. *Martin v. Great Lakes Higher Educ. Grp.*, 584 B.R 886 (Bankr. N.D. Iowa 2018). At the time of her adversary proceeding, Martin owed $230,000 in student loans; and the court observed that her debt would probably continue growing over the years under an income-based repayment plan even if she made regular monthly payments.

> Debtor in this case is 50. If she were to sign up for an IBRP, she would be 70 or 75 when her debt was ultimately cancelled. The tax liability could wipe out all of Debtor's assets not as she is approaching retirement, but as she is in the midst of it. If Debtor enters an IBRP, not only would she have the stress of her debt continuing to grow, but she would have to live with the knowledge that any assets she manages to save could very well be wiped out when she is in her 70s.

Id. at 894.

The Ninth Circuit's Bankruptcy Appellate Court also recognized the potential tax implications for a woman in her sixties if she participated in a long-term income-based repayment program. "Potentially disastrous tax consequences could await her at the termination of the twenty-five year payment period or could await her estate and thus her heirs upon her death," the court stated. *Roth*, 490 B.R. at 920.

In this case, the bankruptcy court expressed similar concerns about putting Metz in an income-driven repayment plan that would cause her debt to continue to

grow. The bankruptcy court referred to such a plan as "a pay-as-she-earns time bomb." *Metz*, 589 B.R. at 760. Accordingly, the court forgave the accrued interest on Metz's student loan debt, requiring her only to pay back the principal.

As ECMC correctly noted in its brief, forgiven loans are not considered taxable income if the debtor is insolvent at the time the debt is cancelled. Appellant Brief, at 24-25. And of course, ECMC is right: Metz's tax liability from an income-based repayment plan will be reduced to the extent she is insolvent.

But think of the implications of ECMC's argument. Essentially, ECMC is suggesting that the court should not be concerned about the tax liability Metz will face at the end of an IBRP because Metz will likely be insolvent 25 years in the future—when she will be 84 years old.

What an astonishing admission! ECMC is acknowledging that 25 years from now, when Metz will be well into her retirement years, she will probably be broke. And recall that ECMC objected to the modest contributions Metz made to her retirement savings, maintaining that these payments were "elective deductions." Appellant Brief at 42.

In sum, a long term IDR is inappropriate for Metz, who would be 84 when her payment obligations cease, and who would owe 9 times what she borrowed. As a California bankruptcy court explained, an income-based repayment plan is not the same as a bankruptcy discharge, "particularly given the possibility that a debtor

may face a substantial tax liability when the student debt is forgiven." *Barrett v. U.S. Dep't of Educ,*, 545 B.R.625, 633 (Bankr. N.D. Cal. 2016).

C. IDRs Place Participants Under Severe Psychological Stress

Finally, long-term repayment plans have significant psychological costs for debtors who pledge to devote a percentage of their income to student loan payments for terms stretching as long as a quarter century. As one commentator noted:

> Studies have consistently found that socioeconomic status and debt-to-income ratio are strongly associated with poor mental health. Debt from student loans is often viewed as necessary by most Americans, but can be a chronic strain on an individual's financial and emotional well-being. The mere thought of having thousands upon thousands of dollars' worth of debt can severely impact those with already fragile mental health, especially if they will carry that debt for the rest of their lives. There is also the relentless nature of debt collection, the incessant calls from creditors, and the hassle of continuing to put student loans in forbearance. Financial difficulties "can also contribute to a sense of continuing entrapment and hopelessness that can in turn serve to extend an episode."

Katheryn E. Hancock, *A Certainty of Hopelessness, Depression, and The Discharge of Student Loans Under the Bankruptcy Code*, 33 L. & PSYCHOL. REV. 151, 160-161 (2009) (internal citations omitted). *See also* Hunt, *Help or Hardship?*, 106 GEO. L.J. at 1320 ("Even if IDR renders the monthly payments more affordable, indebtedness can inflict suffering by exacting a mental and emotional total on the debtor.").

In recent years, several courts have rejected long-term, income-driven repayment plans for bankrupt student loan debtors based at least partly on psychological costs such plans can impose. The Sixth Circuit's *Barrett* opinion, for example, rejected ECMC's position that a student loan debtor should be placed in an income-contingent repayment plan based partly on psychological considerations. "ECMC's argument overlooks the psychological effect of having a significant debt remain, and discards the central theme of the Bankruptcy Code—to provide the debtor with a fresh start." *Barrett*, 487 F.3d at 365 n.8 (internal citations omitted).

Other courts have also taken psychological factors into account when assessing the impact of income-based repayment plans on student debtors. For example, an Ohio bankruptcy court refused to place a 35-year-old single mother of two children into a long-term income-based repayment plan, instead discharging her student loan debt in its entirety. "Given [the debtor's] desperate circumstances, and her status as the proverbial honest but unfortunate debtor," the court wrote, "she is entitled to sleep at night without these unpayable debts continuing to hang over her head for the next 25 years." *In re Lamento*, 520 B.R. 667, 679 (Bankr. N.D. Ohio 2014).

Likewise, in a 2015 decision, a Missouri bankruptcy court rejected the U.S. Department of Education's argument that Michael Abney, a single father in his 40s

living on less than $1200 a month, should be placed in an IBRP. *Abney,* 540 B.R. at 681. The court pointed out that Abney's payments under such a plan would be so low that interest would continue to accrue, meaning that the total debt would grow. Moreover, "[t]he overhang of such debt could well impact not only [Abney's] access to credit over the 25–year IBRP period, but could also affect future employment opportunities and access to housing." *Id.* at 689. In addition, the court observed, "decades of mounting indebtedness, even with a zero or minimal payment amount, can impose a substantial emotional burden as well." *Id*. The court noted sympathetically that Abney had "already suffered emotionally from his ongoing debt struggles and was in fact hospitalized in part because of it." *Id*.

In a 2009 opinion, a Minnesota bankruptcy court rejected ECMC's argument that Steven Lee Halverson, a 65-year old debtor, be placed in a long-term income-based repayment plan based partly on Halverson's age and health condition. *Halverson v. Educ. Credit Mgmt. Corp*., 401 B.R. 378 (Bankr. D. Minn. 2009). The court pointed out that Halverson's debt was accruing interest at the rate of nearly $2,000 a month and Halverson would likely never make more than his then current wage of $13.50 an hour. "If Halverson elected to participate in the ICRP, he would pay for twenty-five years, and then any remaining balance would be forgiven and assessed for taxes as income. He would be ninety years old." *Id* at

382. The court also noted that long-term indebtedness under an income-based repayment plan could adversely affect Halverson's marriage. "Already, [Halverson's wife] has suffered physical manifestations of the stress and it is not clear that their marriage will survive the hardship," the court wrote. "Their ability as a married couple to finance their retirement years and to spend those years in peace will be greatly diminished by the emotional toll of these loans." *Id*. at 388.

In a 2016 decision, an Iowa bankruptcy court also considered the emotional burden of long-term indebtedness when it discharged student loan debt owed by Sara Fern, a 35-year-old single mother of three children. *Fern v. FedLoan Servicing*, 553 B.R. 362 (Bankr. N.D. Iowa 2016), *aff'd*, 563 B.R. 1 (B.A.P. 8th Cir. 2017). Fern's student loans (totaling approximately $27,000) had always been in deferment or forbearance due to her low income.

The Department of Education argued that Fern should be placed in an income-driven repayment plan, pointing out that her monthly payments would be zero based on her current income. But the bankruptcy court rejected that argument and discharged Fern's student loans.

In ruling in Fern's favor, the court pointed out that Fern's debt, which was growing due to accrued interest, would have a continuing negative effect on her credit. And the court also took notice of the emotional toll of long-term indebtedness:

> This mounting indebtedness has also indisputably been an emotional burden on Debtor. Debtor testified that knowing that the debt is hanging over her, constantly growing, and that she will never be able to repay this debt, is distressing to her. Debtor testified that she feels like she will never be able to get ahead because she will always have this debt.

Id. at 370.

The court found Fern's testimony to be persuasive, and took the emotional burden of long-term indebtedness into account in deciding that repaying her student loans would be an undue hardship. The Court noted that it would not ignore a hardship "simply because it is not reflected on a balance sheet." *Id*.

Finally, an Illinois bankruptcy court ruled that it would consider the "emotional aspects" of putting a student loan debtor in a long-term repayment plan. "The psychological and emotional toll on a debtor that results from adding 25 years to a student loan should not be overlooked," the court observed. *Durrani v. Educ. Credit Mgmt. Corp*., 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004). This was especially true, the court noted, when the debtor had incurred the debt many years earlier.

It is not unreasonable to conclude that stress about massive student loan indebtedness has contributed to the nation's rising suicide rate among middle-aged Americans. According to a 2015 report by Katherine Hempstead and Julie Phillips, the suicide rate for people in the 40-64 age group has gone up 40 percent

since 2007. Hempstead and Philips suggested that economic problems may have contributed to the rising suicide rate, and that "adverse effects of economic difficulties on psychological well-being may have been greater for those who did not anticipate them." Katherine A. Hempstead & Julie A. Phillips, *Rising Suicide Among Adults Aged 40 to 64 Years: The Role of Job and Financial Circumstances*, 48 AM. J PREV. MED 491 (2015).

CONCLUSION

The federal student loan program is in crisis. Almost 45 million borrowers have outstanding indebtedness totaling $1.56 trillion. Millions of borrowers are struggling to pay back their student loans and a significant number of older Americans are delinquent on their loans or in default.

Vicky Joe Metz is an example this crisis. She borrowed a little less than $17,000 in the 1990s to attend a community college. Over the years she paid back $14,000, "not a dime of which has gone to principal." *Metz*, 589 B.R. at 760. Unfortunately, Metz was never able to achieve financial security, and she filed for bankruptcy multiple times.

Metz is now 59 years old, and her loan balance has quadrupled from $16,613 to $67,277. Although ECMC insists that Metz failed the *Brunner* test, the bankruptcy court ruled that she met all three standards of that test, and the court's

findings are amply supported by the record. As the Tenth Circuit instructed in *Polleys*, an appellate court should accept "the Bankruptcy Court's factual findings unless they are clearly erroneous." *Polleys,* 356 F.3d at1305.

Numerous scholars have argued that student debtors should have easier access to bankruptcy relief than the undue hardship standard as interpreted by *Brunner* now provides. *See, e.g.*, SANDY BAUM, STUDENT DEBT: RHETORIC & REALITIES OF HIGHER EDUC. FINANCING 98 (2016) ("eliminate the difference between student loans and other forms of credit in the bankruptcy law"); Robert Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 468, 497 ("'undue hard-ship' provision in the Bankruptcy Code should be repealed"). *See also generally*, Terence L. Michael & Janie M. Phelps, *"Judges?! We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH.L. REV. 73, 105 (2005) (income contingent repayment plans "are the direct antithesis of the concept of a 'fresh start'").

But even under the undue hardship standard articulated by *Brunner*, it makes no sense to deny distressed debtors relief from oppressive student loans because they failed to enroll in a long-term income-driven repayment plan. Student debtors in such plans rarely repay their loans, and they suffer disastrous tax consequences

for forgiven debt unless they are insolvent at the time the debt is canceled. In addition, income-driven repayment plans impose serious psychological and emotional stress that comes from being burdened by debt that will never be repaid.

Income-driven repayment plans that stretch for as long as a quarter of a century and result in negative amortization are never appropriate for student loan debtors who come to the bankruptcy courts in good faith and seek the fresh start the Bankruptcy Code is intended to provide. Ms. Metz is 59 years old and originally incurred her student loan debt in the 1990s. Her indebtedness has already grown to four times what she borrowed, and a 25-year repayment plan would cause her debt to grow still more—possibly to nine times what she borrowed.

The bankruptcy court did not err in holding that a portion of Ms. Metz' student loans should be discharged based on undue hardship under section 523(a)(8). The decision of the bankruptcy court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. Bankr. P. 8017(d) because this brief contains 6,967 words, excluding parts exempted by Fed. R. Bankr. P. 8015(a)(7)(B)(iii).

2. This filing complies with L.R. 8015-1(b) and the type style requirements of Fed. R. Bank. P. 8015(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Kansas by using the Appellate CM/ECF system on January 29, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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