No. 14-1691

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re ROBERT E. MURPHY,
Debtor

ROBERT E. MURPHY,
Debtor-Appellant
- v.-
U.S. DEPARTMENT OF EDUCATION
EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
Appellee

SALLIE MAE, INC.; COLLEGE BOARD
Interested Parties

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
NO. 13-11408

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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July 29, 2015

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Murphy v. U.S. Dept. of Educ. – No. 14-1691

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/s/John Rao

Dated: July 29, 2015

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NOT APPLICABLE.

/s/John Rao

Dated: July 29, 2015

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Consumer Law Center is a public interest, non-profit legal organization incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and larger community on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on bankruptcy issues affecting its members and their clients.

As described in the accompanying motion for leave to file a brief in support of appellant, both organizations have a strong interest in student loan issues and the outcome of this case, and believe that their perspective on § 523(a)(8) will assist this Court in developing an undue hardship standard.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

(a) No party's counsel authored this Amici Curiae Brief in whole or in part;

(b) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and

(c) No person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The undue hardship tests of other circuit courts were developed at a time when debtors sought an immediate discharge of student loans in bankruptcy without waiting five or seven years for an automatic discharge the law then provided. Today, borrowers who are seeking discharge of student loans are not jumping the gun on a future automatic discharge. On the contrary, many have already been burdened by the obligations for decades and, if denied a discharge, face a lifetime of crushing debt. Other changes to bankruptcy law and student loan programs suggest that this Court should not be restrained by decisions from other circuits that gave undue weight to concerns that are not pertinent today.

Rather than adopt one existing test over another, we urge this Court to provide a formulation of the undue hardship standard in simple terms, that restricts consideration of extraneous and inappropriate factors not consistent with the statutory language. A finding about whether a debtor's hardship is likely to persist should be based on hard facts, not conjecture and unsubstantiated optimism. Hardship should be assessed based on the debtor's ability to repay student loans based on the loan terms, not twenty-five years into the future under an administrative income-based repayment plan. Consideration of the debtor's good faith, past conduct and life choices simply has no place in an undue hardship determination and if permitted, results in unnecessary litigation and value-laden, inconsistent judgments.

ARGUMENT

I. Changes To Section 523(a)(8) And Student Loan Programs Have Rendered The *Brunner* Test Obsolete And Compel Consideration Of A New Approach.

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 adopted by nine circuit courts of appeal was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). At that time, student loans were automatically dischargeable in bankruptcy, without proving undue hardship, if debtors simply waited five years after their loans first became due. Thus, the overarching concern expressed in virtually all of the seminal decisions was about potential abuse, that debtors may prematurely seek a discharge soon after student loans came due, without demonstrating a sustained period of inability to pay.

This concern was also described in a House Report at the time Congress enacted the five-year waiting period. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., 133, reprinted in 1978 U.S.Code Cong. & Admin.News 5787, 6094 ("Instead, a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due, have generated the movement for an exception to discharge.”).

The harshness of the *Brunner* test understandably can be seen as a reaction to this concern about impetuous filings, as demonstrated by facts of the *Brunner* case itself. Ms. Brunner filed bankruptcy approximately seven months after receiving her Master's degree, and sought to discharge her student loans two months later when they came due. Like all other debtors at the time, Ms. Brunner could have simply waited five years before filing bankruptcy and her student loans would have been discharged. This helps explain why the *Brunner* court and those following *Brunner* added a “good faith” prong to the test despite the lack of any textual basis for it in § 523(a)(8). *See In re Brunner*, 46 B.R. 752, 755 (S.D. N.Y. 1985) (hereinafter “*Brunner I*”) (“good-faith” requirement carries out the intent of § 523(a)(8) to “forestall students ... from abusing the bankruptcy system”).

Amici submit that most debtors today, like Mr. Murphy, are not seeking an undue hardship discharge soon after their student loans come due. A recent empirical study that considered the demographic characteristics of debtors who seek undue hardship discharges found that the mean age of those in the sample was 49 and the median age was 48.5. *See* Iuliano, Jason, “An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard,” 86 American

Bankruptcy Law Journal 495 (2012). The concern of Congress and courts adopting the *Brunner* test, that debtors seeking a bankruptcy discharge soon after graduating college or ending their studies, is simply no longer relevant.

The early undue hardship cases also reflected a concern about the financial stability of loan programs, particularly when a bankruptcy discharge was sought before the government had an opportunity to collect on the debt. Not only are debtors now seeking discharges long after loans have been made, but the government has been provided extraordinary collection tools that did not exist during the *Brunner* era. In 1991, the Higher Education Act was amended to permit a borrower's wages to be garnished to collect defaulted student loans in an administrative proceeding, without obtaining a court judgment. 20 U.S.C. § 1095a. A Department of Treasury procedure also can be used to collect student loans through the offset of tax refunds. 31 U.S.C. § 3720A. The Debt Collection Improvement Act of 1996 expanded these collection efforts by permitting the offset of Social Security of other government benefits. Pub. L. No. 104-134, 110 Stat. 1321 (1996); 31 U.S.C. § 3716. In 1991, the then-existing six-year statute of limitations for filing collection actions against borrowers, and all other limitation periods for student loan collection, were eliminated. *See* Pub. L. No. 102-26, 105 Stat. 123 (Apr. 9, 1991), amending 20 U.S.C. § 1091a. Collection lawsuits, tax intercepts, wage garnishments, and government benefit offsets may be done at any time. The only end point is that collection must cease when a borrower dies. 20 U.S.C. § 1091(a)(d). The possibility of debtors avoiding collection during periods when they have an ability to repay their student loans, before seeking a bankruptcy discharge, is another factor not relevant today.

As discussed in Appellant's Supplemental Brief (p. 15), the amount of student loan debt burdening debtors today is significantly greater than in the *Brunner* era. This is caused in part by the substantial increase in the costs of education.[1] It also reflects student loan collection practices, in which interest and collection fees of 25 per cent or more are capitalized during periods of nonpayment, and payments are first applied to accrued interest and fees. A debt of $20,000 can quickly grow to over $50,000. *See, e.g.*, *In re Martish*, 2015 WL 167154 (Bankr. E.D. N.C. Jan 12, 2015) (after making approximately $39,835 in payments on a consolidation student loan in the original amount of $11,202, debtor still owed $27,021 at time her chapter 13 case was filed).

A 2005 Code amendment expanded the scope of § 523(a)(8) to include student loans made by private lenders that are not subsidized or guaranteed by the government, and which may be denied to borrowers based on creditworthiness. The "undue hardship" language is now applicable to purely private student loans regardless of the terms of the loan or the underwriting criteria. The concern of

[1] Data on the cost of education compiled by the National Center for Education Statistics are available at: http://nces.ed.gov/programs/digest/d13/tables/dt13_330.10.asp?referral=report.

Brunner and its progeny in protecting the "enlightened social policy" of student loan programs that promise loans to borrowers without considering creditworthiness is also of less relevance today. *Brunner I*, 46 B.R. at 756 ("In return for giving aid to individuals who represent poor credit risks, [§ 523(a)(8)] strips these individuals of the refuge of bankruptcy in all but extreme circumstances.").

The *Brunner* test may have served its purpose in a different time, but it is now obsolete and should not be adopted by this Court.

II. Existing Undue Hardship Tests Stray Too Far From The Plain Language Of Section 523(a)(8) And Test Too Much.

The *Brunner* undue hardship test, and certain incarnations of the totality of the circumstances test (hereafter "totality test"), consider matters not contemplated by the words of the statute. The Second Circuit's review of the statutory language in *Brunner* was cursory at best. Even the lower court's opinion that was largely adopted by the Second Circuit devoted little attention to statutory construction and focused more on policy considerations it believed had motivated Congress. Writing on a clean slate, this Court has the opportunity to take a fresh look at the undue hardship standard, first by considering the meaning of "undue hardship."

The ordinary meaning of "hardship" is a "condition that is difficult to endure," Random House Webster's College Dictionary (2010); "a thing or circumstance that causes ongoing or persistent suffering or difficulty," American

Heritage Dictionary of the English Language (Fifth Ed. 2011). "Undue" is defined as "exceeding what is appropriate or normal." *Id*. It conveys that a matter is significant, as opposed to *de minimis* or insignificant. Together these words refer to a significant, ongoing condition that is difficult for the debtor to endure. Read in the context of the debt dischargeability, the statutory language looks at the present and future financial condition of the debtor and the debtor's dependents and asks the question whether they will endure significant difficulty, such as being unable to maintain a normal standard of living, if the student loan must be repaid rather than discharged. At bottom, if repayment of the student loan would prevent the debtor from satisfying ordinary and necessary living expenses so that a debtor could not effectively "make ends meet," this would be an undue hardship. *See, e.g., In re Skaggs*, 196 B.R. 865, 868 (Bankr. W.D. Okla. 1996).

This meaning of "undue hardship" is consistent with its application in a similar context. In determining whether recovery of a benefit overpayment should be waived, the Veterans Administration regulations provide that one of the factors that should be considered is "undue hardship." This is defined in the regulation to be: "[w]hether collection would deprive debtor or family of basic necessities." 38 C.F.R. § 1.965(a).

Congress adopted a construct for "undue hardship" in another section of the Code, after *Brunner* was embraced by the circuit courts, that comports with its ordinary meaning. Section 524(c) has long required that reaffirmation agreements entered into by the debtor must be reviewed, either by the court or through a certification of debtor's attorney, to ensure that the repayment obligation will not impose an "undue hardship on the debtor or a dependent of the debtor." In the 2005 Code amendments, Congress included a presumption to guide bankruptcy courts in applying this undue hardship standard:

> … it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt.
>
> 11 U.S.C. § 524(m)(1).

The test created by the presumption looks solely at the debtor's income and expenses in relation to the payment requirements under the reaffirmed debt. *See, e,g*, *In re Visnicky*, 401 B.R. 61, 63 (Bankr. D. R.I. 2009); *In re Stevens*, 365 B.R. 610, 612 (Bankr. E.D. Va. 2007). Although the context in which "undue hardship" arises under § 524(c) and (m) is different than dischargeability under § 523(a)(8), there is no escaping the fact that Congress used the identical phrase in both sections of the same statute. At a minimum, the presumptive test added in 2005 sheds light on what Congress intends when it uses the phrase "undue hardship" in a statute with respect to the impact of debt repayment on a debtor.

III. The Limited Legislative History of Section 523(a)(8) Suggests A Less Stringent View Of Undue Hardship Than Courts Have Adopted.

Numerous courts have commented that Congress said little about "undue hardship" in the Code's legislative history. *E.g.*, *In re Kopf*, 245 B.R. 731, 736, n.10 (Bankr. D. Me. 2000). The Tenth Circuit observed that "[t]he phrase 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States." *ECMC v. Polleys*, 356 F.3d 1302, 1306 (10th Cir. 2004). The Commission Report provided a description of undue hardship that Congress may have relied upon in enacting § 523(a)(8). *Brunner I*, 46 B.R. at 754 ("The Commission's report provides some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress."). The Commission Report describes "undue hardship" as follows:

> In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living within their management capability, as well as to pay the education debt.
>
> Report of the Comm'n on the Bankr. H.R. Doc. No. 93-137, Pt. II § 4-506 (1973).

Importantly, the Commission Report focuses on the debtor's inability to maintain a minimum standard of living while repaying the loans. It is devoid of stringent terms such as “certainty of hopelessness” or “total incapacity.” *In re Randall*, 255 B.R. 570, 577 (Bankr. D. N.D. 2000) (applying totality of circumstances test and noting that standard involves a “total incapacity both at the time of filing and on into the future to pay one's debts”); *Brunner I*, 46 B.R. at 755 (“dischargeability of student loans should be based upon the certainty of hopelessness”). The Report refers to a debtor maintaining a “minimal standard of living” based on “adequate” income, rather than suggesting the debtor must endure extreme poverty and demonstrate extraordinary circumstances. *In re Courtney*, 79 B.R. 1004, 1010 (Bankr. N.D. Ind. 1987) (suggesting that a debtor must show that an effort to repay would “strip[] himself of all that makes life worth living.”). The Report also focuses on the debtor’s present and future condition. It does not refer to any of the debtor’s pre-bankruptcy past, such as the debtor’s reasons for obtaining the student loans or attempts to repay them.

Courts that require a “certainty of hopelessness,” “total incapacity,” or virtual absence of any expectation of loan repayment by the debtor have strayed too far from the statute’s plain meaning and its legislative history. *Krieger v. Educ. Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (noting “it is important not to allow judicial glosses, such as the language found in *Roberson* and *Brunner*, to supersede the statute itself"); *Kopf*, 245 B.R. at 741 (*Brunner* and other similar approaches "test too much").

IV. This Court Should Provide A Formulation Of The Undue Hardship Standard In Simple Terms Based On The Statutory Language, That Avoids Inconsistent Results And Unnecessary Litigation.

Although the totality of circumstances test (hereafter "totality test") has been described as a "less restrictive approach" than *Brunner*, *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003), it has not always been applied in a manner that avoids the harshness of *Brunner*. Both tests consider similar financial matters under their first prongs. While the totality test does not expressly incorporate the objectionable aspects of *Brunner's* second and third prongs, they can nevertheless creep back into the totality test under its catch-all third prong that considers "any other relevant facts and circumstances." This provides an opportunity for the parties to argue, and the court to consider, numerous factors that may not be probative of undue hardship as contemplated by the statutory language. *Polleys*, 356 F.3d at 1309 (under totality test, "courts may choose from a multitude of factors and apply any combination of them to a given case, suggesting that just about anything the parties may want to offer may be worthy of consideration"). The *Brunner* test already is unpredictable and non-uniform; a totality test is likely to be no different. *See In re Speer*, 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) ("[T]he application of [*Brunner*] standard requires each court to apply its own intuitive sense of what 'undue hardship' means on a case by case basis. With so many Solomons hearing the cases, it is no wonder the results have varied.").

The existing undue hardship tests are far too complex and encourage parties opposing discharge to engage in costly, contested litigation. Rather than adopt one of the existing **tests**, amici urge this Court to describe the undue hardship **standard** in simple terms based on the statutory language. In light of the numerous decisions applying *Brunner* and totality tests, this Court should describe what the undue hardship standard is, and more importantly, what it is not.

The First Circuit B.A.P. has "distilled [undue hardship] to its essence" by noting that it "rests on one basic question: 'Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?'" *In re Bronsdon*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

To the extent the inquiry extends beyond this basic question, we urge the Court to provide guidance on the key considerations as follows.

A. Consideration of the economic factors should focus on whether the debtor can maintain a minimal standard of living while repaying the student loan.

Consideration of the debtor's financial circumstances is at the core of the undue hardship standard. The amount of the debtor's income is reviewed in relation to the debtor's ability to meet necessary expenses. The standard should not require “abject poverty” or income below a certain threshold, such as the federal poverty guideline. *In re Hornsby*, 144 F.3d 433 (6th Cir. 1998) (debtors did not need to be at poverty level to show undue hardship). In most cases, though, this is not an issue in dispute as the income of debtors who file bankruptcy is far below other Americans.[2]

It is appropriate for the bankruptcy court to consider whether the debtor’s expenses are commensurate with a reasonable, not extraordinary, standard of living. Regardless of whether this is a characterized as a “minimal” standard of living, the focus should be on whether the debtor can pay for basic necessities. Rather than becoming mired in arguments over whether a particular expense is excessive in relation to various shifting standards, a better approach is to focus on certain basic needs of the debtor’s family. The bankruptcy court’s analysis in *In re Ivory*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001), serves as useful example of this approach. The court listed what it considered to be the elements of a minimal standard of living. These include decent shelter and utilities, communication services, food and personal hygiene products, vehicles (maintained, insured, and tagged), health insurance or the ability to pay for medical and dental expenses when they arise, some small amount of life insurance, and some funds for

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[2] Median household income for debtors filing chapter 7 bankruptcy in 2007 was $23,136. This was 52% below the median household income of $48,200 for the general U.S. population. Lawless, Robert, *et al*., Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors, Am. Bankr. Law J. Vol. 82 , 363 (2008).

recreation. When a borrower's monthly income falls hundreds of dollars below the level at which the debtor could afford to pay for these necessities, courts need not consider arguments over much smaller expenditures for items such as cable television and Internet access. The basic purpose of this inquiry is to ensure that, after debtors have first provided for their basic needs, they do not allocate discretionary income to the detriment of the student loan creditor.

Bankruptcy courts are accustomed to evaluating debtors' expenses for reasonableness under other Code provisions. This process is done when a chapter 7 filing is challenged for abuse under § 707(b) or there is a dispute over whether all of the debtor's projected disposable income is being contributed to a chapter 13 plan in accordance with § 1325(b). In both instances, the court is guided by standards for certain basic living expenses set under the "Collection Financial Standards" used by the Internal Revenue Service in setting repayment terms for delinquent taxpayers. There is nothing unique about the undue hardship standard that warrants a different approach. If there are legitimate disputes about whether the debtor could repay a student loan by limiting unnecessary expenses, courts should make use of the Code's well-established expense standards.

The analysis of current income and expenses must also consider whether the debtor can satisfy basic living expenses while paying student loans. As discussed below, the full current monthly payment required to amortize the loan should be considered. *In re Fecek*, 2014 WL 1329414 (Bankr. S.D. Ind. Mar. 31, 2014) (using student loan's contractual monthly payment, borrower has nothing left over for expenses typically included in IRS payment standards).

B. Additional or extraordinary circumstances may help the debtor prove undue hardship, but should not be required.

Brunner's second prong, which looks at additional circumstances showing that the hardship is likely to persist, has encouraged courts to create rigid threshold requirements. Often this includes a requirement to show a "certainty of hopelessness" or certain "unique" or "extraordinary" circumstances that look well beyond foreseeable continued financial hardship. Many courts have required that the exceptional circumstances must be something beyond the likely persistence of the debtor's financial problems, and may require proof of serious illness, psychiatric problems, incapacity or disability of a debtor or dependent. This consideration, albeit formulated differently, may appear in the totality test's first and third prongs.

The requirement to show something akin to a "certainty of hopelessness" requires debtors to prove a negative; that a virtually unpredictable course of events will not result in good fortune for the debtor. Life has many twists and turns that are unforeseen, making it impossible to forecast with precision a debtor's condition in ten or twenty years (as some courts have required). The requirement also suggests a burden of proof much stricter than the preponderance of the evidence standard that applies to hardship determination cases. Such a proof requirement eviscerates the "fresh start" potential inherent in § 523(a)(8)'s allowance for discharge in certain circumstances. *Polleys*, 356 F.3d at1310 (courts need not require a "certainty of hopelessness").

Rather than require some degree of certainty that is simply beyond proof in most cases, the debtor should be required to show that it is more likely than not that the financial difficulties causing undue hardship will continue into the immediate, foreseeable future. The likely persistence of hardship may be due to health problems or physical or mental disability of the debtor or a dependent. But it may also stem from more mundane causes, such as financial barriers that the borrower faces in his or her economic environment. The court should evaluate only realistic expectations rather than speculate concerning improved future prospects.

Although the standard is forward-looking, looking back at the debtor's employment history can help forecast the debtor's realistic future prospects. If the debtor has been stuck in low or modest paying jobs for the past ten or fifteen years, achieved only modest pay increases over that time, maximized her income potential in her field based on education, experience and skills, and there are no more lucrative jobs available to the debtor, only some highly unusual circumstance would suggest that the condition is not likely to persist. Debtors who despite being in good health and working hard, do not earn enough to pay for basic necessities for their family, should be not be denied a hardship discharge because they cannot show they are disabled or some additional circumstances. Age of the debtor or other factors that limit employment opportunities, or prevent retraining or relocation, are factors to be weighed.

The "future" should not exceed beyond the loan repayment period. *Bronsdon's* focus on the debtor's circumstances "in the foreseeable near future" is noteworthy. Student loan creditors have aggressively pushed courts to consider long-term repayment plans, up to twenty-five years long, as alternatives to bankruptcy discharge. This is inconsistent with bankruptcy law, as addressed below.

The evidence in this case did not support the conclusion of the lower courts that Mr. Murphy, who at trial had been unemployed for the prior thirteen years and was age 63, would have a miraculous change of circumstances allowing him to make the $2,400 per month payments on his student loans.

C. Consideration of lack of good faith or improvident decision-making from the debtor's past should not be part of the undue hardship analysis.

Brunner's third prong requires that the debtor show a good faith attempt to repay the loan. Courts have considered under this prong (as well as under the third prong of the totality test) whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. This requirement looks to the debtor's past conduct.

While initially somewhat narrow in scope, the debtor's good faith has seemingly extended to all prongs of *Brunner* and the third catch-all prong of the totality test. It has morphed into a morality test in which a myriad of the debtor's life choices and past conduct are called into question. Permitting consideration of "good faith" or "other relevant facts and circumstances" has forced debtors to refute arguments by student loan creditors that they should have avoided having too many children (*In re Walker*, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); *Ivory*, 269 B.R. at 911)); should not take prescription drugs to counteract the side effects of mental health medication (*In re Renville*, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006)); should not have taken custody of two grandchildren, one of whom was victim of physical abuse (*In re Mitcham*, 293 B.R. 138 (Bankr. N.D. Ohio 2003)); or should not have ended studies without getting a degree so as to care for elderly parents (*In re Bene*, 474 B.R. 56 (Bankr. W.D. N.Y. 2012)).

As previously noted, a good faith consideration lacks foundation in the words of the statute. It is also significant that other subsections of § 523 do in fact make certain debts nondischargeable based on the debtor's past bad conduct. *See,* *e.g.*, § 523(a)(2)(A)(debts obtained by false pretenses or representations, or actual fraud); § 523(a)(6)(debts based on willful and malicious injury of another or property of another); § 523(a)(9)(debts based on death or injury caused by debtor's operation of a motor vehicle while intoxicated). Except when Congress has expressly provided otherwise in § 523 or in some other Code section, debts are discharged in bankruptcy even when debtors have made mistakes, exercised bad judgment, and engaged in immoral actions. Congress did not make student loan dischargeability turn on questions of good faith or morality, as it did for other debts under § 523.

An open-ended inquiry into decisions the debtor made in the past, based on its subjective nature, inevitably leads to inconsistent results. Good faith should not provide the means for student loan creditors and courts to impose their own values on a debtor's decisions and life choices. To the extent there is some role for a good faith inquiry in the undue hardship standard, it should be limited to questions about the debtor's honesty in relation to the claimed hardship, such as whether the debtor has fabricated or fraudulently portrayed a hardship. Issues related to the debtor's good faith in filing bankruptcy can be addressed by the court under § 707(b) or § 1325(a)(7).

V. The Existence Of Income-Based Repayment Plans Is Irrelevant To The Undue Hardship Determination Under Section 523(a)(8).

Since the early 1990s, federal legislation has authorized various forms of income-based repayment programs for student loan borrowers. The earliest version, known as the "Income-Contingent Repayment Plan" ("ICRP"), allows for potential forgiveness of a student loan after twenty-five years.[3] For the duration of the twenty-five year period the borrower must make monthly payments set at 15% of discretionary income. Discretionary income is defined as the difference between 150% of the applicable HHS poverty guideline and the borrower's current income. If the borrower's income falls below 150% of the poverty guideline, the ICRP monthly payment would be $0.00. In order to have the outstanding student loan debt forgiven, the borrower must annually recertify and comply with all program guidelines for twenty-five years.

A later version of the long-term repayment program, known as "Income-Based Repayment" ("IBR"), has become prevalent since 2007.[4] The IBR allows forgiveness after twenty years. The IBR sets payments at 10% of discretionary income.

Student loan creditors routinely oppose undue hardship discharges by highlighting potential availability of long-term income-based repayment plans.

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[3] 20 U.S.C. § 1098e; 34 C.F.R. § 682.215 and § 685.221.
[4] 20 U.S.C. § 1098e; 34 C.F.R. ¶ § 685.221.

ECMC in this case acknowledges the lower courts' view that the availability of ICRP is not dispositive, but argues that "the undisputed availability of a $0.00 monthly payment further supports the Bankruptcy Court's determination that Murphy did not prove undue hardship." ECMC Brief, p. 13. The role, if any, that the existence of these programs should exert in a court's undue hardship determination has been the focus of extensive litigation in all circuits.

A. An undue hardship standard that appropriately implements section 523(a)(8) must focus on the debtor's ability to make the originally scheduled loan payments.

In considering whether now and in the foreseeable near future the debtor can maintain a reasonable standard of living and at the same time afford to make payments on the student loan, a critical issue any court must address is: what are the student loan "payments" that form the basis for this evaluation? Both *Brunner* and the totality test require that a court evaluate the hardship the debtor is likely to incur if the debtor actually makes payments due on the loan. Neither of these standards assesses "hardship" based on the debtor's making no payments at all. The ICRP argument that ECMC formulated in Mr. Murphy's case cannot be squared with either of the prevailing undue hardship standards.

In determining the appropriate monthly payment amount for the undue hardship assessment, the appropriate place to begin is with Congress's enactment of the operative Code provision in 1978. There were no income-based payment programs in 1978. Congress could not have intended that courts evaluate undue hardship using payment figures derived from programs that did not exist at the time. Given the clear, absolute five-year discharge option that existed in 1978, any type of long-term repayment program running for twenty-five years would have been irrelevant to the undue hardship determination as envisioned by Congress at the time. Congress has not revisited the undue hardship standard since 1978.

The initial version of the ICRP was developed in 1993. After Congress removed the time-based automatic bankruptcy discharge option in 1998, the undue hardship standard was left as the only discharge option. The legislative history indicates that in 1998 Congress was aware that the long-term payment plans and other options could serve as fallbacks for borrowers who did not qualify for an undue hardship discharge.[5] However, Congress did not repeal the bankruptcy hardship provision; indeed, it expressly stated that it did not intend that these new payment alternatives should displace or in any way change the undue hardship standard drafted into the Code in 1978. According to the relevant 1998 Conference Report addressing the elimination of the time-based automatic discharge," [t]he conferees note that this change does not affect the current provisions allowing any student borrower to discharge a student loan during

[5] Higher Education Amendments of 1998, Conference Report 105-750 (Sept. 25, 1998); 1998 U.S. Code Cong. & Admin. News 404.

bankruptcy if they can prove undue economic hardship."[6] Finally, among the substantial revisions to the Code made in 2005, Congress added § 523(a)(8)(b) to extend the nondischargeability exception to cover private student loans. Here again, Congress did not alter the 1978 language related to the discharge for undue hardship. By this time, the income-based plans had been available for more than a decade.

When Congress created the undue hardship discharge option in 1978, there was no ambiguity about what it meant to make payments on a student loan. As is the case today, students typically executed notes with a fixed repayment period. As is true today, this period was usually ten years. In creating the undue hardship discharge option, Congress clearly referred to the hardship caused by making the payment needed to pay off the loan within the original ten-year amortization period. *See Bene,* 474 B.R. at 73 (opining that today Second Circuit would not define relevant repayment period by reference to long term payment plans); *Polleys*, 356 F.3d at 1310 (under *Brunner*, "inquiry into future circumstances should be limited to the foreseeable future, at most over term of the loan"). Today, just as in 1978, courts must evaluate hardship based on the impact that making payments due under the original note terms will have upon the debtor.

[6] *Id*.

Courts using the totality test turn to the income-based plans under that test's catch-all third prong. *Brondson*, 435 B.R. at 801. The *Brondson* court recognized, as have all other courts, that participation in a long-term plan is not mandatory and a borrower should not be denied an undue hardship discharge solely because the borrower is not presently enrolled in a plan or did not enroll in one in the past. Instead, the *Brondson* court designated eligibility for a plan as "one of many factors to consider" in the undue hardship evaluation. The court noted that the long-term plans could be harmful for certain borrowers. *Id*. at 802. However, the court also believed that the plans "may be beneficial for a borrower whose inability to pay is temporary and whose financial situation is expected to improve significantly in the future." *Id*. For this latter class of borrowers, the availability of the plans could weigh against the undue hardship discharge.

The *Brondson* court's treatment of income-based plans is problematic. In that court's view, a judge should disregard the debtor's non-participation in long-term repayment program when the participation would harm the debtor. However, when in a court's view participation would help the debtor, such as when the debtor faces only a temporary problem and the debtor's financial situation is expected to improve, the court should give negative weight to the borrower's non-participation. Simply put, this analysis adds nothing to the application of § 523(a)(8). Debtors who face only a temporary hardship and whose financial situation will improve do not meet the statutory undue hardship standard. There is no need for further elaboration or consideration of the long-term repayment programs. The borrower facing only temporary hardship would fail the "totality of the circumstances" test based on the first two prongs of the test alone.

B. Giving weight to long-term repayment programs conflicts with the Congressional intent to authorize the discharge of student loan debts.

Congress authorized the discharge of student loan debts in bankruptcy. The right to a discharge is limited. However, when a debtor asks to discharge a student loan in bankruptcy, the court must rule on the request by making an undue hardship determination. The court does not make this determination if instead it evaluates the consequences of the debtor's participating in a long-term repayment program. The possibility of forgiveness of debt after twenty or twenty-five years if the debtor complies with all requirements of a repayment plan does not remotely resemble a discharge under the Code. To substitute one for the other conflicts directly with the court's obligation to enforce the Code. *In re Denittis*, 362 B.R. 57, 64-65 (Bankr. D. Mass. 2007); *Kopf*, 245 B.R. at 735. In many ways, the forgiveness option under an ICRP or IBR is the antithesis of a bankruptcy discharge. *In re Booth*, 410 B.R. 672, 676 (Bankr. E.D. Wash. 2009).

Rather than removing a debt burden, the income-based programs almost invariably increase the burden. *In re Wolfe*, 501 B.R. 436, 439 (Bankr. M.D. Fla.

2013). Doubling of the indebtedness under a long-term plan, as would occur in Mr. Murphy's case, is not unusual. This is the opposite of a "fresh start." *In re Dufresne*, 341 B.R. 391 (Bankr. D. Mass. 2006); *In re Brooks*, 406 B.R. 382, 393 (Bankr. D Minn. 2009). Rather than rebuilding credit, the debtor's credit may be poisoned for life. This has a drastic impact not only on the individual's future access to credit, but also on employment opportunities and access to housing. *In re Strand*, 298 B.R. 367, 376 (Bankr. D. Minn. 2003). Decades of mounting indebtedness impose a substantial emotional burden on a person as well. *In re Barrett,* 337 B.R. 896, 903-904 (B.A.P. 6th Cir. 2006), *aff'd* 487 F.3d 353 (6th Cir. 2007); *In re Marshall*, 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010). The bankruptcy discharge provides clear relief from this burden. The long-term plans offer no certainty of relief. Instead, they present a highly speculative option that may provide no relief at all.

Borrowers only obtain a forgiveness of debt if they adhere rigorously to all requirements of an income-based program for its full twenty to twenty-five year duration. Borrowers who default while in a program lose eligibility. 34 C.F.R. §§ 685.221(a)(2), 685.209(a)(ii), 682.215(a)(2). Re-defaults can occur because the income-based plans do not take expenses into account. The formulas that set payments based solely on income do not look at medical expenses, high housing costs, or expenses for any short-term emergency the borrower may encounter. For twenty to twenty-five years a borrower is one accident away from permanently losing the "discharge" ostensibly available under a long-term repayment plan. Borrowers may also lose eligibility due to paperwork snafus that can occur during the decades of recertification procedures required to maintain participation. 34 C.F.R. §§ 685.209(a)(5)(iii), 685.221(e)(3). Once in default under a plan, the borrower can lose eligibility to participate in another income-based plan. Defaults under plans can be irreparable because the options for removing a loan from default (consolidation, rehabilitation) may be one-time only or (like rehabilitation) burdensome.[7] In sum, it is a mistake to treat commencement of a long-term repayment plan as equivalent to completion of one.

Discharge of a debt in bankruptcy is not a taxable event. However, forgiveness of a student loan debt at the end of an ICRP or IBR is taxable. 26 U.S.C. § 61(a)(12). *Brondson*, 435 B.R. at 802. This *tax* debt is generally not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(1). Therefore, successful completion of a long-term plan may simply see the Internal Revenue Service replace the Department of Education as the powerful creditor pursuing the borrower for several more decades. *In re Barrett*, 487 F. 3d 353, 364 (6th Cir. 2007); *In re Durrani*, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2005) *aff'd* 320 B.R. 357 (N.D. Ill. 2005). Some courts have minimized the tax consequences of non-

[7] *See e.g.* 34 C.F.R. § 685.220(d) (if all the borrower's direct loans have been consolidated, the borrower cannot re-consolidate the same loans to get out of default).

bankruptcy discharge of student loan debt by pointing out the collection of a tax debt may not flow inevitably from ICRP or IBR forgiveness. *In re Brondson*, 421 B.R. 27, 35 -36 (D. Mass. 2009) (collecting cases). These courts opine that the debtor will not suffer harmful tax consequences from the ICRP and IBR discharge decades in the future because the borrower can always claim an insolvency exception to the tax liability. Assuming that this option becomes possible for the perpetually insolvent debtor (considering debtor's equity even in exempt assets), one can only wonder what sense it made to postpone a discharge for twenty-five years. Neither the government nor the debtor benefits from this outcome.[8]

Additionally, income-based plans are not available for private student loans and certain federal student loans. Borrowers with Perkins loans are not eligible for the plans and cannot consolidate them into loans eligible for the plans. Mr. Murphy's loans originated as "Parent PLUS" loans. Bankr. Ct. Op. at 1. Income-based repayment plans are not available for these loans. 34 C.F.R. §§ 685.221(a)(2), 685.209(a)(ii); 682.215(a)(2). By consolidating nine of his twelve Parent PLUS loans to federally guaranteed loans, some of his loans became eligible for the long term plans, while others are not. Not all borrowers are able to obtain even this partial eligibility for income-based plans. Finally, based on their

[8] Courts have not considered the administrative costs to the government, and ultimately taxpayers, in servicing (and recertifying each year for twenty-five years) loans for which there will be no recovery due to borrower's $0.00 payment.

individual circumstances, many borrowers whose loans are potentially eligible for income-based plans cannot apply for them. These include borrowers currently in default, borrowers subject to wage garnishment, and borrowers against whom a judgment has entered.[9]

CONCLUSION

For the foregoing reasons, amici respectfully request that the decision below be reversed.

Respectfully submitted,

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[9] Borrowers in default may consolidate loans in order to seek eligibility for income-based plans. However, the existence of a judgment or garnishment bars consolidation. 34 C.F.R. § 685.220(d)(1)(ii)(B),(C).

CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains fewer than 6,997 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font, except for footnotes and electronic signatures.

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CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of Amici Curiae, the National Consumer Law Center and the National Association of Consumer Bankruptcy Attorneys, on counsel for all parties, electronically through the ECF System, on this 29th day of July, 2015.

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