No. 20-886

IN THE

Supreme Court of the United States

THELMA G. MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Consumer Bankruptcy Rights Center ("NCBRC") is a nonprofit organization dedicated to preserving the rights of consumer debtors and protecting the integrity of the bankruptcy system. NCBRC advances the interests of debtors, who often lack either the financial resources or exposure to the bankruptcy system to adequately protect their own rights in litigation. NCBRC files amicus briefs in cases of systemic importance to ensure that courts have a full understanding of the applicable bankruptcy laws, their underlying policies, and their effect on consumer debtors.

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a nonprofit organization consisting of consumer bankruptcy attorneys throughout the United States. NACBA strives to educate the legal community about the uses and abuses of the consumer bankruptcy process and advocates on behalf of consumer debtors. NACBA and its members are frequently called to testify before Congress, and the organization has filed numerous amicus briefs in this Court and courts across the country in cases implicating the rights of consumer debtors.

NCBRC, NACBA and its members have experienced first-hand the widely inconsistent

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and letters of consent accompany the brief.

treatment of student loan debt in bankruptcy across the country. The Bankruptcy Code permits debtors showing undue hardship to discharge student loan debt. However, the circuits are divided on how to determine whether undue hardship exists. The Eighth Circuit uses the totality of the circumstances test, as do courts in the First Circuit. Other circuits use a three-part test developed by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). But, even among circuits that apply *Brunner*, the application of the three-part test varies significantly. The Fifth Circuit, in particular, is known for its needlessly harsh application of the *Brunner* test that is practically impossible to satisfy. The result is that the Code's promise of relief for debtors suffering undue hardship is illusory in many parts of the country.

SUMMARY OF ARGUMENT

A *writ of certiorari* in this case is warranted and necessary to restore national uniformity on the critical issue of student loan dischargeability in bankruptcy. The Bankruptcy Code permits debtors demonstrating undue hardship to discharge student loan debt. 11 U.S.C. § 523(a)(8). The circuit courts, however, are irreconcilably divided on the meaning of "undue hardship." The result is that the Code's promise of relief for student loan debtors depends more on where the debtor lives than the text of the statute.

ARGUMENT

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED ON MEANING OF UNDUE HARDSHIP IN SECTION 523(A)(8) OF THE BANKRUPTCY CODE.

A. Relief under section 523(a)(8) of the Bankruptcy Code is currently highly dependent on where a debtor lives.

1. Millions of student loan borrowers across the United States are struggling to pay their student loans. It is not surprising then that a common question fielded by Amici and its member attorneys is: *Will I be able to discharge some or all of my student loan debt in bankruptcy?* Currently the answer is: *It depends on where you live.* If the debtor lives in Texas, Louisiana, or Mississippi, it is almost certain that he or she will not obtain any relief under the Bankruptcy Code related to student loan debt. *See In re Thomas,* 581 B.R. 481, 486 (Bankr. N.D. Tex. 2017) (noting that the Fifth Circuit has created an incredibly high burden and that the bankruptcy court in fifteen years had never discharged a single student loan debt when contested by the lender). By contrast, if the debtor resides in Missouri or Maine, courts determine undue hardship based on the totality of the debtor's circumstances. The more flexible "totality test" generally provides debtors with a realistic opportunity to show undue hardship. Amici's experience confirms McCoy's observation that similarly situated debtors will obtain different results in seeking to discharge student loan debt depending on the circuit in which they live. This widely varying application of the Bankruptcy Code undermines its uniformity and undercuts the Code's promise of relief to the honest, but unfortunate debtor.

2. Section 523(a)(8) of the Bankruptcy Code allows debtors to discharge student loan debt "unless excepting such debt from discharge … would impose an undue hardship on the debtor and the debtor's dependents…" Though Congress created a single standard for discharging student loan debt, courts have created two distinct tests for measuring undue hardship. Nine circuits determine undue hardship by applying some version of the three-part test created by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). *See In re Frushour*, 433 F.3d 393 (4th Cir. 2005); *In re Oyler*, 397 F.3d 383 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004); *In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003); *In re Cox*, 284 F.3d 1238 (11th Cir. 2003); *Goulet v. Educ. Credit Mgmt. Corp.,* 284 F.3d 1238 (7th Cir. 2002); *In re Brightful*, 267 F.3d 324 (3d Cir. 2001); *In re Rifino*, 245 F.3d 1083 (9th Cir. 2001). Under the *Brunner* test debtors seeking to discharge student loan debt must show: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) 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; and (3) that the debtor has made good faith efforts to repay the loans. *Brunner,* 831 F.2d at 396.

In contrast to the *Brunner* test, courts in the Eighth Circuit consider the totality of the debtor's circumstances when evaluating undue hardship. The totality test broadly considers circumstances bearing on the debtor's ability to repay the student loan debt including: 1) the debtor's past and present financial resources, and those the debtor can reasonably rely on

for the future; 2) the reasonably necessary living expenses of the debtor and the debtor's dependents; and 3) "any other relevant facts and circumstances surrounding each particular bankruptcy case." *Long v. Educ. Credit. Mgmt. Corp.*, 322 F.3d 549, 554-55 (8th Cir. 2003). In addition to allowing courts to consider a greater range of factors, the "totality of the circumstances" test does not require that the court review the debtor's past conduct for "good faith." *See In re Shaffer*, 481 B.R. 15, 20 (B.A.P. 8th Cir. 2012) (under the totality of the circumstances test, debtor's past unwise spending decisions for items such as clothing and eating out do not preclude an undue hardship finding). Lower courts in the First Circuit also use a totality test that is similar to that used in the Eighth Circuit. *See In re Bronsdon*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

3. The application of two distinct tests—the *Brunner* test and the totality test—has left similarly situated debtors in vastly different positions post-bankruptcy. While one set of debtors is given a fresh start, the other is often left burdened by student loan debt in perpetuity.

For example, in *In re Erkson*, 582 B.R. 542 (Bankr. D. Me. 2018), Ms. Erkson, while in her forties, obtained a bachelor's degree with the goal of becoming a counselor. *Id.* at 544. At some point, Ms. Erkson had difficulty finding employment and returned to school to earn a master's degree. *Id.* at 545. Ms. Erkson's studies were financed with student loans. *Id.* Suffering from progressive hearing loss, which made working in the counseling field difficult, *id.* at 546, Ms. Erkson eventually filed for bankruptcy in 2016. At the time she filed, her student loan debt exceeded $107,000. *Id.* at 545. The court found that while her

counseling practice showed promise for improvement over the next three to five years, her prospects were limited by circumstances beyond her control. *Id.* at 552. Considering the debtor's current age of sixty-four in conjunction with these external limitations, her future was suboptimal. *Id.* In light of the totality of the debtor's circumstances, the court permitted the debtor to discharge her student loan debt. *Id.* at 556.

Similarly, Ms. McCoy returned to school in her forties in an attempt to improve her earning potential. R.8a.[2] She earned a bachelor's degree and went on to complete graduate studies. R.9a. Despite her education, Ms. McCoy was unable to find steady employment. She also suffered from a number of health conditions related to trauma from a car accident and facial burning in a spa incident. R.6a. In 2016, Ms. McCoy filed for bankruptcy and sought to discharge her student loan debt. Applying the *Brunner* test, the bankruptcy court determined that Ms. McCoy did not show undue hardship. Specifically, the bankruptcy court believed that it was possible that Ms. McCoy "could" find better employment in the future, and as a result the second prong of the *Brunner* test was not satisfied. R.21a.

Two women—Ms. Erkson and Ms. McCoy—sought out higher education later in life in order to improve their job prospects. Both obtained bachelor's degrees and went on to graduate studies. Both incurred student loan debt to finance their education. Later, both struggled to find steady employment and suffered from health-related problems. In the same year, 2016, they both filed for bankruptcy protection

[2] Record citations (R.x) are to the Petitioner's Appendix A.

and sought to discharge their student loans. One lived in Maine, where the courts consider the totality of the debtor's circumstances in determining undue hardship. The other lived in Texas, where the courts apply the *Brunner* test. Even though their circumstances were nearly identical, only one obtained the fresh start that bankruptcy was designed to provide.

B. The Application of the *Brunner* Test in Some Circuits Strays So Far Beyond the Text of the Statute That It Is Practically Impossible to Discharge Student Loan Debt.

1. Some circuits, including the Fifth Circuit, have added their own spin on the *Brunner* test, adding extraneous factors that are not consistent with the statutory language. This has included a requirement to show "total incapacity," "certainty of hopelessness," or certain "unique" or "extraordinary" circumstances that look well beyond foreseeable continued financial hardship. These added criteria make it practically impossible for debtors in these circuits to discharge student loan debt.

2. In *In re Gerhardt*, 348 F.3d 89, 92 (5th Cir. 2003), the Fifth Circuit articulated a version of the *Brunner* test that requires the debtor to show exceptional circumstances outside of the debtor's control that result in "total incapacity," presently and in the future. According to the Fifth Circuit, the "plain meaning" of "undue hardship" in section 523(a)(8) is "that student loans are not to be discharged unless requiring repayment would impose **intolerable difficulties on the debtor**." *Matter of Thomas*, 931 F.3d 449, 454 (5th Cir. 2019) (emphasis

added). At least one Texas bankruptcy court has noted that under this incredibly high standard, courts rarely, if ever, discharge student loan debt. *See In re Thomas,* 581 B.R. 481, 486 (Bankr. N.D. Tex. 2017).

Similarly, the Third Circuit, requires a debtor to show "total incapacity" in the future to pay the student loan debt. *See In re Brightful*, 267 F.3d 324, 328 (3d Cir. 2001). In *Brightful*, the Third Circuit reversed the bankruptcy court's finding of undue hardship concluding that because the debtor failed to show a "total incapacity" to pay the debt at some point in the future, she was not entitled to a discharge under section 523(a)(8). While acknowledging that Brightful could not anticipate significantly increased earnings in the future and that its conclusion may have appeared harsh, the Third Circuit justified the result saying: "Here, Brightful struck her bargain, she took her risk, and unfortunately, things did not work out as planned. Brightful's hardship is real, but under the *Faish* [*Brunner*] test, it is not 'undue,' and therefore we cannot discharge her obligation to repay her student loans." *Id.* at 331; *see also Goforth v. U.S. Dep't of Educ.*, 466 B.R. 328, 339 (Bankr. W.D. Pa. 2012) (acknowledging that requiring proof of total incapacity means that debtors will likely be paying on the loan until they die).

3. The Fourth Circuit's version of the *Brunner* test requires the debtor to demonstrate "a certainty of hopelessness." *See In re Spence*, 541 F.3d 538, 544 (4th Cir. 2008). Like Ms. Erkson and Ms. McCoy, Ms. Spence returned to school in her forties to obtain her bachelor's degree and then continued on with graduate studies. *Id.* at 542. Notwithstanding her education, and after bouncing around several jobs, she obtained full-time employment as a mail services

specialist earning $26,000 a year. In addition, she received $267 per month in social security benefits. When she filed for bankruptcy she owed $161,000 in student loan debt. The student loan creditor did not challenge that Ms. Spence satisfied the first prong of the *Brunner* test—that based on current income and expenses, she could not maintain a "minimal" standard of living for herself if forced to repay the loans. *Id.* at 544. But, the Fourth Circuit, while noting Ms. Spence was in her late 60s and had a low-paying job, nevertheless concluded she did not satisfy the second prong of the *Brunner* test because she had not demonstrated "a certainty of hopelessness." *Id.*

This "certainty of hopelessness" element of the *Brunner* test created by some courts forces 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 five, 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. *See In re Carnduff*, 367 B.R. 120 (B.A.P. 9th Cir. 2007) (debtors not required to prove future financial hardship with certainty, but by a preponderance of evidence). Such a proof requirement eviscerates the fresh start potential inherent in Congress's choice to allow for the discharge of student loan debt in certain circumstances.

4. The *Brunner* test also requires that the debtor show a good faith attempt to repay the loan. In analyzing good faith, courts look to the debtor's past conduct and consider whether the debtor made

efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default. While initially narrow in scope, the debtor's good faith has morphed into a morality test in which a myriad of the debtor's life choices and past conduct are called into question, and it has forced debtors to refute arguments by student loan creditors that they should have avoided decisions or life events that ultimately put them in a worse financial position.

This element of the *Brunner* test lacks foundation in the words of the statute. *See In re Bronsdon*, 435 B.R. at 800 (rejecting *Brunner* because, among other things, the "good faith" prong had no statutory basis). Other subsections of section 523 do in fact make certain debts nondischargeable based on the debtor's past bad conduct. *See, e.g.*, 11 U.S.C. § 523(a)(2)(A) (debts obtained by false pretenses, false representations or actual fraud); *Id.* § 523(a)(6) (debts based on the willful and malicious injury of another or property of another); *Id.* § 523(a)(9) (debts based on the death or injury caused by the debtor's operation of a motor vehicle while intoxicated). Except when Congress has expressly provided otherwise in section 523 or in some other Code section, debts are discharged in bankruptcy even when debtors have made mistakes or exercised bad judgment. Congress did not make student loan dischargeability turn on questions of good faith or morality, as it did for other debts under section 523. *See Erkson*, 582 B.R. at 556 (not bad faith where debtor failed to correctly "read the tea leaves of the future and incurred student debt in an area that technology, societal preferences, or legislation later made obsolete").

5. Other circuits applying the same *Brunner* test do not ascribe to a view as harsh as the Third, Fourth and Fifth Circuits. The Tenth Circuit has squarely rejected the "certainty of hopelessness" standard, and instead requires courts to take a "realistic look" at the debtor's circumstances. *See Polleys*, 356 F.3d at 1310. Indeed, "[r]equiring that a debtor demonstrate that his or her financial prospects are forever hopeless is an unrealistic standard." *See In re Roth*, 490 B.R. 908 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

More recently, the Bankruptcy Court for the Southern District of New York noted that:

> Over the past 32 years, many cases have pinned on *Brunner* punitive standards that are not contained therein… Those retributive dicta were then applied and reapplied so frequently in the context of *Brunner* that they have subsumed the actual language of the *Brunner* test.

In re Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020). *See also Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) ("It is important not to allow judicial glosses … to supersede the statute itself.").

As noted by many courts, "judicial gloss" on the undue hardship test has relegated the text of the statute to an afterthought. As a result, "we have a uniform law only in form and not in substance," which in turn has "the consequence of denying access to justice and thus undermining the fresh start principle enshrined in the Bankruptcy Code." Rafael I. Pardo & Michelle R. Lacey, The Real Student Loan Scandal:

Undue Hardship Discharge Litigation, 83 Am. Bankr. L.J. 179, 235 (Winter 2009).

CONCLUSION

Because application of the *Brunner* test or the totality of the circumstances test is often outcome determinative, relief under the Bankruptcy Code turns on where a debtor lives. Under the Fifth Circuit's stringent version of *Brunner*, debtors have little to no chance of receiving a discharge of their student loan debt. To resolve the entrenched split among the circuits and restore uniformity to student loan discharge under the Bankruptcy Code, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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