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 CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF PETITIONER

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The Center for Responsible Lending is a non-profit organization dedicated to ensuring that consumers have access to fair financial products, with an emphasis on consumers who may be marginalized or underserved in the existing financial marketplace, including people of color, women, rural residents and low-wealth families and communities. The Center has advocated against abuses in student lending practices and highlighted the burden that the current student lending system places on people of color and low-wealth individuals and communities. The Center has also advocated for a bankruptcy system that allows for the discharge of debts that consumers are not realistically able to repay, helping individuals and communities to build financial stability and security.

SUMMARY OF ARGUMENT

Today, student loans are understood to be non-dischargeable unless a debtor can show that repayment would cause "undue hardship" under 11 U.S.C. § 523(a)(8). At its inception, the "undue hardship" exception to non-dischargeability was a safety valve, permitting honest but unfortunate debtors to discharge student loans during the first five years of repayment, after which those loans were dischargeable without qualification—by *any* debtor. Today, "undue hardship" is the sole avenue for those

[1] In accordance with Supreme Court Rule 37.2(a), counsel for *amicus* timely notified both parties of intent to file this brief and both have provided written consent. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, made a monetary contribution to this brief.

honest debtors to seek discharge of their student loans.

Congress did not define "undue hardship," and federal courts of appeals have settled on two starkly divergent tests for defining that term. The totality-of-the-circumstances approach, used in two circuits, employs an open-ended set of factors to consider the individual circumstances of the debtor seeking discharge. In that test, no one factor is dispositive. The so-called *Brunner* test, used by the remaining circuits, embellishes the statute, requiring debtors to meet three independent, mandatory prongs. They must show that they are presently unable to cover basic expenses while repaying their loans, that their inability to repay will persist long-term, and that they have made good-faith attempts at repayment. *Brunner v. New York State Higher Educ. Serv.*, 831 F.2d 395, 396 (2d Cir. 1987). A number of courts, including the Fifth Circuit, whose holding is at issue here, have interpreted *Brunner* in draconian ways, demanding "total incapacity" or a "certainty of hopelessness" in repayment.

The burdens of student debt are felt most acutely by low-income and low-wealth debtors, overwhelmingly in communities of color. Because they and their communities have fewer resources to cushion the fall or navigate the bankruptcy system, it is harder to bounce back after financial difficulty. These challenges are compounded when the unavailability of discharge denies the "fresh start" that bankruptcy normally promises. Each of the *Brunner* requirements creates an additional hoop of complexity in pleading and proof that a debtor must jump through and invites courts to engage in speculation unwarranted by the statutory text. The unwarranted complexity, difficulty, and expense

discourage low-income debtors from seeking the relief of the bankruptcy system and makes it harder to obtain discharge when they do.

A simpler, more flexible, and holistic test for undue hardship would comport with the text and purpose of the statute. It would also be more consistent with the purposes of the Bankruptcy Code, helping the low-income debtors who most need a "fresh start."

ARGUMENT

I. There is a persistent circuit split on the proper test for "undue hardship" and the *Brunner* test is flawed.

Student loans are excepted from discharge "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). Congress did not define "undue hardship," permitting courts to consider the individual circumstances of each debtor. A durable split in authority has developed between the courts of appeals, with some taking a flexible approach aimed at fidelity to the statutory text and others adopting a rigid, three-factor test, each prong of which is demanding and dispositive. Courts of appeals applying the rigid test have themselves split further in how harshly each factor is applied.

The primary split is between courts that apply a "totality of the circumstances" test, under which the bankruptcy judge considers all the evidence using a variety of non-exclusive factors, not one of which is dispositive, and courts that have adopted the "*Brunner* test," which requires three independent, mandatory showings to qualify for discharge. The Eighth Circuit has applied some version of a totality-of-the-circumstances approach since 1981. *See*

Andrews v. South Dakota Student Loan Assistance Corp. (*In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981). It has continually reaffirmed that approach on the grounds that "requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B)." *Long v. Educational Credit Management* (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003). The totality-of-the-circumstances test requires courts to consider a non-exclusive set of factors encompassing: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependent's reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each bankruptcy case. *Id.* Likewise, the Bankruptcy Appellate Panel of the First Circuit has also adopted a totality-of-the-circumstances analysis, reasoning that it "best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8)." *Bronsdon v. Educ. Credit Management Corp.* (*In re Bronsdon*), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010).

The remaining courts of appeals, though, apply the *Brunner* test, which requires debtors to meet three separate, mandatory requirements not found in the text of § 523(a)(8): (1) present sub-minimal standard of living, (2) future persistence of that hardship, and (3) past good-faith efforts at repayment. *Brunner*, 831 F.2d at 396.

Some jurisdictions adopting the *Brunner* test, including the Fifth Circuit, have concocted even more complex and demanding versions, generating subsidiary conflicts that are more and less demanding. Both sets of conflicts have proven durable. These conflicts generate unnecessary

complexity and expense and expose debtors to disparate standards and outcomes.

A. The circuit split over the proper test for "undue hardship" is long-standing.

Since the Second Circuit first laid out the *Brunner* test in a summary *per curiam* opinion in 1987, eight other circuits have adopted the test—all at least a decade ago. *See Educ. Credit Mgmt. Corp. v. Mason* (*In re Mason*), 464 F.3d 878, 881–82 (9th Cir. 2006); *Oyler v. Educ. Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 385 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1308–09 (10th Cir. 2004); *Hemar Ins. Corp. of Am. v. Cox* (*In re Cox*), 338 F.3d 1238, 1241 (11th Cir. 2003); *U.S. Dep't of Educ. v. Gerhardt* (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003); *Pa. Higher Educ. Assistance Agency v. Faish* (*In re Faish*), 72 F.3d 298, 306 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993). Indeed, the last circuit to choose a side—opting for totality-of-the-circumstances—did so ten years ago.[2] *In re Bronsdon*, 435 B.R. at 800.

Observing this conflict and the substance of the debate, a "crescendo of courts have recognized that the 'analysis required by *Brunner* to determine the

[2] Although not adopted by the First Circuit proper, the majority of bankruptcy courts in the circuit apply the totality test. *In re Bronsdon*, 435 B.R. at 798 & n.10. The D.C. Circuit has not formally adopted either test, but its bankruptcy courts apply *Brunner*. *Zook v. Edfinancial Corp.* (*In re Zook*), No. 05-00083, 2009 WL 512436, at *1 (Bankr. D.D.C. Feb. 27, 2009). Moreover, formal adoption of either test by the First Circuit or D.C. Circuit would not alter the fact that there is a functional conflict between *Brunner* and totality jurisdictions and between *Brunner* jurisdictions themselves.

existence of an undue hardship is too narrow, no longer reflects reality, and should be revised.'" *Nightingale v. North Carolina State Educ. Assist. Auth.*, (*In re Nightingale*), 543 B.R. 538, 544–45 (Bankr. M.D.N.C. 2016) (quoting *Roth v. Educ. Credit Mgmt. Corp.* (*In re Roth*), 490 B.R. 908, 920 (9th Cir. B.A.P. 2013) (Pappas, J. concurring)). But courts that have adopted it have resisted calls to reassess it, with some even viewing the tests relative durability as reason for inaction. *See*, *e.g.*, *Thomas v. Dept. of Educ.* (*In re Thomas*), 931 F.3d 449, 453–55 (5th Cir. 2019) (reasoning that because the *Brunner* test had survived several substantive changes to the Bankruptcy Code that narrowed the other options for discharge, objections to its stringency were "policy issues. . . for Congress, not the courts").

B. *Brunner* tests too much and has generated subsidiary splits.

The *Brunner* test requires the debtor satisfy three separate, mandatory prongs to obtain discharge: present hardship, future inability to pay, and past good-faith efforts at repayment. In that, it already "tests too much." *In re Hicks*, 331 B.R. 18, 27 (Bankr. D. Mass. 2005). But "[o]ver time, courts have grafted sub-elements to each of the three parts of the *Brunner* test," proof of which "may force debtors into inconsistent positions or difficult burdens of proof." *In re Wolfe,* 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013).

Often the dispositive prong of the test, the second prong asking whether "additional circumstances exist indicating that [inability to pay] is likely to persist for a significant portion of the repayment period of the student loans," has generated the starkest divergences between circuit courts. The majority of *Brunner* jurisdictions have placed

dispositive weight on evidence of "unique" or "extraordinary" additional circumstances, requiring that they amount to a "certainty of hopelessness" for repayment. *Frushour*, 433 F.3d at 400 (Fourth Circuit), *Oyler*, 397 F.3d at 385 (Sixth Circuit), *Faish*, 72 F.3d at 307 (Third Circuit); *O'Hearn v. Educ. Credit Management Corp.* (*In re O'Hearn*), 339 F.3d 559, 564 (7th Cir. 2003); *In re Mosley*, 494 F.3d 1320, 1326 (11th Cir. 2007). Some courts, including the Fifth and Third Circuits, have even pushed beyond this draconian burden, requiring that a debtor demonstrate a "total incapacity" to pay. *Faish*, 72 F.3d at 307; *Gerhardt*, 348 F.3d at 92 (adopting the "total incapacity" standard but not language requiring a "certainty of hopelessness") (quoting *Faish*, 72 F.3d at 307).

Even where a "certainty of hopelessness" may be shown with "illness, disability, a lack of usable job skills, or the existence of a large number of dependents," *Frushour*, 433 F.3d at 401; *Oyler*, 397 F.3d at 386, as the court below did, this can invite courts to engage in arbitrary judgments about the relative difficulty of the circumstances proffered. *See Thomas*, 931 F.3d at 452 (finding that a woman with a degenerative medical condition who had quit jobs where the employers "were unable to accommodate her need to remain sedentary for periods of time during her shifts" did not qualify because she was "capable of employment in sedentary work environments"). Ms. McCoy was found ineligible because her disabilities existed when she took out her loans and because she had previously been able to find "various forms of employment." Pet'r's Appx. at 6a.

In contrast to these "hard" *Brunner* jurisdictions, the Tenth Circuit explicitly rejected the

"certainty of hopelessness" and requires a "realistic look . . . into debtor's circumstances and . . . ability to provide for adequate shelter, nutrition, health care, and the like." *Polleys*, 356 F.3d at 1310. Rather than rely on "unfounded optimism" projected into the distant future, this "softer" *Brunner* looks only to "specific articulable facts" and the "foreseeable future." *Id.*

The first and third prongs have generated less conflict but still raise problems. The first prong asks whether the debtor "cannot maintain, based on current income and expenses, a 'minimal' standard of living . . . if forced to repay the loans." *Brunner*, 831 F.2d at 396. While this prong is reasonably interpreted to not require a debtor "live in abject poverty before a discharge is forthcoming," *In re Hornsby*, 144 F.3d 433, 438 (6th Cir. 1998), some loan servicers and some courts have taken the phrase "minimal standard of living"—grafted onto the statute by judicial gloss—as license to parse what expenses are truly "minimal." *See, e.g.*, *Frushour*, 433 F.3d at 400 (noting with disapproval that loan servicer argued that "Internet and cable connections" were beyond "minimal" standard of living); *Faish,* 72 F.3d at 307 (finding first prong unsatisfied and noting that the debtor could continue to take the bus rather than purchasing a car).

The third prong, invoking "good-faith" repayment, at first a narrow inquiry aimed at that rare borrower that dodges debts on the way to a lucrative career, has since metastasized into a wide-ranging inquiry into past conduct and life choices. Debtors have been forced to refute arguments that they should have avoided having children, *In re Ivory*, 269 B.R. 890, 910 (Bankr. N.D. Ala. 2001), should not have assumed custody of grandchildren, *In re*

Mitcham, 293 B.R. 138, 146 (Bankr. N.D. Ohio 2003), or should not have left school without a degree to care for aged parents, *In re Bene*, 474 B.R. 56, 69–70 (Bankr. W.D.N.Y. 2012).

The good faith requirement is also inconsistent with the text. Congress knew how to authorize inquiries into past conduct and make certain debts dischargeable based on past conduct—and did so elsewhere in § 523. *See, e.g.*, 11 U.S.C. § 523(a)(2)(A) (debts obtained by "false pretenses, a false representation, or actual fraud"); *Id.* § 523(a)(9) (debts related to "death or personal injury caused by the debtor's operation of a motor vehicle" while intoxicated). By contrast, Congress made no explicit provision for student loan dischargeability to turn on good faith or past conduct, providing further indicia of its irrelevance.

The subsidiary conflicts over the stringency of the *Brunner* test have persisted despite voices dissension from judges on courts that apply more stringent standards. *See, e.g.*, *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013) (Easterbrook, J.) (questioning the correctness of the "certainty of hopelessness" standard).

C. These splits expose debtors to materially different law and outcomes between jurisdictions.

These conflicts—between "totality" jurisdictions and *Brunner* jurisdictions, and between "hard" and "soft" *Brunner* jurisdictions—contravene the need for "uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. Art. I, § 8. Uniformity is also important from a practical perspective. As post-secondary degrees become increasingly necessary for economic

advancement, people often attend school and work in multiple states over the course of their lives. Securing the uniformity mandated by the Constitution ensures debtors can move without facing different standards and different outcomes between jurisdictions. Uniformity also makes practical sense given the predominance of federal and federally-backed student loan debt. *See*, *e.g.*, Cong. Budget Office, *The Volume and Repayment of Federal Student Loans: 1995 to 2017* (November 2020), https://www.cbo.gov/system/files/2020-11/56706-student-loans.pdf.

Formally, the two tests resemble one another, "with many overlapping considerations," *In re Bronsdon*, 435 B.R. at 798, and "often consider[ing] similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment," *Polleys*, 356 F.3d at 1309. But in practice, the differences can be outcome-determinative and yield different rates of discharge. *See, e.g.*, *Armstrong v. U.S. Dep't of Educ.* (*In re Armstrong*), Bankr. No. 10-82092, 2011 WL 6779326, at *9 (Bankr. C.D. Ill. Dec. 27, 2011) ("Under the totality of circumstances test, it could be concluded that these circumstances constitute a hardship that is undue. However, the more restrictive *Brunner* test does not clearly admit such an exception."); Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief it (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 Stan. L. & Pol'y Rev. 295, 319, 331 (2016) (finding "much higher" discharge rates in the First Circuit, a totality jurisdiction, than the Third Circuit, a *Brunner* jurisdiction, and suggesting that the disparity derives from "the different undue hardship tests applied in the circuits").

The *Brunner* test has stretched beyond the text of § 523(a)(8) to create conflict, complexity, and difficulty where none is warranted. Worthy debtors suffer as a result. Because the courts of appeals are unlikely to expediently resolve these differences on their own, review by this Court is warranted.

II. People of color and low-income debtors are burdened more heavily by *Brunner*'s restrictive approach.

A. Student debt weighs more heavily on borrowers of color and exacerbates the racial wealth gap.

Student debt has exploded in recent years. In 2020, nearly 45 million student borrowers owed $1.677 trillion. CFPB, *Annual Report of the CFPB Private Education Loan Ombudsman*, 31 (October 2020). The average amount owed in 2020 is about $37,000, up from approximately $20,000 in 2008. *Id.* at 32. The explosion in the size and scope of student debt has led millions of Americans—particularly communities of color—to forego or delay purchases or investments, holding them back from economic security and weighing down economic growth.

Few borrowers feel the burden of student debt more heavily than people of color and people from low-income and low-wealth communities. *See generally* Ctr. for Responsible Lending, *Quicksand: Borrowers of Color and the Student Debt Crisis* (September 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf?mod=article_inline. First, because borrowers of color frequently enter the educational system with less family wealth, they often wind up borrowing substantially more to cover the cost of education. For

instance, Black students take on 85% more student debt than their white counterparts for their education and that difference in indebtedness increases by almost 7% per year after leaving school. Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and Reproduction of the Fragile Black Middle Class*, 5(4), Sociology of Race and Ethnicity 562, 568 (2018). The burden of paying larger debts is compounded by well-documented disparities in employment opportunities and pay. *E.g.*, Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, Pew Research (July 1, 2016). Accordingly, delinquencies and defaults on student loans show similar racial divides. Black bachelor's degree graduates' default rate is five times, and Latino graduates' twice, that of white graduates. Judith Scott-Clayton, Brookings Inst., *The Looming Student Loan Default Crisis Is Worse Than We Thought*, tbl.4 (January 2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf.

In turn, student debt sands the gears of economic stability and security. With debt service often consuming substantial portions of early-career earnings, even borrowers that can keep their heads above water are held back from purchasing homes or making other investments in the future. *See* Nat'l Ass'n of Realtors, *Student Loan Debt and Housing Report,* 28 (2017) (finding that the average student loan borrower delays the purchase of their first home by an average of seven years). Such challenges only exacerbate the existing racial homeownership gap. *See* Laura Sullivan et al., Demos & Inst. on Assets and Soc. Pol'y, *The Racial Wealth Gap: Why Policy Matters*, 9–15 (2015) (describing the role that significant disparities in home ownership play in

reproducing the racial wealth gap), https://www.demos.org/research/racial-wealth-gap-why-policy-matters. Student debt limits the ability of student borrowers of color to accumulate wealth while sapping extra income, widening the racial wealth gap.

Because they often have higher debt loads and are less able to build financial safety nets with things like home equity and family wealth, student borrowers of color and others from low-wealth families encounter financial hardship more acutely. Of the 7.3 million student loan borrowers who were in default as of March 2019, research suggests that approximately 90 percent were Pell Grant recipients—a proxy for coming from low-income families—and the median amount owed was less than $10,000. Ben Miller, *Who Are Student Loan Defaulters?*, Ctr. for American Progress (December 14, 2017), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/.

Although borrowers of color and low-income or low-wealth debtors are likely to benefit from discharge of student debt, they are more likely to lack financial resources necessary to hire an attorney to pursue an adversary proceeding to seek student loan discharge or navigate the complexity of the bankruptcy system on their own. Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 Wash. L. Rev. 1115, 1133 (2016). Studies have found that represented debtors succeed in obtaining student loan discharges substantially more often than unrepresented debtors. *Id.* at 1139 (noting a differential of 28.5% to 56.2% in the literature and 26.8% to 44.8% in the study sample).

B. *Brunner* and its sub-tests disproportionately burden debtors of color.

Brunner's mandatory three prongs and fractalized sub-requirements not only impose a higher standard for discharge than required by § 523(a)(8), but also add unwarranted complexity to the legal process. The procedural complexity and more exacting standards of the Bankruptcy Abuse and Consumer Protection Act of 2005 made it more difficult and more expensive for low-income or low-wealth debtors to file for bankruptcy and obtain relief. Angela Littwin, *Low-Income, Low-Asset Debtors in the U.S. Bankruptcy System*, 29 Int'l Insolvency Rev. S116, S117 (2020). On top of that baseline, "procedure and burdens of proof governing undue hardship adversary proceedings have created access-to-justice barriers that ratchet up the difficulty faced by student-loan debtors in establishing the merits of their claims for relief." Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 U. Fla. L. Rev. 2101, 2101 (2014). For low-income or low-wealth debtors, the *Brunner* test's manifold mandatory requirements intensify the burdens of seeking and obtaining discharge. *Id.* at 2119–21.

But access-to-justice burdens are not the only ones that *Brunner*—and particularly the Fifth Circuit's version—imposes on debtors. Two aspects of the lower courts' approach in this case are paradigmatic of the tendency for "judicial glosses" "to supersede the statute itself," *Krieger*, 713 F.3d at 884—to absurd and draconian effect for low-income debtors.

First, the Fifth Circuit has transmogrified the second *Brunner* prong, which ordinarily deals with *future* ability to repay, to consider *past* actions of the debtor as well. In the Fifth Circuit, "'[a]dditional circumstances' encompass 'circumstances that impacted on the debtor's future earning potential but which were either not present when the debtor applied for the loans or have since been exacerbated." *In re Gerhardt*, 348 F.3d at 92 (quoting *In re Roach*, 288 B.R. 437, 445 (Bankr. E.D. La.2003) (quoting *In re Thoms*, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001) (cleaned up). In the case of Ms. McCoy, the Fifth Circuit concluded she had not presented legally pertinent "additional circumstances" "[b]ecause critical health issues (a car accident and a facial burning incident) occurred before [she] took out the bulk of the loans. . . ." Pet'r's Appx. at 6a. The reasoning behind this conclusion is that "'the debtor could have calculated that factor into its cost-benefit analysis at the time the debtor obtained the loan.'" *Id.* (quoting *In re Thoms*, 257 B.R. at 149).

The idea that the student loan debtor "should have known better" has been embraced by only a "small minority of courts." Cong. Rsch. Serv., *Bankruptcy and Student Loans* 24 (July 18, 2019). Most of those courts are in the Fifth Circuit. *See, e.g.*, *Hoffman v. Tex. Guaranteed Student Loan Corp.* (*In re Williams*), No. 15-41814, No. 16-4006, 2017 WL 2303498, at *6 (Bankr. E.D. Tex. May 25, 2017); *Teague v. Tex. Guaranteed Student Loan Corp.* (*In re Teague*), No. 15-34296-hdh7, Adv. No. 16-03007-hdh, 2017 WL 187557, at *2 (Bankr. N.D. Tex. Jan. 17, 2017). That this is a minority view is for good reason: it penalizes debtors who pursue educational attainment despite encounters with adversity. "The principal purpose of the Bankruptcy Code is to grant

a 'fresh start' to 'the honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan* v. *Gamer*, 498 U.S. 279, 286, 287 (1991)). Penalizing debtors who made an honest education investment that simply did not work out, and now find themselves in dire financial straits, sends the message that if you are poor or have a disability, giving it a "good college try" is not for you. Moreover, it wholly disregards Bankruptcy's purpose of affording debtor's like Ms. McCoy a "fresh start." *Id.*

Second, like many low-income debtors, at the time she filed for bankruptcy, Ms. McCoy qualified for an income-based repayment plan that did not require her to make monthly payments. Income-based repayment plans allow for reduced payments, indexed to income, and allow for full forgiveness after twenty-five years. Because interest continues to accrue, income-based repayment plans almost invariably increase the debt burden, not uncommonly by multiples. That financial sword of Damocles is apparent not only to debtors, on whom it exacts a "psychological and emotional toll," *In re Marshall*, 430 B.R. 809, 815 (Bankr. S.D. Ohio 2010) (quoting *In re Larson*, 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010), but also to potential creditors, landlords, and employers; *In re Durrani*, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004), *aff'd sub nom. Educ. Credit Mgmt. Corp. v. Durrani*, 320 B.R. 357 (N.D. Ill. 2005). And when the debt is finally forgiven, the forgiven amount is taxable as income, generating potentially enormous tax liabilities for debtors who didn't have the ability to make payments in the first instance. 26 U.S.C. § 61(a)(12).

The Fifth Circuit declined to consider Ms. McCoy's income-based repayment plan in denying

discharge. By requiring denial when any one prong is not met, the *Brunner* test encourages such short-circuited analyses. Nevertheless, the court of appeals observed that her ever-growing debt and future tax burden was "highly speculative" because "tax laws can and do change." Pet'r's Appx. at 4a n.3. More morbidly, the court also observed that Ms. McCoy, then aged 62, might simply die before the end of her twenty-five-year loan repayment period, noting "the loan would be discharged without any further liability to her estate." *Id.* (citing 34 C.F.R. § 682.402(b)(1)). For borrowers in Ms. McCoy's situation—and many less extreme ones—the existence of an income-driven repayment plan, even where the current payment is zero, should have no bearing on the availability of discharge. When the "fresh start" of bankruptcy discharge is available, debtors who cannot pay should not be told to wait for tax reform or death.

The *Brunner* test doesn't just multiply the procedural hurdles, substantive difficulty, and expense faced by low-income debtors. By making single prongs or sub-elements dispositive, it frequently inflates the importance of legally irrelevant circumstances, like the timing of a disability, while allowing courts to disregard clearly relevant ones, like the growth of an unpayable debt under an income-based repayment arrangement.

Moreover, the lack of uniformity and variance from circuit to circuit also creates further racial inequities. The Fifth Circuit's jurisdiction covers states with large Black populations, places that have been identified as having racialized bankruptcy filings that exacerbate existing racial wealth disparities. *See* Hannah Fresques and Paul Kiel, Pro Publica, *In the South, Bankruptcy is Different, Especially for Black Debtors*, (September 27, 2017),

https://projects.propublica.org/graphics/bankruptcy-chapter-13. This context makes the strictness of the *Brunner* test burdensome to the Black borrowers who are disproportionately represented in the Fifth Circuit geographies and suggests that Black student loan debtors whose cases are in front of the Fifth Circuit face especially stringent legal scrutiny compared to their peers seeking similar relief in other, Whiter, geographies.

III. A totality-of-the-circumstances test comports with the text and purpose of the Bankruptcy Code and would better serve low-income borrowers of color.

A. A totality-of-the-circumstances test comports with the text and serves the purposes of the undue hardship exception.

Exceptions to discharge are contrary to the purpose of giving a debtor a "fresh start," and therefore "should be confined to those plainly expressed." *Gleason v. Thaw*, 236 U.S. 558, 562 (1915). Congress offered such a plain expression in § 523(a)(8), excepting qualified educational loans from discharge unless requiring repayment "would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8). That exception was created against a background presumption of dischargeability. Permitting "undue hardship" discharge preserves that presumption.

Congress did not define "undue hardship" in § 523(a)(8), leaving it to be interpreted according to its ordinary meaning. Read in the context of the dischargeability exception, the statutory language asks whether the debtor will face significant hardship that will be difficult to endure, or causes suffering, if

the loan is made to be repaid rather than discharged. Put another way and "distilled to its essence," the statutory text presents "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?'" *Bronsdon*, 435 B.R. at 800 (quoting *In re Hicks,* 331 B.R. at 31). That question cannot be reasonably answered with bright-line rules, and Congress has not enacted such rules. It is better addressed by individualized assessments that examine the debtor's specific life circumstances and experiences and do not put dispositive weight on any one factor—in other words, a totality-of-the-circumstances approach.

A flexible standard is consistent with even the most restrictive readings of congressional purposes. *Brunner*'s restrictive approach to discharge has been defended on the grounds that it is more consistent with Congress' purported two goals of safeguarding the financial viability of the student loan system and preventing abuse by undeserving debtors. *E.g.*, *In re Thomas*, 931 F.3d at 453 (citing *In re Pelkowski* , 990 F.2d 737, 742–43 (3d Cir. 1993)). Today, bankruptcy discharges, pursued by a vanishingly small proportion of the millions of student borrowers in default or on income-based repayment, are simply too negligible to constitute threat to the financial viability of student loan programs. And there is little evidence that such abuse, while real, was or is anything but a rare problem. *See* H.R. Rep. 95-595, 133, 1978 U.S.C.C.A.N. 5963, 6094–95 (acknowledging that a "few serious abuses of bankruptcy law" drove the push to make loans nondischargeable but presenting data showing that these were not the norm).

Even if abuse were a well-founded concern, the undue hardship exception today applies to a far wider set of debtors than it did at its inception. Generally, debtors seeking discharge today are not young graduates seeking to shirk their loans on the cusp of a lucrative career: one recent study found that among debtors seeking discharge, the mean age was 49 and the median age was 48.5. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 Am. Bankr. L.J. 495, 509 (2012). And seniors, often borrowing to finance education for children or grandchildren, are the fastest-growing segment of the student loan market and have a default rate of 37 percent. CFPB, *Snapshot of Older Consumers and Student Loan Debt* 2, 11–12 (January 2017). The data simply do not support the continued use of the unduly restrictive and over-inclusive *Brunner* test. Moreover, there is no reason to believe that courts applying a more flexible, individualized, and open-ended totality-of-the-circumstances test cannot root out the occasional malingerer. *See, e.g.*, *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 782–83 (8th Cir. 2009) (denying discharge under the totality of the circumstances test to a licensed, employed, early-career attorney who had made no effort to repay any of his student loan obligations).

Unlike the *Brunner* test, an open-ended totality of the circumstances test that holistically evaluates the situation of each debtor seeking discharge comports with the text and purpose of § 523(a)(8). And it need not hobble a host of "honest but unfortunate" debtors seeking discharge while screening out the few undeserving ones.

B. A simpler, more flexible totality-of-the-circumstances test would help debtors with fewer resources, often borrowers of color, to obtain a "fresh start."

Student debt imposes a disproportionate burden on those who enter the educational system with less, often students of color. Students of color frequently need to borrow more to finance education and are less likely to reap the full economic security and benefits of that education because of heavier debt service obligations and systemic racial discrimination in the workplace. *See Quicksand: Borrowers of Color and the Student Debt Crisis* (September 2019); ORCID Lincoln Quillian, Devah Pager, Ole Hexel, and Arnfinn H. Midtbøen, *Meta-analysis of field experiments shows no change in racial discrimination in hiring over time*, Proceedings of Nat'l Acad. of Sciences of United States of America, 114 (41) 10870-10875; (October 10, 2017, first published September 12, 2017), https://doi.org/10.1073/pnas.1706255114. Many of these student borrowers succeed and achieve financial stability in spite of stacked odds, but many do not. When it comes to rebuilding personal assets and economic security after financial hardship, there is no replacement for a bankruptcy discharge that gives a truly "fresh start," unencumbered by old debts. For many, that discharge must include student loans to truly allow a new beginning.

It is already difficult to file an adverse proceeding for the discharge of one's student loans. And hiring a lawyer to navigate the process requires borrowers who are already in financial distress to bear substantial expense. But that expense is almost essential given the complexity of the substantive requirements and standards of proof that have grown up out of the *Brunner* test. A simple, flexible totality-

of-the-circumstances test would allow debtors to present just that: the totality of *their* circumstances to the court to show why they should be eligible for discharge. Less complexity would make it easier for them to represent themselves successfully, potentially reduce the expense of legal representation, and reduce the danger that attorney or client would trip in one of *Brunner*'s many traps. Even better, it might encourage more "honest but unfortunate debtors" who need a fresh start to pursue it out.

Clarifying undue hardship will not resolve the myriad inequities in the student loan or bankruptcy systems. But it is well within the Court's power to restore fidelity to the text.

CONCLUSION

For the foregoing reasons, the *amicus* urges the court to grant the petition for *certiorari*.

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