No. 18-11091

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

In the Matter of: VERA FRANCES THOMAS,
Debtor

VERA FRANCES THOMAS
Appellant
v.

DEPARTMENT OF EDUCATION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, NO. 3:17-cv-3464

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

TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256

November 5, 2018
On Brief: John Rao and Geoffry Walsh

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that beyond the parties listed in Appellant's brief, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

National Association of Consumer Bankruptcy Attorneys:

Amicus Curiae

National Consumer Bankruptcy Rights Center: Amicus Curiae

Rao, John: On brief for Amici

Twomey, Tara: Amici Curiae Counsel of Record

Walsh, Geoffry: On brief for Amici

Pursuant to Fed. R. App. P. 26.1 and 5th Cir. R. 28.2, undersigned counsel further certifies that Amici Curiae are both nonprofit corporations and that neither entity has a parent corporation or stockholders.

This day of November 5, 2018.

s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

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

NACBA is also a nonprofit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

This case is of vital interest to Amici. Since the enactment of the Bankruptcy Code in 1978, Congress has permitted debtors who can

demonstrate undue hardship to obtain a discharge of student loans. Frequently debtors who may be eligible for discharge of their student loans do not even seek a determination because of the perception, and often the reality, that the undue hardship standard is an insurmountable barrier. The complexity of the multi-pronged undue hardship test that courts have developed, which involve consideration of a multitude of factors, have increased proof requirements and driven up litigation costs. Ironically, those debtors who are most likely to prevail are least likely to afford legal representation, creating a court access problem.

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.

CONSENT

This *amici curiae* brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

The undue hardship test, articulated in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), and adopted by this Court in *U.S. Dept. of Education v. Gerhardt,* 348 F.3d 89 (5th Cir. 2003), is obsolete and as a result the test for undue hardship should be revisited. The *Brunner* test 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 reconsider its adoption of the *Brunner* test, which gives undue weight to concerns that are not pertinent today.

Even if the Court continues the application of the *Brunner* test, we urge this Court to restrict consideration of extraneous and inappropriate factors not consistent with the statutory language.

Courts have expanded the *Brunner* test far beyond what the text of the statute can support. 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 Reconsideration Of An Appropriate Undue Hardship Test.

The nature of student loan debt, the structure of student loan programs, and the Bankruptcy Code itself have all changed significantly since the undue hardship test was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). 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 section 523(a)(8). *See In re Brunner*, 46 B.R. 752, 755 (S.D.N.Y. 1985) (hereinafter "*Brunner I*").

Amici submit that most debtors today are not seeking an undue hardship discharge soon after their student loans come due. An 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, is less applicable today than it was twenty years ago.

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. § 1091a(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.

Additionally, 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. 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 section 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 *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 be reconsidered by this Court. Indeed, a crescendo of courts, including the Bankruptcy Court below, have noted the need to revisit the Brunner test. *See In re Thomas*, 581 B.R. 481, 486 (Bankr. N.D. Tex. 2017); *In re Nightingale*, 543 B.R. 538, 544–545 (Bankr, M.D.N.C. 2016) (noting that "a crescendo of courts" have recognized that the Brunner standard needs to be revised). *See also Krieger v. Educ. Mgmt. Corp.,* 713 F.3d 882, 884 (7th Cir. 2013) (noting it is important not to allow "judicial glosses" of the statutory language, such as those found in *Brunner*, to supersede the statute itself); *In re Roth*, 490 B.R. 908, 920–923 (B.A.P. 9th Cir. 2013) (Pappas, B.J., concurring) (*Brunner* no longer reflects reality and should be

replaced); *In re Smith*, 582 B.R. 556, 565 (Bankr. D. Mass. 2018) (finding both *Brunner* and totality of circumstances tests outdated and flawed); *In re* Coplin, 2017 WL 6061580 * 6 (Bankr. W.D. Wash. Dec. 6, 2017) (noting "drastically different landscape for student loan debtor from the time when *Brunner* was decided" and recognizing that *Brunner* standards must be applied with an understanding of current landscape).

II. The Existing *Brunner* Test Strays Too Far From The Plain Language Of Section 523(a)(8) And Tests Too Much.

The *Brunner* undue hardship test as applied by some courts encompasses matters that are 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. This Court should consider 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 sections 524(c) and (m) is different than dischargeability under section 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. Even If This Court Continues To Apply The *Brunner* Test, 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 section 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." *U.S. Dept. of Education v. Gerhardt,* 348 F.3d 89 (5th Cir. 2003) (requiring a total incapacity in the future to pay one's

education debt for reasons not within the debtor's control); *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 requiring a "certainty of hopelessness" or "total incapacity" have simply strayed too far from the statute's plain meaning and its legislative history. *Krieger,* 713 F.3d at 884 (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. The Formulation Of The Undue Hardship Under *Brunner*, Or Otherwise, Should Be Based On The Statutory Language And Should Avoid Inconsistent Results And Unnecessary Litigation.

The First Circuit Bankruptcy Appellate Panel 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 limit the expansion of the *Brunner* test based on the following key considerations.

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).

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 recreation. When a borrower's monthly income falls significantly 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, Internet access, and cellular phone service. 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 section 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 section 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.

The requirement to show something akin to a "certainty of hopelessness" or "total incapacity" 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 section 523(a)(8)'s allowance for discharge in certain circumstances. *Polleys*, 356 F.3d at 1310 (courts need not require a "certainty of hopelessness").

Rather than require elements of undue hardship that are 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 extend beyond the loan repayment period. *Bronsdon's* focus on the debtor's circumstances "in the foreseeable near future" is noteworthy. 435 B.R. at 800. 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.

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 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* 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 section 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 section 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 section 523.

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.[1] 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

[1] 20 U.S.C. § 1098e; 34 C.F.R. § 682.215 and § 685.221.

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.[2] 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. 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.

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[2] 20 U.S.C. § 1098e; 34 C.F.R. ¶ § 685.221.

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? The *Brunner* test requires 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.

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.[3] 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 bankruptcy if they can prove undue economic hardship."[4] Finally, among the substantial

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

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. A $0 or

minimal IDR payment, which does not pay the education debt and in fact makes it grow larger, is not the appropriate measure for evaluating undue hardship. *See In re Nightingale*, 529 B.R. at 650 ("This Court refuses to jump the logical chasm necessary to conclude that no payment constitutes repayment, regardless of the title the lenders choose to give a program that excuses debtor from repaying her loans. The *Brunner* test specifically requires that the Court determine whether the debtor would be able to maintain a minimal standard of living if forced to 'repay' her student loans."); *see also In re Fern*, 563 B.R. 1, 5 (B.A.P. 8th Cir. 2017) (concluding that a monthly payment obligation in the amount of zero does not "automatically constitute [] an ability to pay.") *In re Morrison*, 2014 WL 739838, at *4 (Bankr. E.D. Wash. Feb. 26, 2014) ("By the very nature of bankruptcy, the majority of debtors will have nominal IBR payment. Thus, using the monthly IBR amount …would render an absurd result—the more destitute the debtor the less likely the discharge.").

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 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.[5] 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). *Bronsdon,* 435 B.R. at 802. This

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[5] *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).

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-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 Bronsdon*, 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.[6]

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. Not all borrowers are able to obtain even this partial eligibility for income-based plans. Finally, based on their 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.[7]

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[6] 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.

[7] The existence of a judgment or garnishment bars consolidation. 34 C.F.R. § 685.220(d)(1)(ii)(B), (C).

CONCLUSION

For the foregoing reasons, amici respectfully request that the bankruptcy court's decision below be reversed.

Respectfully submitted,

s/ Tara Twomey
TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 5th Cir. R. 29.3 because this brief contains 6,485 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

Dated: November 5, 2018

s/ Tara Twomey
TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of Amici Curiae, the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys, on counsel for all parties, electronically through the ECF System, on this 5th day of November, 2018.

s/ Tara Twomey
TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net