No. 18-1445

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re BYRON PATTERSON McDANIEL, JR. AND LAURA PAIGE McDANIEL,
Debtors.

NAVIENT SOLUTIONS, LLC,
Appellant
— v. —
BYRON PATTERSON McDANIEL, JR. AND LAURA PAIGE McDANIEL,
Appellees

On Appeal from the U.S. Bankruptcy Court for the District of Colorado,
Case No. 17–0127

BRIEF OF BANKRUPTCY SCHOLARS AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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QUESTION PRESENTED

Does a private student loan constitute an "obligation to repay funds received as an educational benefit" under 11 U.S.C. § 523(a)(8)(A)(ii)?

INTEREST OF THE *AMICI CURIAE*

The amici are bankruptcy scholars who have an interest in the proper interpretation of the Bankruptcy Code. Jason Iuliano is the primary author of the brief and a research fellow at the University of Pennsylvania Law School. Kara Bruce is a professor at the University of Toledo College of Law. Alan White is a professor at the City University of New York School of Law. The brief draws on Mr. Iuliano's article, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, which is *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3139985 and which is forthcoming in the *American Bankruptcy Law Journal*.

No party's counsel has participated in writing this Brief. No party (or party's counsel) has contributed money to fund preparing or submitting this Brief. No other individual or entity has contributed money that was intended to fund preparing or submitting this Brief.

SUMMARY OF ARGUMENT

A private student loan does not constitute an "obligation to repay funds received as an educational benefit . . . ." under 11 U.S.C. § 523(a)(8)(A)(ii). The plain meaning of the statute, the legislative intent behind the statutory exemption, and the Bankruptcy Code's fresh-start policy all support a narrow reading of the of the student loan discharge exemption. Specifically, they indicate that "educational benefit" refers only to conditional educational grants (i.e., educational funds that a student receives in exchange for agreeing to perform services in the future).

ARGUMENT

At issue in this case is whether a private student loan constitutes an "obligation to repay funds received as an educational benefit" under 11 U.S.C. § 523(a)(8)(A)(ii). Appellant answers in the affirmative, arguing that "obligation to repay funds received" should be read to encompass loans and that "educational benefit" should be read to include any funds that the borrower purports to use to pay educational expenses.[1] Appellant's reading, however, is inconsistent with the plain meaning of the statute, the legislative intent behind the statutory exemption, and the Bankruptcy Code's fresh-start policy. The alternative reading offered by Appellees—which interprets "educational benefit" to mean conditional educational grants—suffers none of these defects.

[1] Opening Brief of Appellant, at 12.

As a preliminary matter, it bears emphasizing that Appellees' reading of the term "benefit" is consistent with a key dictionary definition of the term[2] and tracks common usage of the term in a wide variety of contexts. Consider, for instance, the terms "unemployment benefits," "insurance benefits," "social security benefits," "retirement benefits," and "welfare benefits." Just like "educational benefits" under Appellees' reading, the core feature behind these types of benefits is that they provide monetary assistance that the beneficiary is entitled to receive.[3] The payment may come from the state, an employer, or an insurance company, but in each instance, the payer is distributing guaranteed benefits.[4]

I. Appellant's interpretation is inconsistent with the plain meaning of the statute.

As the Supreme Court has repeatedly emphasized, "[s]tatutory interpretation . . . begins with the text."[5] If the court finds that language is clear and

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[2] *See Benefit*, DICTIONARY.COM, http://www.dictionary.com/browse/benefit?s=t ("a payment or gift made by an employer, the state, or an insurance company").

[3] *See Benefit*, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/benefit ("A payment made by the state or an insurance scheme to someone entitled to receive it.").

[4] *See Benefit*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/benefit (offering one definition of "benefit" as "financial help in time of sickness, old age, or unemployment . . . a payment or service provided for under an annuity, pension plan, or insurance policy . . . a service (such as health insurance) or right (as to take vacation time) provided by an employer in addition to wages or salary").

[5] *Ross v. Blake*, 136 S.Ct. 1850, 1856 (2016) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)).

unambiguous, the inquiry must end there.[6] This approach—known as the "plain meaning rule"—is central to judicial interpretation. For two key reasons, Appellant's proposed interpretation is inconsistent with the plain meaning of the statute: (1) it conflicts with the canon of *noscitur a sociis*, and (2) it conflicts with the canon against surplusage.

A. The canon of *noscitur a sociis* requires that "educational benefit" be given a narrow reading.

"Educational benefit" is only one of three categories of obligations that Congress excepted from discharge in § 523(a)(8)(A)(ii)—scholarships and stipends being the other two.[7] By including these two additional terms, Congress provided an important clue regarding the meaning of "educational benefit." Specifically, the fact that these three terms are grouped together suggests that they have similar features and should be interpreted in relation to each other. As the Supreme Court wrote in *McDonnell v. U.S.*, "a word is known by the company it keeps."[8]

This interpretative principle derives from the canon of *noscitur a sociis*, a fundamental rule of statutory construction holding "that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately

[6] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that "[i]f the statutory language is plain, we must enforce it according to its terms").

[7] 11 U.S.C. § 523(a)(8)(A)(ii) (2005).

[8] 136 S. Ct. 2355, 2368 (2016) (internal quotation marks omitted).

surrounding it."[9] In practice, the Supreme Court invokes this canon "where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."[10]

The case of *Gustafson v. Alloyd Co.,* provides an excellent illustration of how the Supreme Court applies the doctrine of *noscitur a sociis*.[11] Central to the *Gustafson* case was the meaning of the word "communication."[12] Rejecting the appellee's argument that "communication" should be read to refer to any written transmission of information, the Court emphasized that "communication" appears in a list of words and must, therefore, be read in conjunction with those surrounding words.[13] Observing that the accompanying terms of "prospectus, notice, circular, advertisement, [and] letter" refer to "documents of wide dissemination," the Court held that "communication" must, likewise, refer only to public transmissions of information and cannot be read to include private writings

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[9] BLACK'S LAW DICTIONARY (10th ed. 2014) (translating the Latin as "it is known by its associates"); *see Maracich v. Spears*, 570 U.S. 48, 63 (2016) (noting that "the canon of *noscitur a sociis* 'counsels that a word is given more precise content by the neighboring words with which it is associated' ") (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)).

[10] *McDonnell*, 136 S. Ct. at 2368.

[11] 513 U.S. 561, 573–76 (1995).

[12] *Id*.

[13] *See id*. at 574 ("The word "communication," however, on which Alloyd's entire argument rests, is but one word in a list, a word Alloyd reads altogether out of context.").

between two—or a small number of—parties.[14] In support of its decision, the Supreme Court wrote, "we rely upon [the canon of *noscitur a sociis*] to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words."[15]

The parallels between the statutory provision in *Gustafson* and § 523(a)(8)(A)(ii) of the Bankruptcy Code are too strong to ignore. There is a disputed term that is capable of two meanings. One of these meanings is extremely broad; the other is narrow. And there are two accompanying terms in the list that suggest a narrow reading of the disputed term. These factors indicate that the student loan provision is an ideal candidate for the canon of *noscitur a sociis*.

As one bankruptcy court that relied on this principle wrote, what educational benefits, scholarships, and stipends have in common is that "[u]nlike loans, [they] are conditional educational grants, which are not generally required to be repaid."[16] In another recent bankruptcy case, the court similarly observed that

> [T]he canon of statutory construction known as *noscitur a sociis* instructs that when a statute contains a list, each word in that list presumptively has a similar meaning. To the extent that educational benefit (defined nowhere in the Bankruptcy Code) is ambiguous, it should be presumed to have a meaning similar to the other items in the list set forth in § 523(a)(8)(A)(ii). Scholarship and stipend both refer to funds which are not generally required to be repaid by the recipient. Therefore, in the absence of plain meaning to the contrary,

[14] *Id*. at 575.
[15] *Id*; *see also Yates v. U.S.*, 135 S.Ct. 1074, 1087 (2015).
[16] *In re Decena*, 549 B.R. 11, 19 (Bankr. E.D.N.Y. 2016).

> or compelling legislative history, educational benefit must be understood to refer to something other than a loan, especially given that Congress uses the word loan elsewhere in § 523(a)(8). The concept which unites the three separate terms in the list in § 523(a)(8)(A)(ii) is that they all refer to types of conditional grants.[17]

Viewed from this perspective, Congress' decision to group these terms together and preface them with the phrase "obligation to repay funds received" makes complete sense. The subsection was designed to except from discharge grants of money that are tied to service obligations—a category wholly distinct from loans.[18]

Appellant disputes this application of the canon of *noscitur a sociis*, arguing that their interpretation is consistent because "educational loans, scholarships, and stipends all help students meet the costs of education."[19] Here, the Appellant has engaged in sleight of hand. By substituting "educational loans" for "educational benefit," Appellant has framed the statute as covering three distinct categories. However, under the Appellant's proposed reading, educational benefit covers far more than educational loans. In fact, under Appellant's interpretation, "educational benefit" necessarily includes scholarships and stipends.

This interpretation violates a second core interpretive principle of statutory construction known as the canon against surplusage.

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[17] *In re Campbell*, 547 B.R. 49, 55 (Bankr. E.D.N.Y. 2016).

[18] *See id*. at 55 (concluding that, based on this analysis, "[i]t follows that 'educational benefit' does not encompass loans").

[19] Opening Brief of Appellant, 44.

B. The canon against surplusage requires that "educational benefit" be given a narrow reading.

The canon against surplusage is frequently discussed in conjunction with *noscitur a sociis* and, in most cases, favors the same conclusion.[20] As its name suggests, the canon against surplusage holds that courts must "give effect, if possible, to every clause and word of a statute."[21]

On this dimension, the Appellant's interpretation fares poorly. To begin, it

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[20] *See, e.g.*, *McDonnell v. U.S.*, 136 S.Ct. 2355, 2369 (2016) (observing that the "more limited reading [required by the canon of *noscitur a sociis*] also comports with the presumption 'that statutory language is not superfluous'") (quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n.1 (2006); *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274 (2013) (discussing the canon of *noscitur a sociis* and the canon against surplusage and finding that they both favor the same reading of the disputed term).

[21] *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 941 (2017) (internal quotation marks omitted); *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836 (1988) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). This mandate creates a strong presumption against reading statutory terms or phrases in a manner that duplicates other terms or renders entire clauses superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (explaining that "one of the most basic interpretative canons" is that " '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' ") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Emphasizing the canon's importance, the Supreme Court has—on numerous occasions—described it as a "cardinal principle of statutory construction." *See, e.g.*, *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 941 (2017); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 567 (2013); *Alaska Dept. of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 489 n.13 (2004); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

renders all the accompanying terms within § 523(a)(8)(A)(ii) irrelevant. Because scholarships and stipends both provide educational benefits—as Appellant understands the term—Congress would have had no reason to include these adjoining terms in the statute.

To fully appreciate the extent to which the Appellant's reading violates the canon against surplusage, however, it is necessary to step back even further and look at all of § 523(a)(8). This section of the statute contains three provisions, each of which excepts distinct educational debts from discharge. In addition to the provision excepting scholarships and stipends, there is a clause that excepts any "educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution"[22] and a third clause that excludes "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."[23]

Under Appellant's reading, these additional clauses are superfluous.[24]

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[22] 11 U.S.C. § 523(a)(8)(A)(i) (2005).

[23] *Id*. at § 523(a)(8)(B).

[24] *See In re Scott*, 287 B.R. 470, 474 (Bankr. E.D. Mo. 2002) ("If the third provision of section 523(a)(8) were interpreted to mean that all educational loans were excepted from discharge then the first two categories . . . would certainly be rendered meaningless and superfluous . . . . The third category would subsume the first two provisions and make them completely unnecessary. Such an interpretation

Because every exemption in these provisions is a type a fund that recipients use to advance their educations, Congress could have just exempted from discharge any "obligation to repay funds received as an educational benefit" and left it at that. The fact that Congress took an alternative course strongly cautions against Appellant's reading of the term. As the Supreme Court has held in similar contexts, it is imperative to "resist a reading of [a term] that would render superfluous an entire provision passed in proximity as part of the same Act."[25]

To defend against this line of argument, Appellant relies on *Husky International Electronics v. Ritz*.[26] 578 U.S. __, 136 S. Ct. 1581 (2016). In that case, the Supreme Court held that "some overlap" in coverage regarding the definition of "actual fraud" did not render § 523 redundant. *Id*. at 1588. The operant phrase here is "some overlap."[27] Appellant's use of this term in the present context[28] appears to be an attempt at prevarication. The only way there is "some overlap" is if Appellant intends to use the term in the Aristotelian sense where

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is contrary to statutory interpretation and to common sense.").

[25] *Yates v. U.S.*, 135 S.Ct. 1074, 1085 (2015); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (quoting *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988))) (" 'As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.' ").

[26] Opening Brief of Appellant, at 39 (citing *Husky International Electronics, Inc. v. Ritz*, 578 U.S. __, 136 S. Ct. 1581, 1588 (2016))

[27] The Court underscored that its interpretation of section 523(a)(2)(A) preserved "meaningful distinctions" between the various subsections. *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. at 1588.

[28] Opening Brief of Appellant, at 39–41.

some can mean all.

Under Appellant's proposed reading, some exemptions set forth in § 523(a)(8) are "educational benefits" in the same way that some Border Collies are dogs. Although the use of the word some is technically accurate, it is misleading. Just as there is not a single Border Collie that is not a dog, there is not a single exemption in § 523(a)(8) that is not an educational benefit. Given Appellant's proposed reading, a far more honest description of the overlap would be "complete and total." Quite simply, Appellant is asking the Court to read "educational benefit" in a manner such that this two-word phrase subsumes the rest of the seventy-seven-word statutory provision. This is not a method of textual interpretation the Supreme Court has ever countenanced.

II. Appellant's interpretation is inconsistent with the legislative intent behind the "educational benefit" exemption.

Although some forms of educational debt have been excepted from the normal bankruptcy discharge process since 1976, Congress did not add the "educational benefit" exemption until 1990.[29] During the Congressional hearings, only one reference was made to this amendment of § 523(a)(8). Specifically, the chairman of the Subcommittee on Economic and Commercial Law asked the U.S. attorney for the Eastern District of Texas to explain "[t]he specific problem [the

[29] *See* The Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4965 (1990).

amendment] is designed to address."[30]

The U.S. attorney responded as follows:

> This section adds to the list of non-dischargeable debts, obligations to repay educational funds received in the form of benefits (such as VA benefits), scholarships (such as medical service corps scholarships) and stipends. These obligations are often very sizeable and should receive the same treatment as a "student loan" with regard to restrictions on dischargeability in bankruptcy.[31]

This answer provides three key points showing that the educational benefit exemption was not intended to cover the loans at issue in this case. First, the U.S. attorney described educational benefits as "educational funds received in the form of benefits."[32] This description is the very definition of conditional educational grant. Second, the U.S. attorney provided VA benefits—which are an extremely common type of conditional educational grant—as an example of the kind of debt obligation that the provision was designed to cover. Third, the U.S. attorney cited the Eighth Circuit case of *U.S. Department of Health and Human Services v. Smith*—a 1986 case that addresses whether conditional educational grants are included within the statutory exemption.[33]

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[30] Federal Debt Collection Procedures of 1990: Hearing on P.L. 101–647 Before the H. Subcomm. on Econ. and Commercial Law, H. Judiciary Committee 101st Cong. 42 (June 14, 1990) (Mr. Brooks' Questions for the Record for Mr. Wortham).

[31] *Id*. at 74–75.

[32] *Id*. at 74.

[33] *Id*. at 75; *U.S. Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122 (8th Cir.1986).

In particular, *Smith* involved a medical student who had been awarded approximately fourteen thousand dollars in tuition assistance from the Physician Shortage Area Scholarship Program—a federal program designed to encourage physicians to work in underserved areas.[34] As part of the terms of the award, Smith agreed that, following graduation, he would practice medicine for three years in an area that has a shortage of physicians.[35] Smith, however, declined to fulfill the terms of the agreement.[36] The U.S. Department of Health and Human Services sued Smith for breach of contract and sought to collect approximately twenty-eight thousand dollars.[37] Soon after, Smith filed for bankruptcy.[38]

The question before the *Smith* court was whether the tuition assistance fell within the Bankruptcy Code exemption for educational debt. At the time, § 523(a)(8) looked quite different from its present form. The section only excepted from discharge debts " 'for an educational loan made . . . by a governmental unit, or made under any program funded . . . by a governmental unit.' "[39] Both the bankruptcy court and district court found that, because Smith's debt was not a "loan," it was dischargeable.

The U.S. Department of Health and Human Services appealed the ruling to

[34] *Smith*, 807 F.2d at 123.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*. at 124 (quoting 11 U.S.C. § 523(a)(8)).

the Eighth Circuit. That Court reversed—holding that "loan" could be read to include contingent "obligation[s] to repay."[40] The Eighth Circuit based its decision, not on the language of the statute, but rather on the congressional purpose underlying the provision—namely, to prevent debtors from abusing the student loan system.[41] As the Court observed,

> [a]lthough we recognize that the language of PSASP . . . arguably may give rise to certain ambiguities . . . the circumstances which led to the enactment . . . compels the conclusion that Congress intended § 523(a)(8) of the Bankruptcy Code to except from dischargeability debts incurred under scholarship programs such as PSASP.[42]

The wording of the statute and the U.S. attorneys' answer to the congressman's question present strong evidence that, when Congress added the "educational benefit" language to § 523(a)(8) in 1990, it did so to codify the ruling in *Smith* and thereby preempt a possible circuit split.[43]

What was said in the legislative record is not the only factor indicative of Congress's intent. What was left unsaid is also highly suggestive. When Congress enacted the original student loan exemption, the congressional debate proved

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[40] *Id*. at 125–27.
[41] *Id*. at 126–27.
[42] *Id*.
[43] *In re Campbell*, 547 B.R. 49, 55 (Bankr. E.D.N.Y. 2016) (reviewing the legislative history and determining that "[t]he phrase 'educational benefit' first appeared in § 523(a)(8) of the Bankruptcy Code in 1990, as codification of the holding in *U.S. Dep't of Health & Human Servs. v. Smith*").

extensive and contentious.[44] The fact that, during the 1990 amendment, no members of Congress discussed the provision (aside from the subcommittee chair's single question to the U.S. attorney)—much less objected to the provision's inclusion—suggests that they viewed the amendment as an inconsequential codification of the ruling in *Smith* and not as a sweeping reform that would extend the Bankruptcy Code exemption to all forms of educational debt imaginable. Appellant argues that the lack of extensive legislative history supports a broad interpretation of "educational benefit."[45] But the exact opposite is true.

Appellant seeks to undermine the import of the congressional record by claiming that the current version of the statute is "substantially different" from the 1990 version.[46] Although it is true that the current version of § 523(a)(8) differs from the 1990 version, this is only because Congress added an additional section to the statute—namely § 523(a)(8)(B). The provision at issue in this case—§ 523(a)(8)(A)(ii)—is unchanged. Perhaps in claiming that the statute is

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[44] *See* H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 132–162 (1977), U.S. Code Cong. & Admin. News 1978, p. 5787; 124 Cong. Rec. H 466–472 (daily ed. February 1, 1978); S. Rep. No. 95–989, 95th Cong., 2d Sess. 79 (1978); 124 Cong. Rec. H 11096 (daily ed. Sept. 28, 1978); 124 Cong. Rec. S 17412 (daily ed. October 6, 1978); *see also In re Boylen*, 29 B.R. 924, 926 (Bankr. N.D. Ohio 1983) (noting that "[w]ith regard to the [1978] exception to discharge for student loans, the legislative history is extensive, providing pages of debate and pages of congressional comments along with letters from individuals both in support of and opposing this exception to discharge").

[45] Opening Brief of Appellant, at 45.

[46] *Id*. at 46.

"substantially different," Appellant means that Congress altered the meaning of § 523(a)(8)(A)(ii) when it updated the statute in 2005. There is, however, no evidence in the Congressional record to support this claim.

In fact, the legislative history supplies no indication that Congress gave any thought to the meaning of educational benefit during the 2005 BAPCPA floor debates. Moreover, to the extent members of Congress have used the phrase to reference student debt, they do so to signify conditional educational grants.[47]

III. Appellant's interpretation conflicts with the policy rationales underlying the Bankruptcy Code.

IV.

For more than a century, the Supreme Court has held that the "principal purpose of the Bankruptcy Code" is to provide "honest but unfortunate debtors" with a "fresh start."[48] Over the decades, courts,[49] Congress,[50] and scholars[51] have

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[47] *See, e.g.*, 151 Cong. Rec. 5427 (2005) (statement of Rep. Edolphus Towns) (praising the Veterans Self-Employment Act because it would allow veterans to "apply a portion of [their] educational benefit[s] to defray the portion of a franchise purchase cost attributable to training").

[48] *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 365 (2007); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

[49] *See, e.g.*, *Segal v. Rochelle*, 382 U.S. 375, 380 (1966) (suggesting that bankrupt individuals have a right to "start[] out on a clean slate"); *In re Hudgens*, 149 Fed. Appx. 480, 483 (7th Cir. 2005) (quoting *In re Chambers*, 348 F.3d 650, 653 (7th Cir. 2003)) ("The primary purpose of the bankruptcy discharge is to give the debtor a 'fresh start.'"); *In re Seminole Oil & Gas Corp.* 963 F.2d 368 (4th Cir. 1992) ("The fundamental goal of bankruptcy is to provide the debtor a 'fresh start' free from . . . the dismembering hands of creditors.")

repeatedly affirmed the importance of this goal.

There are two primary justifications underlying the fresh-start policy: protecting the individual debtor and protecting society. With regard to the former, there exists substantial research showing that people are subject to a number of cognitive biases that cause them to underestimate risks.[52] These deficiencies lead people to overestimate their likelihood of success and consequently miscalculate their likelihood of financial ruin. Bankruptcy offers people a way to recover when such unanticipated financial risks come to pass. In doing so, the fresh-start policy seeks to correct for problems that arise not out of immoral action but rather out of

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[50] *See, e.g.*, 151 CONG. REC. H2053 (daily ed. Apr. 14, 2005) (statement of Rep. Goodlatte) (emphasizing the need for "objective standards [to] help ensure that the fresh start provisions of Chapter VII will be granted to those who need them . . . ."); 145 CONG. REC. H2655 (daily ed. May 5, 1999) (statement of Rep. Gekas) ("We, our enlightened forefathers, saw fit to allow the Congress to evolve in a situation in which a fresh start would be accorded to an ordinary citizen who cannot meet his obligations . . . ."); REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 91-137, pt. 1, at 71–80 (1973).

[51] *See, e.g.*, Rafael Efrat, *The Fresh-Start Policy in Bankruptcy in Modern Day Israel*, 7 AM. BANKR. INSTITUTE L. REV. 555, 555 (1999) ("The notion that such individuals should be able to promptly and effectively re-join economic life through an unduly punitive and certain bankruptcy system is an essential component of any progressive and industrialized society."); Karen Gross, *Preserving a Fresh-Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986) ("The opportunity for an individual debtor to obtain relief from indebtedness and begin anew as a productive member of society—commonly termed the "fresh start policy"—has been an essential principle of our bankruptcy laws for more than seventy-five years.").

[52] *See, e.g.*, RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE 17–192 (1980).

cognitive biases that led people to take on more debt than they could manage. Given the young age at which most debtors take out student loans, the fresh-start policy is a particularly valuable safeguard against excessive youthful optimism.

At a society-wide level, the fresh-start policy has a number of other benefits. First, individuals who are unable to get out from under their debts are more likely to turn to social welfare programs for assistance. This course of action places taxpayers on the hook for debtors' poor financial decisions. Because society is not a party to private student loan contracts, the court should demand clear evidence that Congress intended to except such loans from discharge before expanding the scope of the statute and thereby placing additional costs on taxpayers.

This restraint is especially warranted given that the creditor is far better able to monitor risk. A system that permits bankruptcy discharges is one that encourages creditors to be judicious when extending lines of credit. After all, if creditors lend to individuals who are unable to repay the loan, they will bear the loss when a borrower discharges the debt. In a system where loans are non-dischargeable creditors will lend to individuals who have little chance of repaying their loans, knowing that society will act as a partial guarantor.

A second way in which the fresh-start policy benefits society is by encouraging individuals to be productive. As John Weistart has written, "excessive debt, with its attendant pressure on family and emotional stability and job security

[might] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance."[53] An individual who is overburdened by his debts will be far less productive than one who receives the benefits of his efforts. After all, as creditors garnish a higher and higher portion of a debtor's wages, the debtor's incentive to work gets weaker and weaker. By substituting leisure for work, the debtor comes out ahead, but everyone else is left worse off. The fresh-start policy mitigates this problem by enabling debtors to reach a position where they are once again incentivized to work and make productive contributions that benefit society.

Although the fresh-start policy confers many benefits on society, it is clear that a blanket rule allowing the discharge of any debts would be problematic. On this basis, Congress has enacted a number of exceptions. One of these discharge exceptions is for student loan debt that meets certain criteria. In creating this exemption, several members of Congress argued that student loan debtors who sought discharges were abusing the system. Representative Allan Ertel's statement is perhaps the most direct statement on this point:

> [Student loan discharges] encourage fraud . . . . [A]s a student leaves college to find a job, that student would have two options: (1) repay a substantial loan at a time when that student's financial situation is probably at its

[53] *See* John Weistart, *The Costs of Bankruptcy*, 41 L. & CONTEMP. PROB. 107, 111 (1977).

> lowest, or (2) discharge the debt in bankruptcy, having received the benefit of a free education. If Student A elects to repay the loan, honoring the legal and moral obligation that was incurred, he begins his career with a substantial debt and the accompanying financial pressure. Meanwhile, Student B (who chooses to declare bankruptcy) can begin with a clean slate and is free to spend his initial earnings on other items . . . . Student B is rewarded for refusing to honor a legal obligation. The lesson that Students A and B have learned is that it 'does not pay' to honor one's debts or other legal obligations. A valuable educational program should not be destroyed because of a loophole that Congress can easily correct.[54]

Despite the congressman's concern, there is no evidence that an appreciable number of borrowers have ever sought to exploit the system, much less that the federal student loan program was on the verge of being "destroyed" by debtor abuses.[55] Quite the opposite, in fact. The empirical data show that student loan debtors work hard to repay their loan obligations and only turn to bankruptcy after exhausting other options.[56] As far back as 1978, the empirical evidence supported

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[54] H.R. Rep. No. 95-595, 536 (1977) (statement of Rep. Ertel); *see also* H.R.Rep. No. 595, 95th Cong., 2d Sess. 133, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6094

[55] *See* Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 473 (2012) (noting that "[t]he nondischargeability of student loans . . . depended on a theoretical argument that former students might abuse the discharge by going to school and then filing in bankruptcy before getting a lucrative job, despite lack of evidence that this was actually happening").

[56] *See* Oliver B. Pollack & David G. Hicks, *Student Loans, Chapter 13, Classification of Debt, Unfair Discrimination and the Fresh Start after the Student Loan Default Prevention Initiative Act of 1990*, 1993 DET. C.L. REV. 1617, 1621 (arguing that the "concern . . . was more perceived than real"); Kurt Weise, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Test of "Undue Hardship,"* 26 ARIZ. L. REV. 445, 446 (1984) (citing H.R. Rep. No. 95-595 at 133 (1977)) (noting that "less than one percent of all matured educational loans had

this conclusion.

That year, the General Accounting Office released a study finding that, prior to the enactment of any student loan discharge exemptions, only three-tenths of one percent of the amount of federally insured student loans were discharged through bankruptcy.[57] In other words, for every one hundred dollars in student loan debt, only three cents were discharged. This low percentage was at a time when no barriers existed to eliminating student loan debt through bankruptcy. As the General Accounting Office's study showed, fears of widespread abuse were unfounded. Few student loan debtors filed for bankruptcy and even fewer sought to game the system. As one congressman observed, the student loan discharge exception is nothing more than "a discriminatory remedy for a 'scandal' which

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been discharged in bankruptcy"); Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009) ("Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy.").

[57] *See* H.R. Rep. No. 95-595, at 148 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6108 (statement of Rep. James O'Hara) (highlighting that only "two-tenths of one percent of the loans made have been discharged in bankruptcy, involving less than three-tenths of one percent of the dollars"); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 249 (2006) (lamenting that the "empirical data, like many empirical data gathered in Washington, fell on deaf ears"). This lack of evidence has, unfortunately, not stopped courts from asserting that a problem existed. *See, e.g.*, *In re Renshaw*, 222 F.3d 82, 87 (2d Cir. 2000) (asserting that "Congress enacted § 523(a)(8) because there was evidence of an increasing abuse of the bankruptcy process that threatened the viability of educational loan programs and harm to future students as well as taxpayers").

exists primarily in the imagination."[58] Subsequent research has reinforced this conclusion.

In 2005, bankruptcy reform expanded the scope of the student loan discharge exception to cover certain private loans. Researchers at the Federal Reserve Bank of Philadelphia used this event as a natural experiment to test whether student loan discharge is a moral hazard problem.[59] Specifically, the researchers examined whether individuals with private educational loans rushed to file for bankruptcy before the new law came into effect and rendered their debts non-dischargeable. Based on extensive data, the researchers concluded that student loan debtors do not engage in strategic default.[60]

Appellant is, in short, asking this Court to penalize all student loan borrowers, even though the overwhelming majority act in good faith. Reading the phrase educational benefit narrowly, however, avoids this problem while still closing a potential loophole for abuse. Specifically, Appellees' reading precludes a type of discharge that arises only in situations worthy of moral opprobrium (i.e., in

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[58] *See* H.R. Rep. No. 94-1232 (1976).

[59] *See* Rajeev Darolia & Dubravka Ritter, *Strategic Default among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, working paper no. 17-38, FEDERAL RESERVE BANK OF PHILADELPHIA, *available at* https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-38.pdf?la=en.

[60] *See id*. at 20 (The "analysis does not reveal debtor responses to the 2005 bankruptcy reform that would indicate widespread opportunistic behavior by [private student loan] borrowers before the policy change").

cases where borrowers, due to their own changed preferences, refuse to honor the terms of the agreement).

CONCLUSION

The Court should hold that the phrase "educational benefit" does not refer to private educational loans but rather applies only to conditional educational grants. This reading is required by the statutory text, the legislative history, and the core policy rationales underlying the Bankruptcy Code.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because: It contains 6018 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Further, pursuant to 10th Cir. R. 25.5, all required privacy redactions have been made; any required copies to be submitted to the court will be exact copies of the version submitted electronically; and, the electronic submission was scanned for viruses with the most recent version of Norton Anti-Virus Plus, and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Tenth Circuit Court of Appeals by using the Appellate CM/ECF system on April 18, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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