No.

IN THE

Supreme Court of the United States

THELMA G. MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code permits courts to discharge student loan debt in bankruptcy if a debtor can show that repaying it would cause her "undue hardship." 11 U.S.C. § 523(a)(8). Two inconsistent standards have emerged to evaluate whether a debtor's showing is sufficient. Most circuits, including the Fifth Circuit, apply the *Brunner* test, *see Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), which prohibits discharge unless the debtor can prove, among other things, a "total incapacity" to repay the debt in the future. Other courts have rejected *Brunner* in favor of a more flexible test under which the totality of circumstances may be considered. On this approach, courts ask whether the debtor's "reasonable future financial resources will sufficiently cover payment of the student loan debt[] while still allowing for a minimal standard of living." *In re Long*, 322 F.3d 549, 554-55 (8th Cir. 2003).

The question presented is whether the Fifth Circuit erred in applying the *Brunner* test instead of the totality test to determine whether a debtor would suffer an "undue hardship" absent discharge of her student loan debt.

RELATED PROCEEDINGS

In re Thelma G. McCoy, No. 19-40269 (5th Cir. judgment entered June 5, 2020)

Thelma G. McCoy v. United States of America, No. 3:18-CV-21 (S.D. Tex. judgment entered March 7, 2019)

Thelma G. McCoy v. U.S. Department of Education, No. 16-08007 (Bankr. S.D. Tex. judgment entered December 7, 2017)

In re Thelma G. McCoy, No. 16-80108 (Bankr S.D. Tex. order of discharge entered August 26, 2016)

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INTRODUCTION

Petitioner Thelma McCoy is one of more than 45 million people in the United States with student loan debt. The Bankruptcy Code permits the discharge of student loan debt upon a showing that repayment would cause the borrower "undue hardship." 11 U.S.C. § 523(a)(8). The courts of appeals are deeply divided on how to determine what constitutes "undue hardship." Courts and commentators have acknowledged this division for years, and there is no indication that the circuits will resolve it. This Court's intervention is necessary to bring uniformity to this important and recurring question.

Several circuits, including the Fifth Circuit, have applied the rigid, three-part test invented by a New York district court and adopted by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The *Brunner* test permits an "undue hardship" discharge only if the debtor can show: "(1) that [she] cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that [she] has made good faith efforts to repay the loans." *Id.* Each prong is essential: The debtor's failure to satisfy any one of them mandates a denial of relief.

The Eighth Circuit expressly rejected the *Brunner* test in 2003, opting instead for a holistic approach

that requires courts to consider the "totality of the circumstances" each debtor faces. *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). Under this approach, bankruptcy courts must analyze all the "facts and circumstances surrounding each particular bankruptcy case" to answer one principal question: Will the debtor's "reasonable future financial resources … sufficiently cover payment of the student loan debt[] while still allowing for a minimal standard of living"? *Id.* at 554-55.

These approaches diverge sharply in both application and outcome. Whereas the totality approach permits courts to consider all relevant facts and circumstances—as they must when interpreting open-ended statutory standards, *see Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014)—the *Brunner* test categorically disqualifies even the most downtrodden debtors from discharge if they fail to satisfy any one of its three elements. For instance, the Fifth Circuit in applying the *Brunner* test requires a debtor to show a "total incapacity" to pay the debt in the future, regardless of whether the debtor's age, disability, or other mental and physical limitations would otherwise make repayment an "undue hardship." The totality approach, by contrast, preserves § 523(a)(8)'s congressionally mandated discretion by allowing a bankruptcy court to conduct a holistic review of all of the debtor's circumstances to determine if together they amount to an "undue hardship."

The split over the meaning of "undue hardship" is square, entrenched, affects [millions] of debtors, and shows no signs of resolving itself. Courts in nearly

every circuit have openly acknowledged the division, but no court on either side of the split has shown any indication of yielding. Each circuit presented with an opportunity to review the issue en banc has declined to do so, demonstrating that further percolation would be futile. Today, opinions applying either approach are routinely unpublished, and debtors affected by this issue (most of them pro se litigants) have little opportunity to address the question given the entrenched positions.

This case presents an ideal vehicle to resolve the conflict. The courts below denied discharge on the view that Ms. McCoy might be able to repay some of her student loan debt in the future, which they treated as dispositive under *Brunner*'s second prong. Had Ms. McCoy filed for bankruptcy in a non-*Brunner* jurisdiction, the court would have exercised its discretion to consider all facts relevant to undue hardship, including her age (62 years old), her debilitating disabilities (degenerative back problem, fatigue, chronic headaches, panic attacks, depression, etc.), and her exhaustive job search. That divergence disserves the constitutional directive that Congress establish "uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

The Court should grant the petition for a writ of certiorari and settle this important and timely issue.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is available at 810 F. App'x 315 and reproduced at Pet. App. 1a-7a. The opinion of the district court and transcript of the

bankruptcy court ruling denying discharge are reproduced at Pet. App. 8a-17a and 18a-22a, respectively.

JURISDICTION

The Fifth Circuit entered judgment on June 5, 2020, Pet. App. 1a-7a, and denied a timely petition for rehearing en banc on August 3, 2020, Pet. App. 23a-24a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 523(a)(8) of the Bankruptcy Code, Title 11, provides in pertinent part:

> (a) A discharge under section 727, 1141, 1192 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—…
>
> > (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
> >
> > > (A)(i) an 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; or
> > >
> > > > (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

> (B) 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; …."

STATEMENT OF THE CASE

1. Petitioner Thelma McCoy is a 62-year-old African American woman with serious disabilities. After raising four children, she returned to school at age 43, earning a bachelor's degree from Louisiana State University in general studies in 2004, a master's degree in social work from the University of Houston in 2006, and a Ph.D. from the University of Texas in social work in 2014.[1] Pet. App. 8a-9a, ROA.38, 49, 784.[2]

When she began her Ph.D. program in 2006, Ms. McCoy owed only $10,000 in student loans. ROA.738, 785. She also qualified for a package of grants and scholarships that, together with her husband's income, covered her expenses. ROA.785. But over the following eight years—the time it took to complete her degree—Ms. McCoy suffered a series of hardships that took her dramatically off course.

In 2007, she was in a car accident with a drunk driver, leaving her temporarily wheelchair bound.

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[1] Ms. McCoy finished her degree in 2012 but did not receive her diploma until 2014 because a new dissertation committee needed to be reassembled after her committee chair left the University. ROA.49-50.

[2] Citations to "ROA" refer to the Record on Appeal in the Fifth Circuit.

ROA.57-58, 728, 732, 774. Then her husband filed for divorce, financially destabilizing her. ROA.36-37, 785. Two years later, she suffered first- and second-degree burns to her face. Pet. App. 15a, ROA.729. During this time, the University of Texas informed her that, because she was moving into the third year of her doctoral program, she would no longer receive scholarship funding. ROA.785. To complete her degree, Ms. McCoy would have to rely on student loans. ROA.785-786.

In the years leading up to and following her graduation from the Ph.D. program, Ms. McCoy suffered from a range of disabilities: memory loss, dizziness, insomnia, numbness and decreased range of motion in her left hand, loss of appetite, fatigue, chronic headaches, panic attacks, depression, and frequent feelings of hopelessness. ROA.730-731. In 2016, an MRI revealed that she had a developed a degenerative back problem. ROA.774. Discs protruding from her spine intermittently paralyzed her legs, hands, and fingers, making even simple movements—such as sitting up or typing on a computer—prohibitively painful. ROA.776.

Despite her physical and mental deterioration, Ms. McCoy has always sought employment. She worked part-time student jobs while pursuing her degree. ROA.779-780. (Her program forbade full-time work. ROA.785.) And before graduating, she secured a few part-time, online teaching jobs with various universities. ROA.210-212, 245, 249, 252, 254-256, 619-637, 738-739, 779-780. But those were months apart, paid little, and were not renewed. ROA.210-212, 245, 249, 254-256, 738-739, 779-780. After graduation, she

could not find a full-time position. ROA.780. Between 2012 and 2017, she applied for 185 jobs, both inside and outside her field. Table 1, C.A. McCoy Opening Br. at 47-56; ROA.182-187, 189-193, 195-209, 213-235, 363-364, 366, 370-375, 377-430, 782-783. Despite these efforts, she could not find steady employment. ROA.68, 782.

2. In 2016, at the age of 60 and with no employment prospects in sight, Ms. McCoy filed for bankruptcy. She moved to discharge her student loan debt soon after. By the time of her filing, the $174,947 she had borrowed to complete her degree had nearly doubled with interest. ROA.152-180.

In 2017, the Bankruptcy Court held a trial on Ms. McCoy's request to discharge her student loan debt. Pet. App. 18a-22a, ROA.25-79. Noting that Ms. McCoy qualified for Income Based Repayment (a repayment plan that caps monthly payments at a percentage of income)[3] and had "recently gotten some part-time employment," the court believed it was "possible" that Ms. McCoy might find "better employment" in the future. Pet. App. 10a, ROA.78. It accordingly concluded that Ms. McCoy could not satisfy *Brunner*'s second prong and denied her discharge request. Pet. App. 20a-22a, 12a.

3. The District Court affirmed. Pet. App. 17a. Relying on Fifth Circuit precedent applying *Brunner*,

[3] The Bankruptcy Court emphasized that Ms. McCoy qualified for a periodic payment of zero dollars at the time of trial because her income was so low.

the court noted that a debtor must show "a total incapacity" to repay her debts in the future due to circumstances that "were not present when [she] applied for the loans at issue or have since been exacerbated." Pet. App. 13a, 16a. It held that, because Ms. McCoy had taken out loans, earned her Ph.D. degree, and secured part-time work *after* the traumatic events she cited as evidence of her inability to pay, the Bankruptcy Court had not erred in finding against her under *Brunner*'s second prong. Pet. App. 15a-17a.

4. The Fifth Circuit affirmed, holding that the District and Bankruptcy Courts applied the correct standard and had not erred in concluding that Ms. McCoy could not "prove a total incapacity in the future to pay [her] debts." Pet. App. 5a.[4]

5. The Fifth Circuit denied rehearing en banc. Pet. App. 23a-24a.

[4] Because it viewed *Brunner*'s second prong as dispositive, the Fifth Circuit declined to address the "impact of a zero-dollar monthly payment under an income-based repayment plan on the first prong of *Brunner*." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. The Entrenched Circuit Split Regarding Which "Undue Hardship" Test To Apply Is Worthy Of This Court's Review.

A. The Question Presented is the subject of a persistent and acknowledged split among the courts of appeals.

1. The decision below is the product of a clear and acknowledged split in the courts of appeals. The Bankruptcy Code requires debtors to show an "undue hardship" to discharge student loan debt, 11 U.S.C. § 523(a)(8), but courts apply dramatically different tests to determine whether that standard is satisfied.

In *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), the Second Circuit first adopted a three-part test, which other circuits, including the Fifth Circuit in the decision below, have since come to apply. Pet. App. 3a-4a; *In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Frushour*, 433 F.3d 393, 400 (4th Cir. 2005); *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003); *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *In re Pena*, 155 F.3d 1108, 1114 (9th Cir. 1998); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re Cox*, 338 F.3d 1238, 1240 (11th Cir. 2003). Applying the *Brunner* test, these courts allow student loan debt to be discharged only if the debtor can show "(1) that [she] cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that [she] has made good faith efforts to repay the loans." *Brunner*, 831 F.2d at 396.

By contrast, the Eighth Circuit considered and rejected the *Brunner* test, deciding that the statute calls for a holistic evaluation of the "totality of the circumstances" to determine whether discharge would be appropriate. *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The First Circuit, while not formally committed to either approach, has acknowledged the split, and courts within that circuit predominantly apply the totality approach. *In re Nash*, 446 F.3d 188, 190, 192 (1st Cir. 2006); *In re Bronsdon*, 435 B.R. 791, 797-98 (B.A.P. 1st Cir. 2010).

Courts applying the totality approach consider and balance the full spectrum of a borrower's relevant circumstances in considering a discharge of her student loan debt, including: "(1) [her] past, present, and reasonably reliable future financial resources; (2) … [her] and her dependents' reasonable necessary living expenses; and (3) *any other relevant facts and circumstances* surrounding each particular bankruptcy case." *Long*, 322 F.3d at 554 (emphasis added).

2. Courts of appeals on both sides of this conflict have acknowledged the division in the circuits and expressly rejected each other's views. The Eighth Circuit rejected *Brunner* in favor of its totality test in 2003. *Long*, 322 F.3d at 553; *see also Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 779 (8th Cir. 2009). And courts of appeals adopting and applying

Brunner after *Long* have recognized that other courts follow the totality approach, but they continue to apply *Brunner* instead. *In re Thomas*, 931 F.3d 449, 454-55 (5th Cir. 2019); *Frushour*, 433 F.3d at 400; *Polleys*, 356 F.3d at 1307-09; *Cox*, 338 F.3d at 1241.

Lower courts in nearly every circuit have also acknowledged the division. *E.g.*, *In re Hicks*, 331 B.R. 18, 23 (Bankr. D. Mass. 2005); *In re Wells*, 380 B.R. 652, 657-58 & n.7 (Bankr. N.D.N.Y. 2007); *In re Hamilton*, 361 B.R. 532, 549 (Bankr. D. Mont. 2007); *In re Mandala*, 310 B.R. 213, 220-21 (Bankr. D. Kan. 2004). The federal government has also referenced the split and its potential to lead to divergent outcomes, acknowledging in 2006 that the Court should wait to resolve this split until the separate positions could be "clarified" and "ascertained." Brief for the Federal Respondent in Opposition at 12-13, *Educ. Credit Mgmt. Corp. v. Reynolds*, 549 U.S. 811 (2006) (No. 05-1361), 2006 WL 2136239, at *12-13.

Even within the circuits that follow *Brunner*, the stated adherence to that test "has only given the illusion of consistency despite actual differences in its substance and application." *Hicks*, 331 B.R. at 30. Most courts applying *Brunner* demand a heightened showing under the second prong, requiring the debtor to establish a "certainty of hopelessness" or "total incapacity" to repay her student loan debt throughout the remainder of the repayment period. *See In re Brunner*, 46 B.R. 752, 755, 758 (S.D.N.Y. 1985), *aff'd sub nom. Brunner*, 831 F.2d 395; *In re Brightful*, 267 F.3d 324, 328 (3d Cir. 2001); *Frushour*, 433 F.3d at 401; *Oyler*, 397 F.3d at 386; *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *In re Mosley*, 494 F.3d

1320, 1326 (11th Cir. 2007). The Fifth Circuit is among this group, requiring debtors to show "a total incapacity ... in the future to pay [their] debts for reasons not within [their] control." *Gerhardt*, 348 F.3d at 92; *see* Pet. App. 5a. Some of these courts have gone so far as to require, as part of *Brunner*'s second prong, that debtors prove repayment would "strip[them] of all that makes life worth living." *In re Courtney*, 79 B.R. 1004, 1011 (Bankr. N.D. Ind. 1987) (quoting *In re Frech*, 62 B.R. 235, 243 (Bankr. D. Minn. 1986)).

The remaining *Brunner* jurisdictions, by contrast, do not require consideration of these "separate burden[s]" in evaluating a debtor's future hardship. *See In re Mason*, 464 F.3d 878, 882 (9th Cir. 2006); *Polleys*, 356 F.3d at 1310 (expressly declining to require debtors to show a "certainty of hopelessness").[5]

3. The split in the circuits has persisted for nearly two decades, and nothing suggests it will resolve itself, despite efforts to persuade courts of appeals to reconsider *Brunner*. Although "[a] crescendo of courts" have criticized *Brunner*'s framework as "too narrow" and "no longer reflect[ing] reality," *In re*

[5] One Seventh Circuit panel has remarked on the "certainty of hopelessness" standard's lack of textual grounding, observing that it "sounds more restrictive than the statutory 'undue hardship.'" *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (7th Cir. 2013). But to no avail: Bankruptcy courts within the Seventh Circuit still mandate that showing. *See, e.g.*, *In re Bukovics*, 2019 WL 2067374, at *6 (Bankr. N.D. Ill. May 8, 2019); *In re Platt*, 2018 WL 8367716, at *6 (Bankr. S.D. Ind. May 3, 2018), *subsequently aff'd sub nom. Platt v. United States*, 775 F. App'x 253 (7th Cir. 2019).

Nightingale, 543 B.R. 538, 544 (Bankr. M.D.N.C. 2016) (citing cases), the circuit split has only solidified. *See also, e.g.*, *In re Ng-A-Qui*, 2015 WL 5923363, at *4 n.2 (B.A.P. 9th Cir. Oct. 9, 2015) (citing similar criticisms); *In re Roth*, 490 B.R. 908, 920, 923 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) (calling on Ninth Circuit to "reconsider its adherence to *Brunner*" and instead adopt the totality approach).

Despite ample opportunities, no circuit has taken steps to resolve the split. At least four circuits have denied petitions to take the issue en banc, including courts on both sides of the issue and the Fifth Circuit below. *See In re Faish*, 72 F.3d 298 (3d Cir. 1995), en banc pet. denied Jan. 16, 1996; *In re Spence*, 541 F.3d 538 (4th Cir. 2008), en banc pet. denied Aug. 26, 2008; Pet. App. 23a-24a; *In re Reynolds*, 425 F.3d 526 (8th Cir. 2005), en banc pet. denied Jan. 26, 2006. These and other circuits now regularly dispose of student loan bankruptcy cases with unpublished opinions, even where the debtor challenges the choice of the standard applied by the circuit, given the now-entrenched nature of the split. Pet. App. 2a-4a; *Williams v. U.S. Dep't of Educ.*, 752 F. App'x 363, 364 (7th Cir. 2019), *reh'g denied* (Feb. 21, 2019); *In re Acosta-Conniff*, 686 F. App'x 647, 648 (11th Cir. 2017); *In re Lepre*, 530 F. App'x 121, 123 (3d Cir. 2013).

B. The competing "undue hardship" tests contrast sharply and produce different outcomes.

The two competing standards for evaluating § 523(a)(8)'s "undue hardship" exception—*Brunner* and the totality test—diverge dramatically. Under

Brunner, a debtor must satisfy all three prongs of a rigid test to obtain discharge: "[I]f the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends and the student loan is not dischargeable." *Long*, 322 F.3d at 554. The totality standard, by contrast, treats no single factor as dispositive, instead reflecting "a less restrictive approach" that allows courts to "examine[] … the unique facts and circumstances that surround [each] particular bankruptcy." *Id.*

The Eighth Circuit has expressly acknowledged that its totality approach is "less restrictive" than the *Brunner* test, finding that a flexible approach is more consistent with the language and purpose of § 523(a)(8). *Id.* Other courts, too, have explained how the different tests produce different results. To take just one example, in *In re Armstrong*, a bankruptcy court in the Seventh Circuit acknowledged that under a totality approach, the facts of that case could "constitute a hardship that is undue" where a 65-year-old debtor could be paying back the nondischargeable debt for the rest of his life. 2011 WL 6779326, at *9 (Bankr. C.D. Ill. Dec. 27, 2011). But the court was bound to apply the "more restrictive *Brunner* test," which "does not clearly admit such an exception" to permit an "undue hardship" discharge based on the debtor's age. *Id.*; *see also, e.g.*, *In re Kelly*, 312 B.R. 200, 207 (B.A.P. 1st Cir. 2004) ("Under *Brunner*, the Debtor's failure to make a good faith effort to repay the loans would result in a conclusion of nondischargeability. Under the totality of circumstances approach, [it] is an additional factor to be weighed, but not necessarily a determinative factor."); *In re Denittis*, 362 B.R. 57, 63 (Bankr. D.

Mass. 2007) (same). Accordingly, the outcome will often turn on which standard the bankruptcy court employs.

Commentators, too, have noted a meaningful difference in outcomes depending on which test is applied. *See, e.g.*, 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, 315, 329 (2016) (finding, in a nine-year study of the First and Third Circuits, that "[d]ebtors in the First Circuit [which primarily uses the totality standard] were more than twice as likely as debtors in the Third Circuit [which uses only *Brunner*] to secure a discharge through an undue hardship determination"). Thus, in many cases (including this one, *see infra* § IV), whether a debtor is granted a fresh start or strapped with a lifetime of debt will turn on where she happens to file for bankruptcy.

II. The Totality Test, Unlike The *Brunner* Test, Is Grounded In The Statute's Text And Furthers Its Purpose.

Brunner improperly imposes a rigid superstructure on statutory text that calls for discretion and flexibility. It also undermines Congress's purpose in creating an exception to non-dischargeability in the first place. The Court should adopt the totality test to correct this misinterpretation of the statute and eliminate *Brunner*'s artificial limitations on circumstances that can be considered in assessing "undue hardship."

A. Section 523(a)(8) permits the discharge of student loan debt if paying it "would impose an undue hardship on the debtor and the debtor's dependents." Because the Bankruptcy Code does not define "undue hardship," that term must take its "ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). "Undue" means "[g]oing beyond what is appropriate, warranted, or natural; excessive"; "hardship" means "extreme want or privation." Oxford English Dictionary 1010, 1114 (2d ed. 1989). Thus, an "undue hardship" is an "extreme want or privation" that is "excessive" under the circumstances.

This statutory language "d[oes] not draw bright lines." *Roth*, 490 B.R. at 923 (Pappas, J., concurring). Rather, it gives bankruptcy courts "the flexibility to make fact-based decisions in individual cases about the need for student loan debt relief." *Id.* In a word, § 523(a)(8) confers "discretion." *Long*, 322 F.3d at 554.

Brunner's three-part test is incompatible with the flexible standard that Congress imposed. *Brunner* imposes artificial and unsupportable constraints on the exercise of discretion, barring courts from attending to "[e]quitable concerns or other extraneous factors"—even those which are central to the debtor's overall circumstances—if they are "not contemplated by [its] framework." *In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995); *see supra* § I.B (discussing *Armstrong*); *see also, e.g.*, *In re Reynolds*, 425 F.3d 526, 534 (8th Cir. 2005) (affirming discharge under the totality approach "because of the effect of the debts on [the debtor's] mental health").

This Court has not hesitated to excise judicially imposed constraints on open-ended statutory standards, even when those inflexible constraints have become widely accepted among lower courts. In *Octane Fitness*, for example, the Court considered the proper interpretation of § 285 of the Patent Act, which authorizes a district court to award attorney's fees to the prevailing party in "exceptional" circumstances. 572 U.S. at 553. Like the Fifth Circuit in this case, the Federal Circuit used a time-worn multiprong test to determine whether a patent case was "exceptional." This Court reversed. Where statutory text is "patently clear" and "imposes one and only one constraint on [lower] courts' discretion"—as § 523(a)(8) does here—applying an "unduly rigid" multipart test "impermissibly encumbers [that] statutory grant of discretion to [lower] courts." *Id.* When faced with "statutory text that is inherently flexible," lower courts should not "superimpose[] an inflexible framework"; instead, they should take a "holistic, equitable approach" that includes a "case-by-case exercise of their discretion, *considering the totality of the circumstances*." *Id.* at 550, 554, 555 (emphasis added); *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931-32 (2016) (similarly overturning the Federal Circuit's "unduly rigid" two-part test for enhanced damages where the statute "clearly connotes discretion" and provides "no precise rule or formula" to limit it).

In addition to *Brunner*'s structural rigidity, its specific requirements are devoid of textual support. To satisfy *Brunner*'s second prong, for example, a debtor in the Fifth Circuit must show "a total incapacity in the future to pay [her] debts for reasons not

within [her] control." Pet. App. 5a (quoting *In re Gerhardt*, 348 F.3d 89, 92 (5th Cir. 2003)). Other circuits use different but equally dire language to apply the same heightened standard, requiring debtors to prove a "certainty of hopelessness." *See supra* § I.A. These extreme requirements have "resulted in a climate in which it seems 'no educational loan could ever be discharged.'" *In re Nightingale*, 543 B.R. 538, 545 (Bankr. M.D.N.C. 2016) (quoting *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013)). These formulations are simply "not supported by the text of § [5]23(a)(8)." *Hicks*, 331 B.R. at 28. Under the statutory text Congress enacted, the debtor need not demonstrate a "certainty of hopelessness" to repay her loans; she must demonstrate only that repaying them would cause an "undue hardship." *Id.*; *see also In re Bronsdon*, 435 B.R. 791, 799-800 (B.A.P. 1st Cir. 2010) (same).[6]

B. *Brunner* is also inconsistent with Congress's underlying purpose of allowing deserving debtors a fresh start and permitting the discharge of student loans in appropriate circumstances. Before 1978, student loan debt could be discharged in bankruptcy, just like any other unsecured debt. *In re Johnson*, 218 B.R. 449, 451 (B.A.P. 8th Cir. 1998). However, some members of Congress became concerned about "recent college graduates [who] were filing for bankruptcy to rid themselves of student loan obligations 'on the eve of a

[6] *Brunner*'s third prong—which requires debtors to show a "good faith" effort to repay their loans, *see* Pet. App 12a—likewise lacks clear grounding in the statutory text. *See, e.g.*, *In re Crowley*, 259 B.R. 361, 367 (Bankr. W.D. Mo. 2001); *Hicks* 331 B.R. at 28-32.

lucrative career.'" *Hicks*, 331 B.R. at 22. To close this perceived loophole, Congress enacted what was later codified as § 523(a)(8). *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549. The legislation's dual purpose was "to rescue the student loan program from insolvency, and to prevent abuse of the bankruptcy process by undeserving student debtors." *Hicks*, 331 B.R. at 22 (internal brackets and quotation marks omitted).

Under the 1978 legislation, a debtor was required to show "undue hardship" only if she sought a discharge within five years of the start of her loan's repayment period. After that, her debt would once again be fully and unconditionally dischargeable in bankruptcy. Higher Education Act in the Education Amendments Act of 1976, Pub. L. No. 94-482 (codified at 20 U.S.C. § 1087-3 (1976)). By creating a narrow window of nondischargeability, the legislation closed the perceived loophole in a manner that was consistent with the Bankruptcy Code's broader goal of "providing a 'fresh start' for the honest but unfortunate debtor," *Polleys*, 356 F.3d at 1308, and the Federal Student Loan Program's goal of "encourag[ing] educational endeavors," Nat'l Bankr. Review Comm'n, *Bankruptcy: The Next Twenty Years*, § 1.4.5 (Oct. 20, 1997).

Over the next twenty years, Congress expanded the scope of the "undue hardship" exception. It first extended the window of time during which an "undue hardship" showing was necessary for discharge—increasing it from five to seven years in 1990, *see* Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789, 4964-65, before extending it indefinitely in

1998, *see* Higher Education Amendments Act of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837. Later, in 2005, Congress expanded the scope of § 523(a)(8) to include private student loans not made or guaranteed by the Federal Government. *See* Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8)(B) (2012)). Thus, after 2005, the only way for a debtor to discharge any type of student loan at any time was by showing an "undue hardship."

As Congress expanded the scope of § 523(a)(8), the *Brunner* test spread through multiple circuits, which, over time, ratcheted up its requirements to such "mythic proportions" that, today, "most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans." *In re Rosenberg*, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020). The upshot is that, at a time when § 523(a)(8) covers more borrowers than ever before, *Brunner* has made the discharge for "undue hardship" all but unattainable: *Brunner*'s rigid structure and heightened standards prevent the bankruptcy abuses Congress aimed to curb in its original 1977 legislation, to be sure, but only by "constrain[ing]" courts "to deny discharge under even the most dire circumstances." *Polleys*, 356 F.3d at 1308. This was never Congress's intent.

C. None of these concerns apply to the totality-of-the-circumstances approach to "undue hardship." That test tracks more faithfully the plain language of the statute, which asks whether repayment would create an "extreme want or privation" that would be "excessive" under the circumstances. Oxford English

Dictionary 1010, 1114 (2d ed. 1989). On this approach, "if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged." *Long*, 322 F.3d at 554-55. Because there are no dispositive factors, this approach also is not "unduly rigid, … impermissibly encumber[ing] the statutory grant of discretion to [lower] courts," *Octane Fitness*, 572 U.S. at 553, and it eliminates atextual requirements like "total incapacity" or a "certainty of hopelessness." Indeed, the Eighth Circuit adopted the totality approach specifically *because* it invites courts to exercise the "inherent discretion" § 523(a)(8) grants but *Brunner* eliminates. *Long*, 322 F.3d at 554.

The totality test also advances the legislative purpose of the statute in a manner that is consistent with the goals of both the Bankruptcy Code and the Federal Student Loan Program. Like *Brunner*, the totality approach erects a high barrier to discharging student loans, and so serves Congress's dual aims of protecting the solvency of the student loan program and preventing abuses of the bankruptcy system by undeserving debtors. *Hicks*, 331 B.R. at 22, 32. Unlike *Brunner*, however, it meets these goals without abandoning those honest debtors who will suffer a genuine "undue hardship" if their loans are not discharged.

III. The Question Presented Is Important And Recurring, And Now Is The Time To Resolve It.

Student loan discharge has been an issue of national importance since Congress began treating certain types of educational debt as nondischargeable in the late 1970s. But as New York's Attorney General recently observed in an amicus brief criticizing *Brunner*, "[t]he state of student loans has dramatically changed over the last thirty years," creating "a nationwide student loan debt crisis in the United States that harms both individual households and state and local economies." Brief for the N.Y. State Dep't of Fin. Servs. as Amicus Curiae at 5, *In re Rosenberg*, No. 20-cv-688 (S.D.N.Y. July 3, 2020).

"Average tuition prices have more than doubled at U.S. colleges and universities over the past three decades …." Jennie H. Woo & Erin Dunlop Velez, *Stats in Brief: Use of Private Loans by Postsecondary Students: Selected Years 2003-04 Through 2011-12*, Nat'l Ctr. for Educ. Statistics 1 (2016).[7] During that time, public funding for higher education has declined. State Higher Educ. Exec. Officers Ass'n, *State Higher Education Finance: FY 2019*, at 21, 34 (2019) (per capita funding down 8.7% from pre-2008 levels).[8] As a result, the number of students who rely on loans to access higher education has steadily grown, from 28 million in 2007 to 43 million (or roughly one-fifth

[7] https://tinyurl.com/ydza2kk5.

[8] https://tinyurl.com/y6knbmxu.

of the country's adult population) today. U.S. Dep't of Educ. Office of Federal Student Aid, *Federal Student Loan Portfolio: Federal Student Aid Portfolio Summary*.[9] Many of those borrowers cannot "realistically" make their loan payments "while still providing for the basic needs of [themselves] and [their] household[s]." Kevin M. Lewis, *Bankruptcy and Student Loans*, Congressional Research Service 1 (2019) (internal quotation marks omitted).

These trends help explain the dramatically increased default rates among today's student borrowers. *See* Jennie H. Woo et al., *Repayment of Student Loans as of 2015 Among 1995-96 and 2003-04 First-Time Beginning Students*, Nat'l Ctr. for Educ. Statistics 16 (2017) (finding 50% increase in 12-year default rate between 2007 and 2015).[10] Faced with massive debt and limited job prospects, these borrowers will be forced to turn to bankruptcy courts for relief in numbers unseen in any prior generation. It is imperative that, when they do, those courts apply consistent standards to determine who will, and who will not, receive the "fresh start" the Bankruptcy Code is meant to provide. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). The need for both clarity and consistency has never been greater.

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[9] https://tinyurl.com/yawd2wr4.

[10] https://tinyurl.com/y7tqjusd.

IV. Ms. McCoy's Case Presents An Excellent Vehicle To Resolve The Question Presented, Especially Because The Use Of The *Brunner* Test Was Likely Outcome-Determinative.

The courts below applied the *Brunner* test to determine whether Ms. McCoy demonstrated an "undue hardship" and found that Ms. McCoy was ineligible for discharge under *Brunner*'s second prong because she failed to prove a "total incapacity" to repay her student loan debt in the future. *See supra* 7-8. Ms. McCoy expressly took issue with the *Brunner* framework in both her Opening Brief before the Fifth Circuit and her Petition for Rehearing En Banc. C.A. McCoy Opening Br. at 38-41; C.A. Reh'g Pet. at 5, 11-14. The question is thus fully preserved for this Court's review.

The lower courts' application of the *Brunner* test rather than the totality test was likely outcome-determinative for Ms. McCoy. In denying relief under *Brunner*'s second prong, the lower courts focused exclusively on Ms. McCoy's eligibility for income-based repayment and her prospects of obtaining future employment. The *Brunner* framework foreclosed them from holistically weighing all of her extenuating circumstances—her advanced age, debilitating mental and physical illnesses, and extensive but ultimately fruitless job search—in reaching their decisions. *See supra* 7-8. Moreover, in demanding that Ms. McCoy demonstrate a "total incapacity" to repay her debts in the future, the Fifth Circuit went well beyond what the Eighth Circuit's totality approach would require. Had the bankruptcy court been free to consider the totality of Ms. McCoy's circumstances, it would have

been well within the court's discretion to find that Ms. McCoy's extreme circumstances amount to an undue hardship, permitting a discharge of her student loan debt.

Indeed, Ms. McCoy's circumstances closely resemble those of the debtor in *In re Grimes*, 2013 WL 5592913, at *3 (Bankr. D. Neb. Oct. 10, 2013). There, a bankruptcy court applying the totality approach held that "participation in an income contingent repayment plan … is simply one factor to consider," and concluded that discharge was warranted based on the debtor's "age" (there, 66), unsuccessful job search following a lost job, and poor health. *Id.* Ms. McCoy is of a similar age, engaged in a lengthy but failed job search after finishing school, and suffers from a host of mental and physical disabilities. Had a bankruptcy court been permitted properly to exercise the discretion granted by § 523(a)(8) to consider all her circumstances, untethered by the rigid three-part *Brunner* test, Ms. McCoy likely would have obtained a more favorable outcome.

This case thus exemplifies how a debtor's fate ultimately depends, not on the nature of her circumstances or her individual degree of hardship, but instead on the jurisdiction in which she resides. That cannot be squared with the constitutional mandate of a "uniform" bankruptcy law. This Court should grant certiorari to make the discharge of student loan debt available to all debtors who can demonstrate "undue hardship," regardless of where in the country they happen to live.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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