No. 18-56300

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CHRISTOPHER OLE MUNCH,
Debtor.

CHRISTOPHER OLE MUNCH,
Debtor/Appellant,

– v. –

EDUCATION CREDIT MANAGEMENT CORP.; and
U.S. DEPARTMENT OF EDUCATION,
Appellees.

On Appeal from the United States District Court
For the Central District of California
Case No. 2:16-cv-01684-RAJ

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Munch v. Educ. Credit Mgmt. Corp. et al., No. 18-56300

Pursuant to Fed. R. App. P. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, make the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **Jeremy W. Faith, Chapter 7 Trustee**

This 3rd day of December, 2019.

/s/ Erika Heath
Erika A. Heath
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 courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization, with approximately 2,500 consumer bankruptcy attorney members. NACBA advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized to protect the rights of consumer bankruptcy debtors. NACBA files *amicus curiae* briefs in various cases seeking to protect those rights. *See, e.g., Am.'s Servicing Co. v. Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc).

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. At $1.48 billion, the amount of student loan debt outstanding is eclipsed only by mortgage debt. Yet, the treatment of student loans in bankruptcy courts is widely inconsistent, and often needlessly harsh to honest but unfortunate debtors

seeking a fresh start. This treatment is amplified by the basic fact that debtors most likely to meet the "undue hardship" standard to obtain a student loan discharge are the ones least likely to afford counsel to litigate the matter against the federal government. The proper standard for analyzing "undue hardship" discharge thus has far-reaching implications for student loan borrowers nationally.

AUTHORSHIP AND FUNDING OF AMICI BRIEF

Pursuant to Fed.R.App.P. 29(c)(5), no counsel for a party authored this brief wholly or partially, and no person/entity other than NACBA, its members, NCBRC, and their counsel made any monetary contribution toward the preparation/submission of this brief.

SUMMARY OF ARGUMENT

The oft-cited principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S.Ct. 1829, 1838 (2015). Unfortunately, that fresh start is unavailable to millions of struggling but honest student loan debtors. That struggle is often needless.

Congress authorized the discharge of student loans in bankruptcy. The discharge is limited, but should not be impossible to obtain. In order to obtain discharge of student loan indebtedness, borrowers must take the extra step of showing that repayment would impose an "undue hardship." 11 U.S.C. § 523(a)(8). This limit was, and is, targeted at a specific form of perceived abuse. Congress was concerned about professionals obtaining expensive degrees and starting lucrative careers, only to discharge their student loan debt shortly after graduation.

The concern about this limited set of abusive borrowers guided the *Brunner* Court when designing the prevailing "undue hardship" standard. *See In re Brunner (Brunner I)*, 46 B.R. 752, 754 (S.D.N.Y. 1985); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). This standard, however, was flawed from the start. *Brunner I* recognized the lack of a statutory basis for the "draconian" test it created, but cited now-obsolete policy concerns to support the test anyway. Further, the severity of its test was mitigated by the then-

automatic discharge of student loans after five years. But the judicial gloss of *Brunner* and its progeny makes little sense in today's world.

Munch's case illustrates *Brunner*'s flaws— both with its application and with the test itself. By any realistic measure, there is no possibility of Munch repaying a growing balance of over $300,000 in student debt – even at his highest earnings potential. Nevertheless, the bankruptcy court determined he could not – as a matter of law – prove any set of facts showing "undue hardship." This decision misapplied the Ninth Circuit's version of *Brunner*. That error highlights how *Brunner* lends itself to misapplication and inconsistent results – often locking courts into the fiction that debtors like Munch will be capable of repaying such monumental debts.

The result is Munch will never obtain his needed fresh start.

ARGUMENT

Congress authorized the discharge of student loans in bankruptcy. The discharge is limited, but it should not be impossible to obtain.

To discharge student loans, borrowers must take the extra step of showing repayment would impose an "undue hardship." 11 U.S.C. § 523(a)(8). This Circuit has adopted *Brunner*, requiring debtors to establish: (1) they cannot presently maintain a "minimal" standard of living if forced to repay the loans; (2) "additional circumstances" indicate the state of affairs is likely to persist; and (3) "good faith"

efforts to repay the loans. *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111-12 (9th Cir. 1998). The court below misapplied these second and third prongs.

Moreover, Munch's case highlights major flaws with *Brunner*– and how outdated it has become. This Court should take this opportunity to answer the growing call of bankruptcy courts nationwide to revisit *Brunner* in light of the great changes occurring since the decision.

I. THE *DE NOVO* STANDARD OF REVIEW.

As a threshold matter, a bankruptcy court's summary judgment is reviewed *de novo*. *Racusin v. Am. Wagering, Inc.*, 493 F.3d 1067, 1071 (9th Cir. 2007). So reviewed, the decision of the court below cannot stand.

II. THE BANKRUPTCY COURT MISAPPLIED THE SECOND *BRUNNER* PRONG.

The bankruptcy court misapplied the second *Brunner* prong in two ways. First, while it predicted Munch's financial situation could improve, it ignored whether it would improve sufficiently for him to repay approximately $300,000 in student loans. Clearly, he will not afford that anytime in the foreseeable future. Second, in making that prediction, the court overlooked that Munch need only establish his future income prospects by a preponderance of the evidence.

A. The "Additional Circumstances" Need Not Be Extraordinary.

The *Brunner* Court originally imposed this "additional circumstances" requirement to provide guidance as to one's future income. Otherwise, as *Brunner* recognized, "[p]redicting future income is… problematic." *Brunner*, 831 F.2d at 396. By requiring "additional circumstances," bankruptcy courts can evaluate identifiable facts "strongly suggestive of continuing inability to repay over an extended period of time." *Id*.

Because the point of "additional circumstances" is guidance, they need not "be 'exceptional' in the sense that the debtor must prove a serious illness, psychiatric problems, disability of a dependent, or *something* which makes the debtor's circumstances more compelling than that of an ordinary person in debt." *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 946-47 (9th Cir. 2006). Instead, they are simply objective factors that can assist with financial predictions, such as:

> (1) Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; (2) The debtor's obligations to care for dependents; (3) Lack of, or severely limited education; (4) Poor quality of education; (5) Lack of usable or marketable job skills; (6) Underemployment; (7) Maximized income potential in the chosen educational field, and no other more lucrative job skills; (8) Limited number of years remaining in the debtor's work life to allow payment of the loan; (9) Age or other factors that prevent retraining or relocation as a means for payment

> of the loan; (10) Lack of assets, whether or not exempt, which could be used to pay the loan; (11) Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; [and] (12) Lack of better financial options elsewhere.

Nys, 446 F.3d at 947. These factors – very few of which are extraordinary – help illustrate the kinds of unexceptional, objective circumstances that guide these "problematic" predictions.

B. Debtors Must Show Future Inability To Repay Only By A Preponderance Of The Evidence.

Nondischargeability proceedings are decided by the civil preponderance of the evidence standard.

Importantly, the proper standard of proof in this analysis is often described as "confusing," largely because of language used by *Brunner* and its progeny. *See Carnduff v. U.S. Dep't of Educ. (In re Carnduff)*, 367 B.R. 120, 128 (B.A.P. 9th Cir. 2007). For example, the *Nys* Court adopted Brunner's language requiring a "certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Nys,* 308 B.R. at 443. "Even though this language could be interpreted to require absolute certainty that a debtor's financial situation will not improve, this is not so. Rather, only a preponderance of the evidence standard applies." *Carnduff*, 367 B.R. at 128-30. Thus, "the relevant facts must be shown

to be more likely true than not." *United States v. Montano*, 250 F.3d 709, 713 (9th Cir. 2001).

Two aspects of the bankruptcy court's decision suggest it applied a much higher standard. First, the court took issue with the supposed lack of corroborating testimony or medical evidence for munch's health conditions. SER024 (citing *Burton v. Educ. Credit Mgmt. Corp.*, 339 B.R. 856, 874 (Bankr. E.D. Va. 2006)). Yet, it is well-established medical experts are unnecessary for debtors to meet their burden. *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1325 (11th Cir. 2007) ("requiring corroborating evidence when the debtor cannot afford expert testimony or documentation 'imposes an unnecessary and undue burden on [the debtor] in establishing his burden of proof.'"); *Pena*, 155 F.3d at 1113 (debtor's testimony, combined with Social Security award related to the condition, was sufficient). Moreover, the bankruptcy court excluded from evidence numerous medical documents that Munch – a *pro se* debtor – had difficulty authenticating. SER024.

Second, some authority relied upon below (and by Appellee) comes from the Third or Fourth circuits. *See* SER024 (citing *Burton*, *supra*); Appellee's Br., 28 (citing *In re Brightful*, 267 F.3d 324, 330 (3d Cir. 2001)). But those circuits have applied different standards. *See In re Spence*, 541 F.3d 538 (4th Cir. 2008) (debtor in her mid-sixties with student loans totaling $161,000 and in low-paying clerical

job failed to show “certainty of hopelessness”); *Brightful*, 267 F.3d at 328 (debtor must prove “a total incapacity . . . in the future” to pay debt). Even the Third Circuit has apparently softened its standard since *Brightful*. *See Coco v. N.J. Higher Educ. Student Assistance (In re Coco)*, 335 F.App'x 224, 227-28 (3d Cir. 2009) (omitting “total incapacity” language). These notorious standards – impossible for even the most destitute debtors – are not applicable in this Circuit, which takes a more practical approach.

The central question under this prong is whether Munch’s financial situation is more likely to improve enough to repay his loans, or not. To the extent the bankruptcy court required a more stringent standard, it erred.

C. The Bankruptcy Court Failed To Consider Whether Munch’s Income Would Increase Enough To Repay The Loan.

Munch faces a variety of hurdles to repay his student loans, including medical conditions, a criminal history, and inadequate education. These hurdles have prevented him from earning enough income to repay these loans. There is no reason to anticipate anything different in the future.

“The issue is not whether Debtors’ financial circumstances are likely to improve *at all* but whether… their income ‘will increase *to a point where they can make payments* and maintain a minimal standard of living.’” *Carnduff*, 367 B.R. at 130 (emphasis in original) (quoting *Nys*, 446 F.3d 946). This predictive “inquiry into future circumstances should be limited to the foreseeable future,” *Educ. Credit*

Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004), and should be based on realistic assumptions, *see In re Conway*, 495 B.R. 416 (B.A.P. 8th Cir. 2013), *aff'd*, 559 Fed. Appx. 610 (8th Cir. 2014) (per curiam) (when present income and income over past eight years indicated inability to pay loan, bankruptcy court erred in assuming, without supporting evidence, possibly greater reliable financial resources in the future).

The *Carnduff* debtors were young, healthy, well-educated people who were unnecessarily resigned to their financial circumstances. As the bankruptcy court described, "there is *no reason why their financial circumstances should not improve,* particularly when their children become of age, and provided they make the effort." *Carnduff*, 367 B.R. at 129. But while finding their financial situation could improve, the court did not believe it could improve very much:

> Now, having said all that, as a practical matter, it appears to me that unless one or both of these debtors wins the lottery, receives a substantial inheritance, finds a gold mine or a treasure trove in the backyard or somehow achieves wealth in some other way, that there is simply no way in which these loans will ever be repaid in full.

Id., 130. Although full repayment would be essentially impossible, the bankruptcy court denied discharge simply because there was *some* room for improvement. In reversing, the B.A.P. focused on how much improvement could reasonably be expected: "Debtors have shown that their future income and expenses will not permit them to pay their *entire* student loan debt without undue hardship." *Id*.

Munch's future prospects are similar to the Carnduffs in a crucial way. Here, the bankruptcy court rejected Munch's "additional circumstances" because they did not previously prevent him from earning income. SER025 ("Munch fails to explain how he was able to work with these [medical] conditions in the past but will be unable to do so in the future;" Munch "successfully obtained a waiver/exemption of the Board's denial and did work in the field of social work" despite criminal record; and "he has been employed almost continuously for the past five years and there is no significantly probative evidence that his medical condition, alleged criminal stigma, or the quality of his education have prevented him from earning a living").

Creating a benchmark based on Munch's prior earnings misses the point. After all, even if Munch's income returned to his highest earnings, he would still be unable to repay even a portion of these loans. As the court found, Munch "earn[ed] an annual salary of over $43,000" at Munch's highest paying job. SER022. But at that level, Munch's net pay "was still insufficient to cover Munch's monthly expenses of $2,765, excluding his student loan payments." SER023. Thus, it is completely irrelevant whether "his medical condition, alleged criminal stigma, or the quality of education have prevented him from earning a living." That living still fell short of "a minimal standard of living if required to repay the loans." *Id.*

Appellee also mischaracterizes the second prong. It argues Munch's evidence does "not support a conclusion that he was totally incapable of working." (Appellee's Br., 30, 33 ("the evidence demonstrated that Munch had been gainfully employed almost continuously for the past five years at the time").) As described above, debtors need not be "totally incapable of working"; this language, lifted from *Brightful*, does not apply here. *See supra*, at 8-9.

The question is whether Munch is likely to increase his income *even further* than he ever has – enough to repay a growing balance of over $300,000 in student loans. Munch's past salary of $43,000 does not begin to address his ability to repay in the foreseeable future. If he reached that income again, he would still be unable to repay his loans.

D. The Bankruptcy Court Did Not Consider The Quality Of Munch's Education.

Appellee raised the quality of his education as an "additional factor," as stated by *Nys*, but the bankruptcy court did not address that issue.

That omission could make a significant difference here, as there is plenty of reason for quality concerns regarding Munch's education. First, Le Cordon Bleu ("LCB"), which Munch attended, was part of an enforcement action brought by 49 state attorneys general for misrepresenting *inter alia* the costs of the program, and the student's job prospects afterwards. Press Release, Iowa Attorney General, *For-profit school to forgo collecting loans, change practices in agreement with Miller*

(Jan. 3, 2019), available at https://www.iowaattorneygeneral.gov/newsroom/for-profit-school-education-cec-career-ags-intercontinental. LCB has since closed its doors.

Further, although the University of Southern California ("USC") may generally be considered a fine school, its social work program is notorious as one of the worst values in higher education. According to the Department of Education's ("DOE") College Scorecard, its graduates enter the work force with a staggering median debt of $115,136, but median earnings less than $50,000 per year.[1] That debt load is "unusually high even though a large majority of the program's students learn online," as most of the student loan money is "funneled to a publicly traded for-profit technology company called 2U, which provides marketing, recruitment, course design, clinical placement and advising services for online graduate programs." Kevin Carey, *Biggest Offender in Outsize Debt: Graduate Schools*, N.Y. TIMES, June 3, 2019, available at https://www.nytimes.com/2019/06/03/upshot/student-debt-big-culprit-graduate-school.html.

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[1] Available at https://collegescorecard.ed.gov/school/fields/?123961-University-of-Southern-California.

The value of Munch's education should be taken into account when evaluating whether repayment of the loans presents undue hardship. *See Nys*, *supra*.

III. THE BANKRUPTCY COURT MISAPPLIED THE "GOOD FAITH" PRONG.

A. Income-Based Repayment Options Are Irrelevant To "Undue Hardship"

In some situations, income-based repayment alternatives can create a "pay-as-[they]-earn[] time bomb" for debtors, leaving them in worse positions, while not having any positive effect on actual repayment. *In re Metz*, 589 B.R. 750, 760 (Bankr. D. Kan. 2018). In such circumstances, the debtor's decision not to enroll in the program should carry little – if any – weight in a "good faith" analysis.

For starters, relying on income-based plans in a *Brunner* analysis creates an impossible paradox for debtors who face "undue hardship." Debtors who truly face "undue hardship" will, by definition, earn low enough income to qualify for one of these repayment plans. Thus, considering these plans under a *Brunner* analysis "would render an absurd result—the more destitute the debtor the less likely the discharge." *In re Morrison*, 2014 Bankr. LEXIS 751, *14 (Bankr. E.D. Wash. Feb. 26, 2014). Congress, in allowing discharges for debtors facing "undue hardship" could not have intended for those same debtors to be barred from proving "undue

hardship" because their income is low enough to qualify them for $0 monthly payments.

Nor could Congress have intended to use income-based repayment plans to deprive the bankruptcy court of its ability to determine "undue hardship." Instead, the argument deflects the court's attention from the true analysis:

> Most troubling about ECMC's attempts to force the Debtor into the [income-contingent] program, however, is that such use of the program removes from this Court's consideration the very issue Congress entrusted to the Court, namely the repayment of the debt would impose an undue hardship. To hold that debtors must participate in the [income-contingent] program, if eligible, would be no more than the Court abdicating its responsibility to determine the dischargeability of a student loan. If this is the outcome Congress intended, it would have said so...

In re Denittis, 362 B.R. 57 (Bankr. D. Mass. 2007); *see also Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett),* 487 F.3d 353 at 364 (6th Cir. 2007) ("Had Congress intended participation in [income-based programs] to effectively repeal discharge under § 523(a)(8), it could have done so."); *In re Crawley*, 460 B.R. 421, 438 (Bankr. E.D. Pa. 2011); *In re Korhonen*, 296 F.R. 492, 496 (Bankr. D. Minn. 2003); *Coplin v. U.S. Dep't of Educ.*, 2017 Bankr. LEXIS 4153, at *25-28 (Bankr. W.D. Wash. Dec. 6, 2017).

Furthermore, the term "income-based repayment" is a misnomer. For lower income borrowers, these programs often do not cover accumulating interest, and thus do not actually "repay" any portion of the principal balance as contemplated

by *Brunner*. *In re Wolfe*, 501 B.R. 426, 436 (Bankr. M.D. Fla. 2013).[2] "[B]ecause such payment plans did not even come close to covering the interest on the loans, the debt load simply grows more burdensome as time passes," *Coll. Assist v. GuBrath (In re GuBrath)*, 526 B.R. 863, 871 (D. Colo. 2014), until the loans are (hopefully) forgiven after 25 years of negative amortization, *see* 34 C.F.R. § 682.215(f). This repayment period is more than double the standard 10-year repayment period of the original loan. *See* 34 C.F.R. § 685.208(b)(1). "This is the antithesis of a fresh start." *In re Booth*, 410 B.R. 672, 676 (Bankr. E.D. Wash. 2009); *see also Metz*, 589 B.R. at 758 (Bankr. D. Kan. 2018) ("The likely long-term consequences to [Debtor] of participating in the income-based repayment programs are also troubling."); *In re Lee*, 352 B.R. 91, 97 (B.A.P. 8th Cir. 2006).

Besides kicking the can down the road for decades, these repayment plans carry other disadvantages, making them inappropriate for especially strapped debtors. For example, not only do the monthly repayment formulas fail to take a debtor's expenses into account, but the DOE could change the formulas to make them less affordable. *See* 34 C.F.R. § 682.215(b). Debtors must also recertify their income annually. 34 C.F.R. § 682.215(e)(1). Recertification may sound like a small burden, but the process is plagued by notorious servicing errors and delays

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[2] Instead, any balance remaining after 25 years is administratively forgiven. 34 C.F.R. § 682.215(f).

that "can lead to payment shock, increased loan costs, and surprise delinquencies for [income-based] borrowers."[3] Throughout this 25-year process, debtors continue to be haunted by debts appearing on their credit reports, as well as the significant emotional and psychological burden of carrying that ever-increasing debt. *See Barrett,* 487 F.3d at 365 n.8; *In re Abney*, 540 B.R. 681, 689 (Bankr. W.D. Mo. 2015); *In re Lamento*, 520 B.R. 667, 679 (Bankr. N.D. Ohio 2014); *Booth*, 410 B.R. at 675.

If debtors navigate all those hurdles and reach the 25-year mark, then they must still overcome final ones. Forgiveness itself may be elusive. For example, public service borrowers in these programs were recently shocked when they reached the 10-year mark for forgiveness, and an astonishing 99% of their applications were denied by the DOE.[4] Congress could take further action to limit the forgiveness available to student borrowers – a palpable concern given congressional attempts to eliminate these programs altogether. *See* H.R. Rep. No. 110-224 (2007) (motion of Representative Diaz-Balart).

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[3] Consumer Financial Protection Bureau, Annual Report of the CFPB Student Loan Ombudsman, at 46 (Oct. 2017), *available at* https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf.

[4] Danielle Douglas-Gabriel, *Education Department rejects nearly all applicants for a student loan forgiveness program*, L.A. TIMES, Apr. 3, 2019, available at https://www.latimes.com/business/la-fi-student-loan-forgiveness-education-department-betsy-devos-20190403-story.html ("Nearly 99% of applications submitted under Public Service Loan Forgiveness have been denied").

Debtors reaching the 25-year mark must also face the Internal Revenue Service, as the cancellation creates a taxable event. 26 U.S.C. § 61(a)(12). "As interest accrues during the 25 years or lesser repayment period, the amount of debt cancelled will be quite large." *Booth*, 410 B.R. at 676. This resulting tax liability, which may also be nondischargeable, *see* 11 U.S.C. § 523(a)(1), can be crushing to debtors who could only afford nominal payments under the plan. Thus, viewing these plans as bankruptcy alternatives means borrowers are forced "effectively to trad[e] one nondischargeable debt for another." *Mosley*, 494 F.3d at 1327 (internal quotations omitted); *see also Barrett*, 487 F.3d at 365; *Coco v. New Jersey Higher Educ. Student Assistance*, 335 F.App'x 224, 228 (3d Cir. 2009); *Wolfe*, 501 B.R. at 436 (such plans "would likely do more harm than good."); *Barrett v. U.S. Dep't of Educ.*, 545 B.R. 625, 633 (Bankr. N.D. Cal. 2016).

Appellee attempts to minimize this potential tax liability by arguing Munch can avoid it if he remains insolvent at the end of the 25-year period. (Appellee's Br., 37.) But that argument undermines Appellee's larger position because the tax liability is avoided only if the debtor remains destitute 25 years in the future. If we could accurately predict such long-term insolvency, then the debtor's financial situation would undoubtedly meet the "undue hardship" threshold.

The court below erroneously placed significant weight on income-based repayment alternatives. Such alternatives would have had no practical effect on

loan repayment, but would have left Munch in a worse position. His decision not to enroll cannot defeat good faith.

B. The Court Erroneously Denied "Good Faith" On Other Considerations.

The bankruptcy court's "good faith" analysis is rife with other errors.

First, although unclear, the court apparently faulted Munch for not making more payments on the loans. SER029. But "the failure to make a payment, standing alone, does not establish a lack of good faith." *Polleys*, 356 F.3d at 1311. The bankruptcy court acknowledged any payment Munch could afford would have only been "modest." The court also found he could not afford repayment even at his highest earnings level.

Second, the bankruptcy court skewed the timing of Munch's bankruptcy against him on summary judgment. As the court described, "Munch filed bankruptcy less than one week after his U.S. Loans entered repayment status." SER031. Munch filed bankruptcy on November 21, 2016, but the court acknowledged he made payments as far back as 2009. For his most recent loans, Munch received a number of deferments, forbearances, and repayment options before resorting to bankruptcy. SER006-7. In contrast, the *Brunner* debtor failed to seek such forbearances or deferrals. *Brunner I*, 46 B.R. at 758. The timing of Munch's bankruptcy petition was not indicative of bad faith – especially viewing these facts most favorable to him.

Finally, Munch has taken substantial efforts to maximize his income, including a voluminous number of job applications. Yet, the bankruptcy court found that he still somehow lacked "good faith" because – in its subjective, hindsight view – he could have done more on his job search, including seeking job counseling or advice from career counseling or spending more hours every day on a job search. SER028-029. Needless to say, hindsight always lends itself to such critique. But the point is that Munch has made a good faith effort to maximize his income. The bankruptcy court went well beyond his own good faith, however, and instead imposed its own subjective values on what else that effort should entail – an error typical under *Brunner*, as described below.

IV. *BRUNNER* IS OUTDATED.

Citing a prominent bankruptcy judge, Appellant asks this Court to reconsider its application of *Brunner*.

This case illustrates just how correct Appellant and Judge Pappas are. The *Brunner* test "is too narrow, no longer reflects reality, and should be revised by the Ninth Circuit when it has the opportunity to do so." *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring). Many other bankruptcy courts across the country have similarly called for *Brunner* to be revisited. *Nightingale v. N.C. State Educ. Assistance Auth. (In re Nightingale)*, 543 B.R. 538, 545 n.3 (Bankr. M.D.N.C. 2016) (the

Brunner "test makes little sense" today); *Wolfe*, 501 B.R. at 433 ("the rigors of the *Brunner* test are no longer appropriate"); *Ng-A-Qui v. Coll. Assist (In re Ng-A-Qui)*, 2015 Bankr. LEXIS 3453, at *12 n.2 (B.A.P. 9th Cir. Oct. 9, 2015).

Indeed, *Brunner* strayed far from the statutory text– a detour amplified in the face of numerous statutory changes and a shifting student loan marketplace. The test is long overdue for retirement.

A. *Brunner* Departed From The Statutory Language Of Section 523(a)(8).

Perhaps *Brunner*'s greatest flaw is its initial departure from the statutory language. As Judge Easterbrook properly noted, "[i]t is important not to allow judicial glosses, such as the language in… *Brunner*, to supersede the statute itself." *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

The statutory command is simple enough: a debtor must prove "undue hardship" to discharge covered educational loans. 11 U.S.C. § 523(a)(8). 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 a matter is significant, as opposed to *de minimis*. Together these words refer to a significant, ongoing condition difficult for the debtor to endure. Read in the context of dischargeability, the language

looks at the present and future financial condition of the debtor and the debtor's dependents and asks 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 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*, *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 considers factors such as "undue hardship," defined 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 review of a debtor's reaffirmation agreements to ensure 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 courts in applying "undue hardship":

> … 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). This test looks solely at income and expenses relative to the payment requirements under the reaffirmed debt. *See, e,g*, *In re Visnicky*, 401 B.R. 61, 63 (Bankr. D. R.I. 2009). Although this is different than dischargeability under section 523(a)(8), there is no escaping that Congress used the identical phrase in both sections of the same statute. At minimum, the presumptive test added in 2005 sheds light on Congress's understanding of the phrase "undue hardship" in a statute with respect to the impact of debt repayment on a debtor.

That phrase, as used for student loans originated from a draft bill proposed by the Commission on the Bankruptcy Laws of the United States. *Polleys*, 356 F.3d at 1306 ("The phrase 'undue hardship' was lifted verbatim from the [Commission's] draft bill…"); *Brunner I*, 46 B.R. at 754. 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 Comm'n on Bankr. H.R.Doc. No. 93-137, Pt. II § 4-506 (1973).

Much like the "undue hardship" language used by Congress in 2005, this 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." It is also devoid of any subjective "good faith" component that examines the debtor's pre-bankruptcy past, such as the debtor's reasons for obtaining the student loans or attempts to repay them.

This "undue hardship" proposal targeted a specific concern of potential abuse. At the time, Congress was worried about "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." H.R.Rep. No. 95-595, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 6094 (emphasis added). There was little doubt at the time who these "few" debtors were – they were professionals, such as doctors and lawyers, who accumulated large amounts of educational debts for expensive degrees, and sought bankruptcy protection before embarking on lucrative careers with those very degrees. As a result, the 1978 bankruptcy overhaul included an exception on the discharge of student loans, which required

recent graduates to show "undue hardship" if they sought discharge within the first five years of repayment. *See* Pub.L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978); *see also Polleys*, 356 F.3d at 1306 ("Section 523(a)(8) was designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings").

For the next decade, until *Brunner* was decided, there was "very little appellate authority on the definition of 'undue hardship…'" *Brunner*, 831 F.2d at 396. The dearth of pre-*Brunner* "undue hardship" cases is understandable, as student borrowers had alternative paths to discharge: (a) just wait five years after repayment and the loans were automatically discharged under Chapter 7, *see* Pub.L. No. 95-598, 92 Stat. 2549, 2591 (1978) (enacting 11 U.S.C. § 523(a)(8)(A)); or (b) file a Chapter 13 instead, *see* Pub.L. No. 101-508, 104 Stat. 1388 (1990) (subsequent amendment to Section 1328, incorporating the 523(a)(8) dischargeability standard into Chapter 13 bankruptcy). The *Brunner* Court itself noted "considerable time has elapsed since the original filing of [her] Chapter 7 proceedings," and that she may have other avenues to relief. *See Brunner*, 831 F.2d at 397. In any event, "undue hardship" applied only to a small subset of student borrowers.

The *Brunner* Court was well aware of these issues when formulating its standard out of whole cloth. Articulating the basis for requiring "additional circumstances," the *Brunner I* Court explained:

> Even more problematic is the calculation of future income. It is the nature of § 523(a)(8)(B) applications that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power. They may, like appellee, have had difficulty in securing employment immediately after graduation. Extrapolation of their current earnings is likely to underestimate substantially their earning power over the whole term of loan repayment.
>
> It is no doubt for this reason that many courts have required more than a showing on the basis of current finances that loan repayment will be difficult or impossible… Stated otherwise, the debtor has been required to demonstrate not only a current inability to pay but *additional circumstances* which strongly suggest that the current inability to pay will extend for a significant portion of the repayment period of the loan.

Brunner I, 46 B.R. at 754-755 (emphasis added). Thus, the entire basis for imposing "additional circumstances" was that "undue hardship" applications were all, by nature at the time, recent graduates – otherwise, their loans were automatically discharged. Although the Code makes no mention of "additional circumstances," the requirement may have served a practical purpose in the limited set of cases under *Brunner*'s umbrella.

The *Brunner I* Court conceded "[t]here is no specific authority for [the good faith] requirement," but similarly looked to the five-year rule to justify its imposition anyway. As the Court described:

> …the need for some showing of this type may be inferred from comments of the Commission report. In discussing the discharge of loans after five years, when a showing of undue hardship is no longer required, the Commission noted that such discharge is fair because the debtor may be unable to repay his or her debts due to "factors beyond his reasonable control." If external circumstances were seen as justifying discharge after five years, it is likely that only such circumstances should be permitted to justify discharge prior to that time.

Id. at 755 (internal citations omitted). Clearly, the five-year discharge window was the underpinning rationale for the "good faith" prong.

The Second Circuit did not engage in any of its own statutory analysis, and instead adopted *Brunner I*'s new standard wholesale. *Brunner*, 831 F.2d at 396-97. But many changes since *Brunner* show how outdated the test has become.

B. Both The Statutory Landscape And The Student Loan Marketplace Are Different Today Than In 1987.

The world of educational lending today is not like 1987 – when *Brunner* created its standard for a small set of borrowers.

The most notable changes are the lack of other avenues for relief in the Bankruptcy Code. As described *supra*, at 25, the Chapter 13 option was eliminated in 1990. Further, the alternative five-year discharge window in Chapter

7, cited by *Brunner I* as justifying both the "additional circumstances" and the "good faith" prongs, was extended to seven years in 1990,[5] and later eliminated as part of the Higher Education Amendments of 1998.[6] With these statutory changes, the underpinnings of *Brunner I*'s "draconian" approach disappeared by 1998.

Moreover, the government has been provided new extraordinary collection tools since the *Brunner* era. Today the federal government is permitted to garnish wages administratively to collect defaulted student loans without a court judgment. 20 U.S.C. § 1095a. The federal government may also offset tax refunds, Social Security, and other government benefits. 31 U.S.C. §§ 3716, 3720A. The six-year statute of limitations for filing collection actions against borrowers from the *Brunner* era, along with all other limitation periods for student loan collection, have been eliminated. 20 U.S.C. § 1091a. These collection tools can thus be used at any time, with the only end point being the borrower's death. 20 U.S.C. § 1091(a)(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.

Today, there is also a pressing need for bankruptcy relief to a large number of student loan borrowers. At the time of *Brunner*, total educational debt was

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[5] Pub.L. No. 101-647, 104 Stat. 4789, 4965 (1990).
[6] Pub.L. No. 105-244, 112 Stat. 1581, 1837 (1998).

approximately $42 billion. *Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 503 B.R. 698, 703 (Bankr. W.D. Wis. 2013). This number has recently reached $1.48 trillion, 10.8% of which was more than 90 days delinquent or in default – high relative to other types of debt.[7] An additional 8.1 million borrowers, representing 18% of all federal student loan borrowers, are enrolled in income-driven repayment plans, suggesting a large number of graduates struggling with repayment.[8] "[S]tudent loan debt is a gigantic issue in the United States." *Edwards v. Educ. Credit Mgmt. Corp. (In re Edwards),* 2016 Bankr. LEXIS 1029, at *13 (Bankr. D. Ariz. Mar. 31, 2016).

The high amount of outstanding student loan debt 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 Bankr. LEXIS 42 (Bankr. E.D. N.C. Jan 12, 2015) (after approximately $39,835 in payments on a $11,202 loan, debtor still owed $27,021 at time of bankruptcy).

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[7] Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (2019:Q2), available at https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf.

[8] Available at https://studentaid.ed.gov/sa/about/data-center/student/portfolio.

C. The Subjective "Good Faith" Test Should Not Be Part Of Any "Undue Hardship" Analysis.

As *Brunner I* recognized, the Code lacks any textual basis for the "good faith" requirement. It has become the most troublesome aspect of *Brunner* – creating inconsistent results.

While initially narrow in scope, the debtor's good faith has seemingly extended to all prongs of *Brunner*. 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); *In re Ivory*, 269 B.R. 890, 911 (Bankr. N.D. Ala. 2001)); 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)).

Significantly, other subsections of section 523 expressly 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 the Code, 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 some other debts.

A subjective inquiry into the debtor's past decisions inevitably leads to inconsistent results. Good faith should not provide the means for student loan creditors and courts to impose their own values on a debtor's decisions and life choices. To the extent there is some role for a good faith inquiry in "undue hardship," it should be limited to questions about honesty regarding the claimed hardship, such as whether debtors have fabricated or fraudulently portrayed hardship. Issues related to good faith in filing bankruptcy are addressed under sections 707(b) or 1325(a)(7).

The subjective "good faith" test is one of many reasons this Court should accept Judge Pappas' invitation to reconsider *Brunner* altogether.

CONCLUSION

For the above reasons, *amici curiae* ask this court to reverse the decision of the bankruptcy court. Not only the court misapply the *Brunner* test as it exists in the Ninth Circuit, but the test should be revisited entirely.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amici hereby states that there are no related cases in this Court.

/s/ Erika Heath
Erika A. Heath
Attorney for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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