No. 15-485

IN THE

Supreme Court of the United States

MARK WARREN TETZLAFF,
Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held, consistent with every court of appeals to consider the question, that a debtor with outstanding educational loans, who has not "made a good faith effort to repay the loans," is not entitled to a discharge of that student debt in bankruptcy.

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INTRODUCTION

The Bankruptcy Code provides that student debt cannot be discharged in bankruptcy unless it would cause "undue hardship" to a debtor to except that debt from the discharge. 11 U.S.C. § 523(a)(8). The term "undue hardship" is not defined by the Code. Most of the courts of appeals to consider the matter have adopted the *Brunner* test—first announced by the Second Circuit in *Brunner* v. *New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam), which looks to whether (1) the debtor would be able to maintain a minimal standard of living while repaying the debt, (2) additional circumstances suggest that this state of affairs is likely to persist, and (3) the debtor has made good-faith efforts to repay the debt.

The Eighth Circuit defines "undue hardship" with a different verbal formulation, using a test that has come to be described as a "totality of the circumstances" test. *See In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981).

While the words used may differ slightly, the substantive considerations on which the courts rely, and the results they reach in comparable cases, are fully in accord. Thus, despite the differing articulations of the standard, there is no true division of authority among the courts of appeals that would warrant this Court's review.

Moreover, even if one could hypothesize a case in which the different formulations might lead to different results, it is crystal clear that *this* is not such a case. Rather, the bankruptcy court's findings of fact—that the debtor has "lied about his employment experience" and focused "his energy … at making excuses for failure … rather than securing appropriate employment," Pet. App. 25a—would undoubtedly bar this debtor from

discharging his student debt under the Eighth Circuit's totality-of-the-circumstances test. The petition should be denied.

STATEMENT

A. Although a general purpose of the Bankruptcy Code is to provide a procedure where honest but insolvent debtors can obtain a "fresh start," the Bankruptcy Code also "limits the opportunity for a completely unencumbered new beginning to the … debtor." *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991) (internal quotation marks omitted). By excepting student loans from discharge, Congress made the policy choice that repaying taxpayers trumped the "'fresh start'" policy. *Cohen* v. *De La Cruz*, 523 U.S. 213, 222 (1998) (quoting *Grogan*, 498 U.S. at 287).

Section 523(a)(8) of the Bankruptcy Code provides that a student loan debt is not dischargeable unless "excepting such debt from discharge … would impose an undue hardship on the debtor and the debtor's dependents." Although the Bankruptcy Code does not define the term "undue hardship," beginning in 1976, Congress has increasingly limited the ability of debtors to discharge their student loan debt through bankruptcy.

In 1976, Congress added a provision to the Higher Education Act of 1965 that barred the discharge of certain educational loans unless either (a) they had been in repayment for over five years (exclusive of any suspension in repayment), or (b) payment would impose an undue hardship on the debtor or his dependents. Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141.

In a series of subsequent legislative enactments, Congress has underscored its policy judgment to sub-

ordinate the debtor's fresh start to the objective of protecting the taxpayer. *See In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003) (per curiam) ("Considering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness."). In 1990, for example, Congress extended the five-year requirement to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4933, 4965 (codified at 11 U.S.C. § 523(a)(8) (1994)). Subsequently, the seven-year provision was eliminated, allowing discharge of loans only in circumstances of a showing of undue hardship for bankruptcies filed after October 7, 1998. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837. Most recently, in 2005, Congress expanded the types of student loans that are subject to § 523(a)(8) and are therefore not dischargeable absent an undue hardship. Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.

B. Because Congress did not explicitly define undue hardship in § 523(a)(8), courts have looked to the legislative purpose for making student loans nondischargeable in construing this provision. All of the courts of appeals that have chosen a method for analyzing "undue hardship" in § 523(a)(8)—with the exception of the Eighth Circuit—have adopted the so-called "*Brunner*" test. *Brunner* v. *New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

Under the *Brunner* test, a debtor claiming "undue hardship" must demonstrate:

> (1) that the debtor 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 the debtor has made good faith efforts to repay the loans.

831 F.2d at 396.

The Seventh Circuit adopted the *Brunner* test more than twenty years ago. *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993). Over the next twenty years, seven other circuits followed suit, adopting *Brunner* as the preferred rubric.[1]

The Eighth Circuit has adopted a different formulation of the test, one that it adopted in 1981, before the Second Circuit's *Brunner* decision and widespread adoption. *See In re Long*, 322 F.3d 549, 554 (8th Cir. 2003) (confirming the previous adoption of the "totality" test in *Andrews*, 661 F.2d at 704).

The totality-of-circumstances test used by the Eighth Circuit is described as (1) the debtor's past, present, and future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant circumstances. *Long*, 322 F.3d at 554. Many factors are considered under the Eighth Circuit's "other relevant circumstances," including maximization of income, efforts to maintain employment and making

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[1] *See In re Faish*, 72 F.3d 298, 305-306 (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 Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998); *Educational Credit Mgmt. Corp.* v. *Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *Cox*, 338 F.3d at 124.

"'a good faith effort to repay those loans.'" *Educational Credit Mgmt. Corp.* v. *Jesperson*, 571 F.3d 775, 782 (8th Cir. 2009) (quoting *Roberson*, 999 F.2d at 1136).[2]

C. Petitioner, Tetzlaff, was 54 at the time he filed his bankruptcy and adversary complaint. The bankruptcy filing followed his failure to pass the bar exam and after moving back to Wisconsin with his parents to in part help take care of his father.[3]

During the 15 years he pursued post-baccalaureate education (from 1990-2005), Tetzlaff earned a M.B.A. from Marquette University, a M.A. in Religion from Trinity International University, and a J.D. from the Florida Coastal School of Law ("FCSL"). Tetzlaff bor-

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[2] Contrary to Tetzlaff's assertion, the First Circuit has not formally adopted any test, finding it unnecessary. Pet. App. 11. The First Circuit stated there was "no need … to pronounce [its] views of a preferred method of identifying a case of 'undue hardship'" because the differing tests urged by each party—totality of circumstances by appellant and *Brunner* by the appellee—both required the debtor to demonstrate that her disability would prevent her from working for the foreseeable future. *See In re Nash*, 446 F.3d 188, 190 (1st Cir. 2006); *see also* Judgment, *Bronsdon* v. *Educational Credit Mgmt. Corp.*, No. 10-9009 (1st Cir. Sept. 23, 2011). While the Bankruptcy Appellate Panel for the First Circuit, in a split decision, endorsed the totality-of-circumstances test as its choice for analysis of § 523(a)(8)'s undue hardship, the First Circuit has declined to do so. *See In re Bronsdon*, 435 B.R. 791, 798 (B.A.P. 1st Cir. 2010). When appealed to the First Circuit Court of Appeals, the panel summarily affirmed, but carefully added that given that the debtor had demonstrated undue hardship under either the totality or *Brunner* tests, "we make no ruling as to which of the two tests is appropriate." Judgment, *Bronsdon*, No. 10-9009.

[3] Tetzlaff tried twice to pass the Illinois bar exam. The first time he left before it was over. The second time, he came very close to passing. Pet. App. 25a. He has not tried since.

rowed the money at issue in this case to fund his M.B.A. and J.D. degrees from 1992 until 2005. Sometime in 2004, Tetzlaff consolidated the loans into one consolidation loan.

Tetzlaff has prior work experience in the employee-benefits industry and in the financial sector. Despite having multiple advanced degrees and many skills, Tetzlaff had worked minimally since graduation.

Tetzlaff filed a Chapter 7 petition and filed an adversary proceeding in 2012—less than seven years after earning his law degree—seeking discharge of his educational debt pursuant to the "undue hardship" exception found in § 523(a)(8). In his adversary complaint, Tetzlaff alleged (following the three prongs of the *Brunner* test) that a discharge was warranted because: (i) he was unable to maintain a minimum standard of living if forced to repay his student loans; (ii) his circumstances would continue to persist; and (iii) he had made a good faith effort to repay the loans.

On May 1, 2014, the bankruptcy court issued an order holding the loans non-dischargeable. Pet. App. 22a-26a. The first *Brunner* prong was not challenged and was found to have been met; that is, the bankruptcy court found that with Tetzlaff's current income, he was unable to pay his student loan debt and maintain a minimum standard of living. It next turned to *Brunner's* second prong, concluding Tetzlaff was unable to establish he would be unable to pay back his student loan debt in the future. In doing so, the bankruptcy court noted that although "the 'certainty of hopelessness' standard … was criticized in dicta in *Krieger*, it was not explicitly overruled." *Id.* 24a. The bankruptcy court then clarified that "even if the lesser standard were ap-

plicable to this case, Mr. Tetzlaff has not met this test." *Id.*

In analyzing Tetzlaff's future ability to repay his student loans, the bankruptcy court's conclusions were based on its credibility determinations of two competing experts (Dr. Ackerman and Dr. Gurka) and Tetzlaff's testimony. As the trier of fact, the bankruptcy court weighed all testimony and concluded Tetzlaff did not establish he was unable to earn more money in the future. The bankruptcy court deemed it significant that Dr. Ackerman's testing was more complete and current than Dr. Gurka's. Pet. App. 24a-25a. The bankruptcy court also noted that Dr. Ackerman tested forensically, not just clinically, and thus found her testimony particularly credible because "[s]uch tests are important when money is at issue because the taker will be motivated to look as bad as possible." *Id.* 25a. This forensic testing revealed that Tetzlaff was likely malingering—as he scored extremely high on the portion of the testing that indicated he was feigning at least some of his symptoms. *Id.* 24a-25a.

The bankruptcy court concluded, thereafter, that even if Tetzlaff continued to be unable to pass a bar exam—a test he came very close to passing on his first committed attempt—or practice law, he would still be able to find work if he put forth some effort. The bankruptcy court touted Tetzlaff's educational accomplishments, intelligence, advanced degrees, and continued good health, stating:

> Even if he is never able to pass a bar exam, he has an MBA, is a good writer, is intelligent, and family issues are largely over. While he has challenges with past alcohol abuse and interpersonal relationships, he is not mentally ill and

> is able to earn a living .... Mr. Tetzlaff's marital problems, personality problems, misdemeanor convictions, care-taking responsibilities, and failure of the bar exams do not meet the level of undue hardship necessary to discharge student loans. They are typical of many bankruptcy debtors.

Pet. App. 25a.

In its discussion of *Brunner*'s third prong—good faith efforts to repay—the bankruptcy court took note of both Tetzlaff's failure to make any payments on the loans at issue as well as the fact that he made payments towards a "loan"[4] directly to FCLS. Though taking note of both, the bankruptcy court found neither dispositive to its overall good faith or undue hardship determination.

Instead, the bankruptcy court's overall concerns regarded Tetzlaff's dishonesty, malingering, and lack of any meaningful effort to work up to his abilities and thereby maximize his income. Pet. App. 24a-25a. The bankruptcy court concluded that "[m]ost of [Tetzlaff's] energy over the last several years has been directed at making excuses for failure—far in excess of what would be reasonable and not very convincing ones" and "[he] has not tried in good faith to work up to his ability." *Id.*

Based on these findings of fact, the bankruptcy court concluded that Tetzlaff had not established that it

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[4] It is unclear from the record whether the payments to FCLS were a loan and subject to § 523(a)(8) or a tuition payment credit plan. Though Tetzlaff characterized it as the former, he simultaneously offered a ledger from FCLS's comptroller to evidence it, not a promissory note, and referred to it as an account with a cap he was able to use before he began to borrow money.

would be an undue hardship for him to repay his student loans.

Tetzlaff appealed this decision to the district court, which affirmed the bankruptcy court. The district court concluded that the bankruptcy judge was entitled, as the trier of fact, to weigh and discount evidence. Pet. App. 6a-7a. The district court held "I cannot upset the bankruptcy judge's finding of no undue hardship, which was reasonable given the evidence presented at trial concerning Tetzlaff's effort to find employment." *Id.* 19a. The bankruptcy court's decision turned on its factual findings that Tetzlaff was feigning psychological symptoms and not trying to work up to his abilities. *Id.* 19a-20a.

The district court noted "the bankruptcy court did not, as Tetzlaff claims, apply the 'certainty of hopelessness' test." Pet. App. 19a. "[T]he bankruptcy judge concluded that Tetzlaff had failed to meet even the lesser standard that he advocated for." *Id.*

On further appeal, the court of appeals again affirmed the bankruptcy court's conclusion that Tetzlaff had failed to establish undue hardship. The court of appeals noted that the evidence presented at trial indicated that "he d[id] not suffer from clinical levels of anxiety or depression" and that he "may, in fact, be exaggerating his symptoms." Pet. App. 6a. The court of appeals observed that Tetzlaff's academic degrees, prior work experience, age, and commendable pro se representation in the case, all indicated he was fully capable of earning a living and that his efforts to maximize his income were insufficient. It also confirmed that Tetzlaff failed to demonstrate any past efforts to pay down his debt. *Id.* 5a-9a.

ARGUMENT

I. THE ALLEGED CIRCUIT SPLIT IS ILLUSORY—THE DIFFERENT VERBAL FORMULATIONS CAPTURE THE SAME PRINCIPLES

A. Despite the different verbal formulations, there is no substantive split between the circuits on how to analyze undue hardship cases. Both the *Brunner* test and the "totality-of-the-circumstances" test use similar information and typically will lead to similar results. As one circuit put it "[a]s a practical matter, … the two tests will often consider similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment." *See Educational Credit Mgmt. Corp.* v. *Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004). Indeed, the choice of "test" makes so little difference that the First Circuit refused even to choose between the two. *In re Nash*, 446 F.3d 188, 190-191 (1st Cir. 2006).

Other courts agree. For instance, while adopting the *Brunner* test, the Tenth Circuit rejected arguments that the two tests diverged: "We do not read *Brunner* to rule out consideration of all the facts and circumstances. … [*Brunner*] necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor's education and skill level." *Polleys*, 356 F.3d at 1309. And the Eighth Circuit, while applying the totality-of-the-circumstances test, acknowledged that whatever conflict exists between the two test "may not be that significant." *Educational Credit Mgmt. Corp.* v. *Jesperson*, 571 F.3d 775, 779 (8th Cir. 2009). Indeed, the Sixth Circuit, which previously employed a "'hybrid-*Brunner*' model for assessing undue hardship," decided to fully embrace *Brunner* because "the *Brunner* con-

struct subsumes the criteria we have treated as distinct and independent, and [because] the *Brunner* formulation easily accommodates factors we look to in evaluating undue hardship." *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005).

Tetzlaff's challenge thus focuses on cosmetic differences between the *Brunner* test and the totality-of-the-circumstances test. For example, Tetzlaff contends that his efforts to work up to his ability—or lack thereof—would have been analyzed differently under the totality-of-circumstances rubric. But efforts to maximize income or work up to the debtor's ability are examined similarly in totality-of-circumstances and *Brunner* jurisdictions. For example, the Eighth Circuit, applying the totality test, considered a case on similar facts as this one, and reached the same result. In *Jesperson*, the court found that a debtor was not entitled to have his student loans discharged when he was 43 years old, in good health, had a law degree, but had not engaged in good faith efforts to find work.

Indeed, in *Jesperson*, the Eighth Circuit cited to many *Brunner*-jurisdiction cases, including the Seventh Circuit's *Roberson* case, for the proposition that with receipt of government-guaranteed student loans, each student "'assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses.'" *Jesperson*, 571 F.3d at 781 (quoting *Roberson*, 999 F.2d at 1136).[5]

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[5] Not central to the *Tetzlaff* opinion, but illustrative of the general harmonization of the Eighth Circuit's and *Brunner*-jurisdictions decisions, both "tests" examine whether the debtor takes advantage of the generous alternative repayment options. *Compare Jesperson*, 571 F.3d at 781-782 (availability of generous

In fact, lower courts within the Eighth Circuit, also applying the "totality of the circumstances" test, have reached similar results. *See In re Loftus*, 371 B.R. 402, 410-411 (Bankr. N.D. Iowa 2007) (a 43-year-old debtor with three children and $300,000 in debt with two graduate degrees was not sufficiently maximizing his income to warrant dischargeability); *In re Shadwick*, 341 B.R. 6, 11-12 (Bankr. W.D. Mo. 2006) (holding loans non-dischargeable even though debtor unemployed and having failed the bar exam because he possessed significant earning capacity with a J.D. and additional graduate work).[6]

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income-driven repayment plans authorized by Congress relevant to undue hardship inquiry), *with In re Mason*, 464 F.3d 878, 885 (9th Cir. 2006) (finding no undue hardship where the debtor failed to diligently pursue the income-drive repayment option for which he was eligible); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005) (recognizing participation in a repayment program is not required but is an important consideration in the undue hardship analysis).

[6] Tetzlaff argues that ECMC and the Department of Education previously "acknowledged the need for this Court's resolution of the conflict" in *Educational Credit Management Corp.* v. *Reynolds*, No. 05-1361 (U.S. filed Apr. 26, 2006). Pet. 12. That misconstrues ECMC's position in the decade-old *Reynolds* petition. ECMC's primary concern there—though perhaps unwarranted in retrospect—was that the Eighth Circuit had departed from the other circuits and had altered the undue hardship standard by permitting non-economic factors to trump a court's finding of fact that the debtor could not show an economic inability to repay her student loan debt. As the government appropriately pointed out in its brief in opposition, the Eighth Circuit's ambiguous statements left uncertain whether the decision would ultimately stand for a narrow and limited principle, or represent a significant change in the Eighth Circuit's standard for undue hardship. In the ensuing years, it has become evident that the unique circumstances and particular evidence presented in the *Reynolds* case has not had broad applicability to other cases, alleviating the concerns that led ECMC to seek this Court's review.

B. Tetzlaff also contends that there are "[s]ubsidiary [s]plits" that warrant this Court's review. Pet. 12-15. This argument stems from Tetzlaff's misguided assertion that "the Seventh Circuit created a per se rule that petitioner's failure to make any payments on the student loan debt he sought to discharge meant he could not satisfy" *Brunner's* good faith requirement. *Id.* 14. That is incorrect. Nothing in the Seventh Circuit's decision created such a per se rule.

Rather, the bankruptcy court recognized both that Tetzlaff had made payments to FCLS and that he had made no payments on the loans at issue in the dischargeability proceeding. But neither finding was dispositive, nor was a per se rule announced. Tetzlaff's claim of a circuit conflict due to an erroneous reading of the underlying decision provides no grounds for this Court's review.

Instead, Tetzlaff claimed error because the bankruptcy court merely *considered* his payments to FCLS. In other words, Tetzlaff argued that a different per se rule should be in place: He suggested payments to any student loan should *meet* the good faith requirement as a matter of law. Pet. App. 8a-9a. The court of appeals properly declined to adopt such a rule, preserving flexibility in the undue hardship analysis.

The Seventh Circuit's consideration of actual payments and its corollary conclusion that payments are relevant, though not necessarily dispositive, is consistent with other circuits, including totality-of-circumstances courts. *See, e.g.*, *In re Rose*, 215 B.R. 755, 765 (Bankr. W.D. Mo. 1997) (making no payments on student loans tends to negate arguments of good faith); *In re Schulstadt*, 322 B.R. 863, 868 (Bankr. N.D. Iowa 2005) (holding no voluntary payments over the

course of 20 years was relevant); *In re Tinder*, 2009 WL 1035255, at *3 (Bankr. N.D. Iowa Apr. 14, 2009) (whether a debtor makes payments on a loan is highly relevant in totality-of-circumstances, as "[a] debtor's loan repayment history provides insight on the debtor's willingness to repay his or her student loans").

The relevant case law demonstrates consistency in the circuits' consideration of actual payments towards the student loan, relevant but not necessarily dispositive as to the undue hardship conclusion.

Tetzlaff's claims regarding the Seventh Circuit's strict use of "certainty of hopelessness" are inflated and misrepresent the court of appeals' decision. Tetzlaff contends that the use of the phrase "certainty of hopelessness" in the Seventh Circuit warrants review because (1) not all *Brunner* jurisdictions use this language and (2) it does not comport with legislative history.

But "'this Court reviews judgments, not statements in opinions.'" *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030 (2011) (brackets omitted). And the record here is clear that the judgment in this case would be the same regardless of the inclusion of these words in the opinion. Specifically, the bankruptcy court held that even without the strict use of the phrase "certainty of hopelessness," Tetzlaff would not meet his burden of proving hardship more excessive than an ordinary bankruptcy filer now or in the future. Pet. App. 19a-20a, 24a-25a. The district court affirmed that finding as to Tetzlaff's future ability to gain more fruitful employment. *Id.* 18a-19a. Likewise, the court affirmed that the bankruptcy court did not require Tetzlaff to prove certainty of hopelessness, stating "the bankruptcy judge concluded that Tetzlaff had failed to meet even the lesser standard that he advocated for, and thus the

bankruptcy court did not, as Tetzlaff claims, apply the 'certainty of hopelessness' test." *Id.* 19a (citation omitted). Though the Seventh Circuit does not discuss in detail the bankruptcy court and district court's decision on the use of "certainty of hopelessness," it ultimately concludes that Tetzlaff is capable of earning a living and improving his financial condition stating that: "[W]e agree with the bankruptcy court that he is capable of earning a living." *Id.* 6a. Because the phrase "certainty of hopelessness" played no role in the judgment below, the inclusion of that language does not provide a basis for granting certiorari.

C. Tetzlaff next argues that this case warrants review because the choice of totality-of-circumstances test and the *Brunner* test is outcome determinative. Pet. 28-32. That is just incorrect. Each of the three cases on which Tetzlaff relies turns on particular facts that distinguish each of those cases from this one:

In re Reynolds, 425 F.3d 526, 532-533 (8th Cir. 2005). Reynolds had been diagnosed with significant mental illness, as testified by her psychiatrist. She was unlikely to get better work because of her fragile mental health. There was no contrary evidence in the record, so the expert's conclusion that her fragile mental health precluded her from more remunerative work was afforded significant weight by the bankruptcy court, whose judgment was affirmed by the Eighth Circuit.

Bronsdon v. *Educational Credit Management Corp.*, No. 10-9009 (1st Cir. Sept. 23, 2011). Bronsdon was similar to Tetzlaff in that she graduated with a J.D. at age 50 and was 64 at the time of trial and unable to pass the bar. The bankruptcy court also "f[ou]nd[] the Debtor credible," *In re Brondson*, 2009 WL 95038, at*4

(Bankr. D. Mass. Jan. 13, 2009), in her testimony regarding her job search, while the bankruptcy court here expressly found that Tetzlaff had been dishonest, Pet. App. 25a. Further, the record in *Bronsdon* did not include the type of evidence, on which the lower courts here relied, suggesting that the debtor had been feigning her difficulties.

Monroe v. *Department of Education*, 2015 Bankr. LEXIS 3222 (Bankr. W.D. Ark. Sept. 23, 2015). Finally, in *Monroe*, the court granted a discharge of half of the debtor's student loan debt. The record in that case, too, was decisively different from that here. Unlike the debtor here, the debtor in Monroe never received any graduate degree and was working full time earning a steady income. *Id.* There was no evidence presented that she was malingering, but instead the record indicated that she had made a concerted effort to find better-paying work. *Id.*

D. This is an improper case in which to grant certiorari for the purpose of choosing between the *Brunner* test and the totality-of-the-circumstances test for the further reason that, prior to the filing of the Petition in this Court, Tetzlaff has never suggested to any court that the *Brunner* test should not be applicable. Rather, in the lower courts, Tetzlaff acknowledged that *Brunner* was the appropriate test, disputing only the manner in which *Brunner* should be applied. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("'[T]his is a court of final review and not first view.'").

II. THIS CASE WOULD NOT HAVE BEEN ANALYZED DIFFERENTLY UNDER THE TOTALITY-OF-CIRCUMSTANCES TEST

Tetzlaff's case would have come out the same way had it been decided in a totality-of-circumstances jurisdiction. Indeed, courts applying the "totality-of-the-circumstances" test in the handful of cases that do involve factual circumstances similar to this case have come out the same way. The Eighth Circuit's decision in *Jesperson* is a good example. The debtor there had previous substance abuse issues, was highly educated, with a J.D., had just as much debt, but ultimately was determined to be unmotivated to work to his potential—just like Tetzlaff—and was denied a discharge of his more than $300,000 debt. *Jesperson*, 571 F.3d at 784-785; *see also Loftus*, 371 B.R. at 410-411 (a 43-year-old debtor with three children and two graduate degrees was not sufficiently maximizing his income to warrant discharge of his $300,000 debt).

Tetzlaff is also similar to the debtor in *In re Shadwick*, 341 B.R. at 11-12. Both Shadwick and Tetzlaff have J.D.s, and were unable to pass the bar exam initially and had failed to attempt to retake it. Shadwick, however, had three small, dependent children, including one with significant disabilities, yet he was denied a discharge. *Id.; see also In re Tyer*, 384 B.R. 230 (Bankr. N.D. Iowa 2008) (discharge denied of more than $120,000 to 63-year-old debtor).

There is simply no reason at all to suppose that a totality-of-circumstances "test" would find Tetzlaff's evidence of an undue hardship any more persuasive. Tetzlaff was ultimately denied a discharge of his student debt because of his failure to work up to his abilities, his lack of significant health issues, his educational

achievements, the court's credibility determinations, the likelihood that he was feigning psychological symptoms, along with competing expert opinions.[7] Precisely those considerations would have led a court using the slightly different verbal formulation applied in the Eighth Circuit to reach the same result.

III. *BRUNNER* WAS CORRECTLY DECIDED

Tetzlaff argues that this Court should review this case because *Brunner* was "erroneous when decided," Pet. 17-20, even though it has been adopted by nine circuit courts of appeals over a twenty-year span and comports fully with Congress's manifest purpose as demonstrated in the legislative history.

A. Tetzlaff appears to take considerable issue with *Brunner*'s good faith prong, suggesting that this prong has become "punishment" and a "moral judgment" for past mistakes that have no place in the statute or legislative history. Pet. 22. There is no evidence of that. To the contrary, the good faith prong reflects Congress's policy objectives and fully comports with legislative history.

As part of its decision to enact long-term government subsidized student loan programs, it is clear that

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[7] The court of appeals noted "the 'undue hardship' inquiry as a whole is 'a case-specific, fact-dominated standard which implies deferential appellate review.'" Pet. App. 5a (citing *Krieger* v. *Educational Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013)). No matter what rubric the case is determined under, it is heavily fact-laden. In this case, the bankruptcy court's decision was particularly swayed by credibility judgments, including its assessment of the testimony of an expert who testified that the plaintiff might be feigning symptoms. This likewise makes it an unsuitable platform for this Court's resolution of either (i) perceived conflicts or (ii) a review of the fairness of the *Brunner* test.

Congress was—and continues to be—concerned that the student loan program be self-sustaining and devoid of any hint of fraud. Notes from the Senate Conference Report indicate a concern with the potential for abuse (or soft fraud) committed by students who were allowed to borrow without regard to creditworthiness, but in exchange were expected to repay the loans except under remarkable circumstances, stating:

> As noted previously, the Committee bill prohibits discharge in bankruptcy of a guaranteed student loan obligation for a five-year period after the repayment obligation starts. This provision is similar to one suggested by the Administration. Commissioner Bell testified before the Committee that student loan bankruptcies have been on the increase. From the beginning of the program through fiscal year 1972, these totaled 2,146 for $2.4 million. The cumulative total reached 8,969 for $11.3 million, as of February of 1975.

S. Rep. No. 94-882, at 32 (1976); *see also* H.R. Rep. No. 95-595, at 536-538 (1977) (remarks of Rep. Ertel) (expressing concerns about the prevalence of fraud).

All told, the Congressional purpose, amply reflected in the legislative history, supports a bankruptcy court's inquiry into the good faith intentions or willingness to repay. The *Brunner* test sensibly reflects Congress's purpose and thus forms no basis for review by this Court.

B. Tetzlaff next contends that even if *Brunner* were acceptable when first decided, *Brunner*'s flaws have been exacerbated by the evolution of the statute's language, complaining that when Congress eliminated

the "safety valve" of a five-year discharge, it rendered *Brunner* obsolete. Pet. 21.

Tetzlaff contends that "[u]nlike the relatively modest loans made by local banks and colleges in the 1970s, the student loan industry is big business 'with nary a thought given to the borrower's ability to repay the debts.'" Pet. 25 (citing *In re Roth*, 490 B.R. 908, 922 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring)). But this ignores the fact that federally-backed student loan lenders were prohibited from discriminating on creditworthiness considerations, therefore they were prohibited from thinking about whether the borrower would be able to repay the debts. *See* 20 U.S.C. § 1071(a)(2); *see also* 34 C.F.R. 682.404(h) (2004) (prohibiting lenders from denying students loans "because of the borrower's race, sex, color, religion, national origin, age, handicapped status, income, attendance at a particular participating school within any State served by the guaranty agency, length of the borrower's educational program, or the borrower's academic year in school").

Finally, Tetzlaff argues that as a policy matter, this Court should weigh in and announce a test that is less "stringent." Pet. 21. This Court, however, does not and should not grant review for the purpose of displacing Congress's policy judgments. It is for Congress to weigh all of the policy decisions inherent in determining solutions for student borrowers and the costs of higher education. *See generally Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001); *Dunn* v. *CFTC*, 519 U.S. 465, 480 (1997) (citing *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979)). Considering the evolution of § 523(a)(8)'s provisions, as outlined above, there can be no serious argument that Congress's intent has been anything but to make it more challenging to discharge student loan debt, not to make it easier to do so,

through bankruptcy. *See In re Cox*, 338 F.3d 1238, 1242 (11th Cir. 2003) (per curiam) (successive legislative restrictions make clear "Congress's intent to make it harder for a student to shift his responsibility onto the taxpayer"). In any event, Tetzlaff's call for a change in national policy regarding the discharge of student debt is best presented to Congress—it provides no basis for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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