No. _____

In the Supreme Court of the United States

MARK WARREN TETZLAFF, PETITIONER

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Bankruptcy Code, student loan debt is dischargeable in cases of "undue hardship." 11 U.S.C. 523(a)(8). To determine whether petitioner had shown "undue hardship," the court of appeals applied its version of the three-element *Brunner* test. See *Brunner* v. *N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). As two elements of that test, the court of appeals requires a debtor to establish a past good faith effort to repay student loans and a "certainty of hopelessness" that he will never be able to repay his student loan debt in the future. Other courts of appeals apply substantially different versions of the *Brunner* test, requiring that the debtor's inability to pay be "likely to persist for a significant portion of the repayment period," but not requiring a "certainty of hopelessness." Courts in two circuits have rejected the *Brunner* test altogether, adopting a more lenient standard based on the "totality of the circumstances."

This case presents the following questions:

1. Whether the *Brunner* test is the proper standard for determining "undue hardship" for the discharge of student loan debt.

2. Whether, if the *Brunner* test is the proper standard, that test should be (i) modified to eliminate the requirement that a debtor in the past have "made a good faith effort to repay the loans," and (ii) clarified to establish that a debtor need only prove by a preponderance of the evidence that his inability to pay is "likely to persist for a significant portion of the repayment period," not that there is a "certainty of hopelessness."

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Mark Warren Tetzlaff was the appellant in the court of appeals.

Respondent Educational Credit Management Corporation was the appellee in the court of appeals.

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Petitioner Mark Warren Tetzlaff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 794 F.3d 756. The opinion of the district court (App., *infra*, 10a-21a) is reported at 521 B.R. 875. The opinion of the bankruptcy court (App., *infra*, 22a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2015. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the United States Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

Title 11, Section 523(a)(8) of the United States Code provides:

> (a) A discharge under section 727, 1141, 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

Petitioner is a 57-year-old man whose student loan debt burden was nearly $260,000 when he filed for bankruptcy. Divorced and unemployed, he has twice failed the bar exam and has been unable to find steady work since law school. He resides with his elderly mother, and they survive solely on her Social Security benefits payments. Petitioner is also a recovering alcoholic and suffers from other difficulties, including past struggles with depression and misdemeanor convictions, that impair his ability to find law-related work.

Petitioner filed for chapter 7 bankruptcy in 2012 and sought to have his student loan debt discharged on the basis that repayment constituted an "undue hardship." See 11 U.S.C. 523(a)(8). The bankruptcy court held that petitioner's student loan debt could not be discharged, and the United States District Court for the Eastern District of Wisconsin affirmed. Employing the *Brunner* test used by some, but not all, courts of appeals in assessing the "undue hardship" question, the Seventh Circuit likewise affirmed.

The court of appeals' holding reflects the sharp disparity in how different circuits apply the "undue hardship" standard. Similarly situated debtors are less likely to obtain a favorable determination from courts that employ the *Brunner* test than from those that apply the "totality of the circumstances" test, thus denying a "fresh start" to some debtors based solely on where they live. Moreover, nothing in the Bankruptcy Code supports the exceedingly demanding standard employed by the courts below. Petitioner asks the Court to grant certiorari and establish a "uniform" standard by which struggling debtors may qualify for discharge

of their student loan debt. See U.S. Const. Art. I, § 8, Cl. 4.

A. Development Of 11 U.S.C. 523(a)(8)

Before 1977, debtors could discharge student loan debt just as they could any other unsecured debt. As with all debts, student loans were not dischargeable to the extent they were obtained by false pretenses, a false representation, or actual fraud. 11 U.S.C. 523(a)(2).

In 1976, Congress made student loans insured or guaranteed by the government non-dischargeable in chapter 7 bankruptcies until five years after the commencement of the repayment period, except upon a showing of "undue hardship." Higher Education Act in the Education Amendments Act of 1976, Pub. L. No. 94-482 (codified at 20 U.S.C. 1087-3 (1976)). Beginning five years after the repayment period started, student loans insured or guaranteed by the government were dischargeable just like any other unsecured debt. These changes went into effect on September 30, 1977. See U.S. Dep't of Educ., Office of Postsecondary Educ., *Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings* (July 7, 2015), http://www.ifap.ed.gov/dpcletters/attachments/GEN1513.pdf. Congress codified this provision in the Bankruptcy Code the following year as Section 523(a)(8). See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2591.

Assessing whether student loans could be discharged within five years of the start of the repayment period, the Eighth Circuit held in 1981 that "each bankruptcy case involving a student loan must be examined on the facts and circumstances surrounding that partic-

ular bankruptcy for the Court to make a determination as to 'undue hardship.'" *Andrews* v. *S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (1981) (quoting *In re Wegfehrt*, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981)). In 1987, the Second Circuit decided *Brunner* v. *New York Higher Education Services Corp.*, 831 F.2d 395, and applied a more narrow test than the Eighth Circuit's. The Second Circuit set forth a three-prong test for "undue hardship," requiring the debtor to prove each of the following elements: (1) an inability to maintain, based on current income and expenses, a "minimal" standard of living for the debtor (the "present sub-minimal standard of living" requirement); (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" (the "future hardship" requirement); and (3) that the debtor has made a good faith effort to repay the loans (the "past good faith effort" requirement). *Id.* at 396.

In 1990, Congress increased from five years to seven the period during which student loans could be discharged only upon a showing of "undue hardship." See Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4964. Congress also expanded Section 523(a)(8) to apply to chapter 13 debtors. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007, 104 Stat. 1388-28.[1]

In 1997, the Bankruptcy Review Commission, established pursuant to the Bankruptcy Reform Act of

[1] The sunset provision in this amendment was later repealed.

1994, Pub. L. No. 103-394, 108 Stat. 4106, recommended eliminating Section 523(a)(8) altogether "so that most student loans are treated like all other unsecured debts" and "the dischargeability provisions would be consistent with federal policy to encourage educational endeavors." Nat'l Bankr. Review Comm'n, *Bankruptcy: The Next Twenty Years*, § 1.4.5 (Oct. 27, 1997).

Congress rejected the Commission's recommendation, however. Instead, Congress eliminated the ability to discharge student loans on equal terms with other debt even after seven years, making the "undue hardship" test the *sole* means by which a debtor could seek to have student loan debt discharged in bankruptcy. See Higher Education Amendments Act of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837.

In 2003, the Eighth Circuit, expanding on its earlier opinion in *Andrews*, explicitly rejected the *Brunner* test and adopted a "totality of the circumstances" approach to "undue hardship" that considers "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's * * * reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *Long* v. *Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554. As the court observed, this determination necessarily requires "a special consideration of the debtor's present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor's financial position." *Id.* at 555.

In 2005, Congress extended Section 523(a)(8) to include private student loans in addition to those that are

publicly made, insured, or guaranteed. See Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. 109-8, § 220, 119 Stat. 59 (codified at 11 U.S.C. 523(a)(8)(B) (2012)). Congress did not, however, resolve the long-standing split between the courts of appeals regarding the proper standard for determining when "undue hardship" exists under Section 523(a)(8).

B. Facts Of Petitioner's Case

Petitioner Mark Warren Tetzlaff is 57 years old. He is within ten years of normal retirement age and six years of eligibility for Social Security retirement benefits.

As of February 20, 2013, petitioner owed $259,284.72 in federal student loan debt, guaranteed by respondent Educational Credit Management Corporation. Petitioner also held $18,940 in private student loan debt and $75,776.37 in private non-student loan debt. The mix of federal and private student loans was used to pay for petitioner's graduate education at Marquette University, 1992-1994 (MBA received); DePaul University College of Law, 1994-1998 (no degree received); and Florida Coastal School of Law, 1999-2005 (JD received). On August 5, 2013, respondent consolidated all of petitioner's federal student loan debt.

The original repayment period for petitioner's consolidated federal student loan debt was 20 years. Based on an interest rate of 4.125 percent and an eight-year amortization schedule through retirement at age 65, petitioner would need approximately $38,107 of excess annual cash flow to repay just his consolidated federal student loan debt.

Petitioner currently resides in Waukesha, Wisconsin, with his 86-year-old mother. App., *infra*, 2a. Together, they subsist solely on his mother's Social Security payments. *Ibid.* Petitioner is divorced and currently unemployed. *Ibid.* He twice failed the bar exam twice and has been unable to work as an attorney. *Ibid.* Prior to attending graduate school, petitioner worked in the employee benefits industry, as a stockbroker, as an insurance salesman, and as a financial advisor. *Ibid.* He has been unable to find work in these fields since completing law school. In addition, petitioner is a recovering alcoholic and faces other challenges that contribute to his difficulties in obtaining employment, including convictions for several misdemeanor offenses. *Id.* at 2a-3a.

C. Bankruptcy Court Proceedings

Petitioner sought to have his student loan debt discharged in bankruptcy court. Applying the Seventh Circuit's version of the *Brunner* standard, the bankruptcy court found that excepting his student loans from discharge would not impose "undue hardship" under Section 523(a)(8) and thus held that the student loan debt was not dischargeable.

Specifically, the court held that, while petitioner had satisfied the "present sub-minimal standard of living" requirement based on his income history, he failed to satisfy the two remaining requirements of the *Brunner* test. The court found that petitioner did not satisfy the second requirement of the test ("future hardship") because he did not meet the evidentiary standard to show that his hardship would persist. App., *infra*, 24a-25a. The court determined that "Mr. Tetzlaff's marital problems, personality problems, mis-

demeanor convictions, care-taking responsibilities, and failure of the [two] bar exams d[id] not meet the level of undue hardship necessary to discharge student loans." *Id.* at 25a.

The bankruptcy court also found that petitioner failed to satisfy the third *Brunner* requirement ("past good faith effort") because he had made no payments on the federal loans at issue and because he had not focused on securing "appropriate employment." *Ibid.* The bankruptcy court noted that petitioner had "repaid much of the [separate] loan to Florida Coastal Law School," which he had done as a condition for obtaining the release of his law school transcript. *Ibid.* Though this was necessary in order to sit for the bar examination and obtain legal employment, those factors did not matter because the Seventh Circuit had established as an absolute requirement for a finding of "undue hardship" that a debtor have made some payments on the loans sought to be discharged. *Ibid.* Petitioner appealed.

D. Proceedings On Appeal

The District Court affirmed, finding that the bankruptcy court had not abused its discretion in determining that petitioner failed to satisfy the second and third requirements of the Seventh Circuit's *Brunner* test.

Petitioner appealed to the Seventh Circuit, which also affirmed. In affirming the bankruptcy court's determination that petitioner failed to satisfy the *Brunner* test's "future hardship" requirement, the court held that "the dischargeability of student loans should be based upon the *certainty of hopelessness*, not simply a present inability to fulfill financial commitment." App., *infra*, 5a (quoting *In re Roberson*, 999 F.2d 1132, 1136

(7th Cir. 1993)) (emphasis added). The court of appeals agreed with the bankruptcy court that petitioner's "academic degrees, prior work experience, and age," as well as his "capable pro se representation in this case," indicated "that he is capable of earning a living." *Id.* at 6a.

The court of appeals' opinion also effectively establishes a per se rule that no "undue hardship" discharge is possible for a debtor who has failed to make any payments on the debt at issue—no matter how justifiable his reasons for doing so. The court of appeals held that petitioner failed to meet *Brunner*'s "past good faith effort" requirement, rejecting petitioner's argument that payments on his Florida Coastal student loans constituted evidence of his past good faith effort "because he needed the school's cooperation in releasing his diploma and transcript" in order to be able to obtain a law license. App., *infra*, at 9a. The court of appeals reasoned that the undue hardship analysis focuses exclusively on the "loan debt subject to a discharge action" and held that, because petitioner made no payments on that loan, he could not satisfy the past good faith effort requirement. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-DEVELOPED CIRCUIT CONFLICT REGARDING THE "UNDUE HARDSHIP" TEST FOR DISCHARGING STUDENT LOAN DEBT

Student loans are excepted from discharge "unless excepting such debt from discharge * * * will impose an *undue hardship* on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8) (emphasis added). "Undue hardship" is not defined by the Bankruptcy Code, how-

ever, and several different splits of authority have developed as courts have grappled with its meaning.

The first divide is between (i) courts that apply a "totality of the circumstances" test, which has the bankruptcy court make an equitable determination based on all available evidence, and (ii) courts that have adopted the so-called "*Brunner* test," which identifies three specific requirements, all three of which much be satisfied. The Eighth Circuit has adopted the totality of the circumstances approach, expressly rejecting "strict parameters" that "would diminish the inherent discretion contained in § 523(a)(8)(B)." *Long* v. *Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (2003). That court has instead identified three broad categories of factors to evaluate and weigh: (i) the debtor's past, present, and reasonably reliable future financial resources; (ii) a calculation of the debtor's and her dependents' reasonably necessary living expenses; and (iii) any other relevant facts and circumstances. *Ibid.* The First Circuit's Bankruptcy Appellate Panel has also adopted the totality of the circumstances approach, applying effectively the same test as the Eighth Circuit. *Bronsdon* v. *Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 797-800 (B.A.P. 1st Cir. 2010).[2]

By contrast, the *Brunner* test, applied by many circuits, has three separate requirements, each of which is mandatory. *E.g.*, *Brunner*, 831 F.2d at 396. Those

[2] Whether the First Circuit will endorse the "totality of the circumstances" test is presently at issue in an appeal pending before that court. *Murphy* v. *U.S. Dep't of Educ. (In re Murphy)*, No. 14-1691 (1st Cir. docketed June 30, 2014).

requirements are (a) a present sub-minimal standard of living, (b) future hardship, and (c) past good faith effort. Although several courts of appeals have adopted the *Brunner* test, there are significant differences in how they interpret its three requirements.

A. This Conflict Is Long-Standing

The clear conflict between the various "undue hardship" tests contravenes the need for a "uniform" bankruptcy law. U.S. Const. Art. I, § 8, Cl. 4. Nearly a decade ago, respondent itself acknowledged the need for this Court's resolution of the conflict. See Pet., *Educ. Credit Mgmt. Corp.* v. *Reynolds*, No. 05-1361 (U.S. filed Apr. 26, 2006). The United States likewise acknowledged the differing tests. See U.S. Br. in Opp., *Reynolds* (U.S. filed July 28, 2006). The conflict has grown more entrenched over the past ten years, as further divisions have developed among the courts applying the *Brunner* test, while courts in the Eighth Circuit continue to weigh the totality of the circumstances.

B. The Development Of Several Subsidiary Splits In The Courts Of Appeals That Have Adopted *Brunner* Demonstrates The Very Real Differences Between The Two Tests

In addition to the Second Circuit, eight other circuits have adopted some form of the *Brunner* test, including some that have done so relatively recently. See, *e.g.*, *Educ. Credit Mgmt. Corp.* v. *Mason (In re Mason)*, 464 F.3d 878, 881-882 (9th Cir. 2006); *Oyler* v. *Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Educ. Credit Mgmt. Corp.* v. *Frushour (In re Frushour)*, 433 F.3d 393, 400 (4th Cir. 2005); *Educ. Credit Mgmt. Corp.* v. *Polleys*, 356 F.3d 1302, 1308-1309 (10th Cir. 2004); *Hemar Ins. Corp. of*

Am. v. *Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003); *U.S. Dep't of Educ.* v. *Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003); *Pa. Higher Educ. Assistance Agency* v. *Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993). However, even among those courts, there is significant disagreement as to what the *Brunner* test requires a debtor to prove.

1. The courts of appeals differ on how demanding *Brunner*'s "future hardship" requirement is. Some courts, including the court of appeals here, require the debtor to prove a "certainty of hopelessness." See *Frushour*, 433 F.3d at 400 (Fourth Circuit); *Oyler*, 397 F.3d at 385 (Sixth Circuit); *O'Hearn v. Educ. Credit Mgmt. Corp. (In re O'Hearn)*, 339 F.3d 559, 564 (7th Cir. 2003); *Faish*, 72 F.3d at 307 (Third Circuit). But even those courts are not in sync. The Third Circuit has further restricted the "certainty of hopelessness" standard, holding that a debtor can meet it only by showing "total incapacity." *Faish*, 72 F.3d at 307.[3] The Fourth and Sixth Circuits, by contrast, have indicated the debtor can demonstrate "certainty of hopelessness" through "illness, disability, a lack of usable job skills, or the existence of a large number of dependents." See *Frushour*, 433 F.3d at 401 (quoting *Oyler*, 397 F.3d at 386).

[3] The Fifth Circuit has also adopted the "total incapacity" standard, *Gerhardt*, 348 F.3d at 92 (quoting *Faish*, 72 F.3d at 307), though it has not expressly adopted the phrase "certainty of hopelessness," suggesting that its threshold is at least as high as the Third Circuit's.

The Ninth and Tenth Circuits do not require "certainty of hopelessness" in evaluating "future hardship." See, *e.g.*, *Mason*, 464 F.3d at 882-883. The Tenth Circuit has explicitly rejected a "certainty of hopelessness" standard, instead requiring courts to take a "realistic look" at the debtor's circumstances when evaluating "future hardship." *Polleys*, 356 F.3d at 1310.

Although the Seventh Circuit applies the "certainty of hopeless" standard, *O'Hearn*, 339 F.3d at 564, it has, in a recent case, openly questioned the correctness of that test, acknowledging that "'certainty of hopelessness' * * * sounds more restrictive than the statutory 'undue hardship.'" *Krieger* v. *Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (2013) (Easterbrook, J.).

2. The courts of appeals applying *Brunner* also differ as to whether the failure to make any past payments on the precise student loan debt sought to be discharged is a per se bar to discharge under *Brunner*'s "past good faith effort" requirement. Compare App., *infra*, 8a-9a, and *Lehman* v. *N.Y. Higher Educ. Servs. Corp. (In re Lehman)*, 226 B.R. 805, 809 (Bankr. D. Vt. 1998), with *Educ. Credit Mgmt. Corp.* v. *Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007), and *Polleys*, 356 F.3d at 1311. In petitioner's case, 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 "past good faith effort" requirement. App., *infra*, 9a. By contrast, the Tenth and Eleventh Circuits have explicitly held that failure to make any student loan payments does not, standing alone, preclude a finding of past good faith effort. See *Mosley*, 494 F.3d at 1327; *Polleys*, 356 F.3d at 1311.

These distinctions, even within *Brunner* circuits, demonstrate the need for this Court's guidance on how to apply the statutory "undue hardship" standard.

C. The Totality Of The Circumstances Approach Is Less Restrictive Than *Brunner*

The Eighth Circuit has expressly acknowledged that its totality of the circumstances approach is "less restrictive" than the *Brunner* test, finding that a flexible approach is more consistent with the language and purpose of Section 523(a)(8). *Long*, 322 F.3d at 554. The Eighth Circuit eschews rigid requirements in favor of the core purpose of the statutory provision: "if the debtor's reasonable future financial resources will sufficiently cover payments of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged." *Id.* at 554-555.

The Eighth Circuit's "totality" approach differs markedly from *Brunner*'s strict test. The Eighth Circuit allows bankruptcy courts to consider a broad range of factors, with no one factor being dispositive. By contrast, a debtor who fails to satisfy *any one* of the three separate prongs of the *Brunner* test is categorically ineligible for a discharge. See *Brunner*, 831 F.2d at 396. As particularly relevant in this case, the "totality of the circumstances" test does not require evidence of past payment of student loans as an absolute litmus test for "undue hardship." See *Long*, 322 F.3d at 554-555.

Under *Brunner*, a bankruptcy court may not consider "equitable concerns or other extraneous factors not contemplated by the [*Brunner*] test" that might bear on a debtor's "undue hardship." *Brightful* v. *Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 328, 331 (3d Cir. 2001) (declining to find "un-

due hardship" although acknowledging the result "might appear harsh") (citation omitted). In contrast, courts within the Eighth Circuit have considered numerous additional factors: (i) total present and future incapacity to pay debts for reasons not within the debtor's control; (ii) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (iii) whether the hardship will be long-term; (iv) whether the debtor has made any payments on the student loan; (v) whether the debtor has a permanent or long-term disability; (vi) the debtor's ability to obtain gainful employment in the area of study; (vii) whether the debtor has made a good faith effort to maximize income and minimize expenses; (viii) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (ix) the ratio of student loan debt to total indebtedness. *Educ. Credit Mgmt. Corp.* v. *Jesperson*, 571 F.3d 775, 783-784 (8th Cir. 2009) (Smith, J., concurring) (citation omitted). These factors reflect the "inherent discretion contained in Section 523(a)(8)," *Long*, 322 F.3d at 554, and can lead to very different results from *Brunner*'s mandatory requirements. See pp. 28-32, *infra*.

II. A "Totality" Approach Better Comports With The Text And Purpose Of The Bankruptcy Code

The "totality of the circumstances" approach reflects the correct understanding of the statutory provision that allows a debtor to discharge student debt if he can show "undue hardship." The Seventh Circuit's version of *Brunner* deprives the statutory test of its intended flexibility. This Court should grant review to correct that misinterpretation and allow a debtor to

discharge her student loan debts when failure to do so would deprive the debtor of the ability to maintain a minimal standard of living for the foreseeable future.

A. The *Brunner* Test, As Applied In The Seventh Circuit, Is Inconsistent With The Text Of Section 523(a)(8), Its Legislative History, And This Court's Precedent

The current version of Section 523(a)(8) provides that student loan debt is dischargeable "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8). Although Congress has frequently amended Section 523(a)(8), it has retained "undue hardship" as the standard for discharging student loan debt. While courts are rightly concerned about not allowing recent graduates to abuse bankruptcy at the outset of their careers, and about the need to protect the solvency of the education loan program, see, *e.g.*, *Murphy* v. *Pa. Higher Educ. Assistance Agency (In re Murphy)*, 282 F.3d 868, 873 (5th Cir. 2002), these concerns do not justify the *Brunner* test's inflexible per se requirements, which exclude many candidates facing considerable financial hardship from consideration for discharge of their student loans.

1. *Brunner*, based on a district court's flawed understanding of congressional intent, was erroneous when decided

The outsized legacy *Brunner* has spawned belies the cursory nature and sparse analysis of the original opinion. In its 1987 per curiam opinion, the Second Circuit simply endorsed wholesale the district court's analysis and added almost no additional commentary, stating that it "adopt[ed]" the three-part analysis "[f]or

the reasons set forth in the district court's order." 831 F.2d at 396.

The *Brunner* district court's analysis was erroneous because it derived from a misperception of Section 523(a)(8)'s purpose. 46 B.R. 752, 753-754 (S.D.N.Y. 1985). The district court relied primarily on a 1973 draft report from the Commission on the Bankruptcy Laws of the United States (1973 Report). *Ibid.* The court crafted its analysis based on its misunderstanding of what the 1973 Report stated about "the reason for [Section 523(a)(8)]": purported worry about "a rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts." 46 B.R. at 754 (quoting Report of the Comm'n on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 140 n.14). In developing the three-part test that the Second Circuit later adopted, the *Brunner* district court referred repeatedly to this concern as the central purpose of Section 523(a)(8), reasoning, for example, that "[t]he propriety of a requirement of good faith is further emphasized by the stated purpose for [Section] 523(a)(8): to forestall students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans." 46 B.R. at 755 (citing 1973 Report, 140 n.14).

The district court concluded that the three-part test it had crafted might "seem draconian" but "plainly serve[d] the purposes of the guaranteed student loan program." 46 B.R. at 756. The result likely seemed justified in that particular case, given that the debtor in *Brunner* had made no payments on $9,000 in student loans, filed for bankruptcy seven months after receiv-

ing her master's degree, and initiated the adversary action to discharge her student loans in the same month she was supposed to begin repaying them. *Id.* at 753, 758.[4]

But the *Brunner* court's myopic focus on a single footnote of the 1973 Report ignored the report's acknowledgement that student loan abuse was more perception than reality. 1973 Report, 170 n.5. Contrary to the construction given it by the *Brunner* district court, the 1973 Report contained no stringent or restrictive terms such as "certainty of hopelessness," much less any "past good faith effort" requirement or any categorical bar to student loan discharge based on past loan payment history. Instead of suggesting poverty or a showing of extreme circumstances such as medical disability for discharge of student loan debt, the 1973 Report referred to the debtor maintaining a "minimal standard of living" based on "adequate" income. *Id.* at 140 n.17. Rather than establish a strong presumption against discharge, as the "certainty of hopelessness" standard does, the 1973 Report stressed that "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." *Ibid.* (emphasis added). And rather than stress what the debtor had *failed* to do, as the court of appeals did here, the 1973 Report emphasized that "[t]he total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor

[4] *Brunner* typified the student loan debt discharge cases of its time. *Roth* v. *Educ. Credit Mgmt. Corp.*, 490 B.R. 908, 921 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

and his dependents, at a minimal standard of living within their management capability, as well as to pay the education debt." *Ibid.* Where a fair estimate of future income could not support both payment of the debt and a minimal standard of living, the 1973 Report recognized that discharge would be appropriate under the "undue hardship" standard.

The Second Circuit, which "adopt[ed]" the district court's analysis in *Brunner* without meaningful discussion, 831 F.2d at 396, failed to correct the lower court's flawed understanding of Congress's intent in enacting Section 523(a)(8).

2. *Brunner*'s flaws have been exacerbated over time, as courts have made its test more exacting at the same time that changes to Section 523(a)(8) heightened the need for flexibility

When first articulated, the *Brunner* test applied only to chapter 7 debtors seeking to discharge student loan debt during the first five years of the repayment period. In 1987, Section 523(a)(8) permitted student loan discharge if one of two criteria were met: (1) five years had passed since the commencement of the repayment period, or (2) a court determined that requiring future payments on the loan would impose an "undue hardship" on the debtor or the debtor's dependents. Education Amendments Act of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2141. A debtor thus had a safety hatch: he could discharge his student loans, even absent "undue hardship," if the loan repayment period had commenced at least five years before filing for bankruptcy relief.

Since *Brunner* was decided, Congress has broadened the class of debtors to which Section 523(a)(8) applies and eliminated the five-year safety valve. In 1990, Congress extended Section 523(a)(8) to chapter 13 debtors and increased to seven years the waiting period before the safety valve became available. See § 3621, 104 Stat. 4964; § 3007, 104 Stat. at 1388-28. Then, in 1998, Congress eliminated the safety valve altogether. § 971(a), 112 Stat. 1837. In 2005, Congress further swept certain private educational loans into Section 523(a)(8). See § 220, 119 Stat. 59.

In light of these changes to the Bankruptcy Code, *Brunner*'s unduly narrow construction of "undue hardship" has become even more egregious. *Brunner*'s unforgiving standard no longer applies only to individuals who, in the *Brunner* court's words, had "only recently ended their education" and were at "the nadir of their earning power." 46 B.R. at 754. Instead, the *Brunner* test has become, for debtors living within circuits that apply it, the *exclusive* means by which a debtor could discharge educational loans at any time.

Yet, at the same time application of the "undue hardship" standard was being expanded to new classes of debtors, who were facing an increasingly broad range of circumstances, the courts applying the *Brunner* test were making it even more rigid and stringent. In the Seventh Circuit and certain other circuits, the original *Brunner* test has been expanded from a test applicable only during a five-year period to a test that requires evidence of a "certainty of hopelessness" or "total incapacity" based on projections beyond the reasonably foreseeable future. The Seventh Circuit, for example, has narrowed the "future hardship" prong of

the *Brunner* test to a "certainty of hopelessness" of ever repaying the loan—a nearly impossible evidentiary standard—before the court will offer a discharge. See App., *infra*, 5a ("dischargeability should be based on the certainty of hopelessness"). Nothing in the text of Section 523(a)(8) requires a showing of "hopelessness," and demanding that the debtor prove hopelessness to a "certainty" directly conflicts with this Court's admonition that dischargeability exceptions under Section 523(a), including exceptions for discharge of educational loans, are determined based on the *preponderance of the evidence*. *Grogan* v. *Garner*, 498 U.S. 279, 291 (1991).

Courts have likewise transformed the third *Brunner* prong, "past good faith effort," into an unforgiving and strict requirement with no rational connection to the statutory text. "'[U]ndue hardship' is, necessarily, a forward-looking concept"; by making the debtor's past failure to pay student loans a categorical bar to discharge, the *Brunner* courts misconstrue Section 523(a)(8). See *Kopf* v. *U.S. Dep't of Educ. (In re Kopf)*, 245 B.R. 731, 744-745 (Bankr. D. Me. 2009). Those courts have used the requirement of "past good faith effort" to exercise a moral judgment on whether a debtor is worthy of a discharge, which is contrary to the intent of the statute. Interpreting "undue hardship" to mete out punishment for lack of past "good faith effort" is inconsistent with the unambiguous instruction that "undue hardship" discharges be applied to benefit innocent parties that Congress expressly sought to protect, such as a debtor's children, aged parents, or other dependents.

"Undue hardship" is used twice in the Bankruptcy Code, in consecutive sections that each deal with standards for discharge of prepetition debt. Neither usage suggests that the phrase implicates a backwards-facing moral judgment. Immediately following Section 523(a)(8), Section 524(c)(6)(A) uses substantially identical language, conditioning an unrepresented debtor's reaffirmation of prepetition debt on evidence that the reaffirmed debt is "not imposing an undue hardship on the debtor or a dependent of the debtor." Both of these sections are intended to assess whether a debtor's prepetition debt burden is excessive, and neither section requires a punitive or moral assessment of whether a debtor *deserves* to discharge debt. See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405, 513-519 (2005).[5] The "undue hardship" determination in each of these statutes requires consideration not only of the debtor but also the debtor's dependents. 11 U.S.C. 523(a)(8); 11 U.S.C. 524(c)(6)(A).

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[5] Bankruptcy Code Section 1328(b), enacted at the same time as Section 523(a)(8), shows that when Congress intended to condition discharge of prepetition debt on a debtor's good faith, it knew how to do so. Section 1328(b) establishes the test by which a chapter 13 debtor may obtain a discharge of debt notwithstanding the fact that payments have not been completed under a chapter 13 plan. The first element of this test requires that "the debtor's failure to complete such payments is due to circumstances for which the debtor should *not be found justly responsible*." See 11 U.S.C. 1328(b)(1) (emphasis added). The omission of similar language in Section 523(a)(8) suggests that "undue hardship" in Section 523(a)(8) does not require past "good faith effort" to repay student loans.

The *Brunner* test is "truly a relic of times long gone." *Roth* v. *Educ. Credit Mgmt. Corp.*, 490 B.R. 908, 920, 923 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring). "Congress intended to make discharge of a student loan more difficult * * * than other types of debt," but it did not intend to make discharge "impossible." See *Dolph* v. *Pa. Higher Educ. Assistance Agency (In re Dolph)*, 215 B.R. 832, 836 (B.A.P. 6th Cir. 1998). And, while the *Brunner* test was always overly rigid, that inflexibility has become intolerable as the "undue hardship" test has expanded in importance. Even the Seventh Circuit has recently expressed concern that the *Brunner* "future hardship" requirement may have become unduly constraining, acknowledging that "'certainty of hopelessness' sounds more restrictive than the statutory 'undue hardship'" and cautioning courts "not to allow judicial glosses * * * to supersede the statute itself." *Krieger* v. *Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884-885 (2013) (Easterbrook, J.)

B. The "Totality Of The Circumstances" Test Is Better Suited Than The *Brunner* Test For Effecting The Statutory Purpose

The "totality of the circumstances" test, which permits courts to decide whether "undue hardship" exists based on "the unique facts and circumstances that surround the particular bankruptcy," is superior. See *Long* v. *Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003). As discussed above, the primary benefit of the "totality of the circumstances" test is that it discards the "certainty of hopelessness" and "past good faith effort" requirements, which are out of sync with Congress's intent to limit non-dischargeability of student loans to situations where

repayment of the loans will not result in excessive economic hardship. Instead of cabining the many different life circumstances of various debtors into *Brunner*'s rigid checklist, the "totality of the circumstances" test allows courts to account for all of the factors that determine whether a debtor would, in fact, suffer an excessive economic hardship if forced to repay the debt. 11 U.S.C. 523(a)(8). The ultimate question to be answered is: "Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" *Hicks* v. *Educ. Credit Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 31 (Bankr. D. Mass. 2005).

The graduating class of 2015 has the most student debt in U.S. history, with the average indebted student graduating with debt of $35,051. Jillian Berman, *Class of 2015 has the Most Student Debt in U.S. History*, Market Watch (May 9, 2015, 7:48 a.m.), http://www.marketwatch.com/story/class-of-2015-has-the-most-student-debt-in-us-history-2015-05-08. Today, facing the high costs of post-graduate education, nearly all students borrow heavily to finance their education. See *Roth*, 490 B.R. at 922 (Pappas, J., concurring). Currently, 40 million people owe $1.2 trillion in student loan debt. Susan Dynarski, *New Data Gives Clearer Picture of Student Debt*, N.Y. Times, Sept. 10, 2015, http://www.nytimes.com/2015/09/11/upshot/new-data-gives-clearer-picture-of-student-debt.html.

Unlike 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." *Roth*, 490 B.R.

at 922 (Pappas, J., concurring). A recent study found that 75 percent of the increase in defaults between 2004 and 2011 can be explained by the surge in the number of borrowers at for-profit colleges, community colleges, and "other non-selective institutions," where the median salary upon graduation was about $22,000 as compared to $35,000-$49,000 for graduates of more selective colleges. See Adam Looney & Constantine Yannelis, *A crisis in student loans? How changes in the characteristics of borrowers and in the institutions they attended contributed to rising loan defaults*, Brookings Paper on Economic Activity 36 (Sept. 10, 2015), http://www.brookings.edu/~/media/projects/bpea/fall-2015_embargoed/conferencedraft_looneyyannelis_studentloandefaults.pdf. Among this class of student loan borrowers are individuals and families who indisputably face excessive economic hardship and who are denied discharge of student loan debt under the rigid requirements of the *Brunner* test.

Because "exceptions" to the general rule of discharge are enacted against "the well-known purposes of the bankrupt law," which is to give the debtor a fresh start, such exceptions are "confined to those plainly expressed." *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915); see also *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). For that reason, "statutory exceptions to discharge are generally construed 'narrowly against the creditor and in favor of the debtor.'" *Boston Univ.* v. *Mehta (In re Mehta)*, 310 F.3d 308, 311 (3d Cir. 2002) (quoting *In re Pelkowski*, 990 F.2d 737, 744 (3d Cir. 1993)). The "undue hardship" exception in Section 523(a)(8) plainly expresses Congress's intent to deny the privilege of discharge to those who were able but unwilling to pay their student loans, but nowhere sug-

gests a legislative purpose to impose a nearly insurmountable obstacle to a "fresh start" for those for whom repayment of student loan obligations constitutes an excessive hardship. As they have come to be applied, the *Brunner* test's inflexible "future hardship" and "past good faith effort" requirements have diverged from the statutory text and legislative intent, and detract from the "fresh start" principles of the Bankruptcy Code by construing the student-loan exception to discharge broadly rather than narrowly. Doing so defeats Congress's stated intent that discharge should be available in cases where repayment of student loans causes the debtor or his dependents undue hardship. See *Kopf*, 245 B.R. at 744 (the *Brunner* test has "sacrifice[d] the notion of 'fresh start' at the altar of 'undue hardship'"). Instead, this Court should adopt the more flexible "totality of the circumstances" test, which permits courts to consider the specific facts of a debtor's case and determine whether the debtor's likely future financial resources can sufficiently cover repayment of the loans while still allowing for a minimal standard of living.

III. The Different Tests Are Often Outcome Determinative, Including In This Case

Regardless of which test this Court deems appropriate, it should grant a writ of certiorari to decide on a *single* test; a debtor's ability to discharge a significant student loan debt burden should not depend on where that debtor resides. Respondent has previously argued before this Court that the differences between *Brunner* and the "totality of the circumstances" tests are outcome determinative, describing the Eighth Circuit test as "less restrictive" and creating a "gross inconsisten-

cy" because some debtors "may be discharged in the Eighth Circuit when similarly situated debtors elsewhere will not be." Pet. at 15, *Educ. Credit Mgmt. Corp.* v. *Reynolds*, No. 05-1361 (U.S. filed Apr. 26, 2006). Petitioner's case illustrates this disparity. When other courts have analyzed substantially the same facts employing the "totality of the circumstances" test, they have granted discharge. Moreover, granting review in this case, in which the Seventh Circuit applied the most restrictive version of the *Brunner* test, will allow the Court first to determine the most fundamental issue—whether a totality of the circumstances approach or *Brunner*'s inflexible three-requirement test better comports with the statutory "undue hardship" standard. If the Court were to determine that *Brunner* is the correct standard, the Court could then address whether the Seventh Circuit's particularly restrictive version of *Brunner* should be loosened.

A. Courts Applying The "Totality Of The Circumstances" Test Grant Discharges Based On Facts Like Those Here

1. The Eighth Circuit's 2006 decision in *Reynolds* v. *Pennsylvania Higher Education Assistance Agency (In re Reynolds)*, 425 F.3d 526, is instructive. In *Reynolds*, the debtor was a 32-year-old married graduate of the University of Michigan Law School who owed a total of $142,000 in student loan debt. *Id.* at 528-529. She suffered from major depressive illness and anxiety disorders, and although she had passed the Colorado bar exam, she was unable to find work as a lawyer and thus settled for a job as a secretary-receptionist, earning $30,000 per year. *Id.* at 528. Even though this income, combined with that of her husband (a school bus driv-

er), provided enough to cover her monthly debt payments on a 30-year amortization schedule, the court affirmed the bankruptcy court's finding that the debtor's stress level—a product of her debt burden—imposed an "undue hardship" by virtue of its effect on her health. *Id.* at 532-534. While the court found that the debtor "did not establish, as a matter of fact, that she lacked all means to pay down all of the component loans in her educational debt structure," *id.* at 530, a finding that would have prevented dischargeability of her student loan debt under the Seventh Circuit's "certainty of hopelessness" version of the *Brunner* test, the Eighth Circuit nevertheless affirmed the bankruptcy court's reliance on the inherent flexibility of the "totality of the circumstances" test to hold that her loans were dischargeable.

Petitioner's circumstances are comparable to, if not more compelling than, those presented in *Reynolds*. Petitioner is 24 years older than Ms. Reynolds and fewer than ten years from retirement age. He has no income independent of that received by his elderly mother, has twice failed to pass the bar exam, and has a criminal and medical history that render it extremely difficult for him to obtain any gainful employment, much less employment that would permit repayment of his staggering student loans during his limited remaining working years. His student loan debt burden is substantially greater than Ms. Reynold's student loan debts. The Seventh Circuit's adoption of the *Brunner* test precluded it from taking into account these individualized circumstances that the Eighth Circuit recognizes are relevant, and this disparate treatment significantly reduced the possibility that petitioner's student loans would be discharged.

2. A recent bankruptcy court decision, also from the Eighth Circuit, further highlights the glaring differences in outcome that result from the present circuit split. In *Monroe* v. *United States Department of Education (In re Monroe)*, Nos. 13-BK-71026, 14-AP-7030, (Bankr. W.D. Ark. Sept. 23, 2015), slip op., the debtor was a 57-year-old, twice-divorced woman with no dependents who owed $56,010.68 from nine student loans that funded her undergraduate and graduate education. Despite the fact that she was employed in various positions since leaving graduate school, she made no payments on any of her student loans before seeking to have them discharged. Applying the "totality of the circumstances" test, the bankruptcy court nonetheless held that more than half of her debt (five of the nine loans, totaling $29,945.47) was dischargeable, recognizing that, while the debtor could afford to cut back on certain expenses, her earnings potential was unlikely to improve. In stark contrast, the Seventh Circuit here applied its version of the *Brunner* test and held that petitioner categorically did not meet the "good faith effort" requirement because he had not made any payments on the loans at issue.

3. *Bronsdon* v. *Educational Credit Management Corp. (In re Bronsdon)* is another case with striking similarities to petitioner's. 435 B.R. 791 (B.A.P. 1st Cir. 2010). The debtor was a 64-year-old single woman with no dependents. *Id.* at 794. Like petitioner, the debtor in *Bronsdon* earned degrees later in life, including an undergraduate degree from Wellesley College at the age of 50 and a law degree from Southern New England School of Law at age 60. *Ibid.* Also like petitioner, Ms. Bronsdon failed the bar exam multiple times and was unemployed. *Ibid.* At the time of the decision, she

was living temporarily in her father's house and subsisting on monthly Social Security checks of $946. *Ibid.* Importantly, *unlike* petitioner, Ms. Bronsdon did not suffer from the additional difficulties of a struggle to recover from alcohol addiction and depression or the impediment a criminal record creates to a successful search for law-related employment. Her student loan debt totaled $82,049.45, *ibid.*, less than one-third of the amount of petitioner's student loan debt burden. Although Ms. Bronsdon was eligible to participate in the Income-Contingent Repayment (ICR) program, which would have required no monthly payments at her current income level, she did not participate. *Id.* at 795.[6]

The bankruptcy court declined to endorse a specific test, but the Bankruptcy Appellate Panel concluded that the "totality of the circumstances" test was the appropriate means by which to assess the "undue hardship" requirement. The panel held that neither the "certainty of hopelessness" showing nor "good faith effort" requirement were supported by the text of Section 523(a)(8). *Bronsdon*, 435 B.R. at 799-800. And, although Ms. Bronsdon would have been eligible for ICR, the panel held that the bankruptcy court was correct to give little weight to her decision not to apply for

[6] In the ICR and Income-Based Repayment (IBR) programs, income-eligible debtors make reduced monthly payments up to a certain percentage of their discretionary income; the programs also take into account the debtor's family size. At the conclusion of the repayment period, the unpaid balance is forgiven, though debtors may face adverse tax consequences. See Federal Student Aid, U.S. Dep't of Educ., *Income-Driven Repayment Plans for Federal Student Loans* 3 (Apr. 2015), https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment.pdf.

the program, as her ability to repay the debt was unrealistic in light of her age, inability to pass the bar exam, and difficulty in finding employment. *Id.* at 804. Accordingly, the court affirmed the dischargeability of her student loan debt. *Ibid.*

Under a similar analysis, petitioner's student loan debt would likewise be dischargeable. Petitioner is similar to Ms. Bronsdon in terms of his age and failure to pass the bar exam, but has substantially greater student loan debt, *and* must contend with past alcohol addiction and a criminal record that limits his ability to find employment. Petitioner would clearly fare better under the "totality of the circumstances" test than he did under the *Brunner* test. The courts' below treatment of the "past good faith effort" prong of that test as a categorical bar to discharge for petitioner's student loan debt was expressly rejected in *Bronsdon*. Without the categorical rules that were invoked against petitioner below, he would very likely have been granted relief.

B. The Petition In This Case, Arising From A Circuit Applying A Stringent Version Of *Brunner*, Presents An Appropriate Vehicle To Resolve The Circuit Conflict

The Court's review is appropriate in this case, which isolates the legal difference between the "totality of the circumstances" test and the *Brunner* required-elements test and, should the Court determine that *Brunner* is the appropriate standard, offers the Court a chance to clarify the *Brunner* test as it should be applied throughout the country.

1. For the reasons discussed above, see pp. 28-32 *supra*, petitioner's case presents unique facts that like-

ly would have led to a different result in a totality-test jurisdiction. Under the Seventh Circuit's rigorous *Brunner* test, petitioner lost automatically upon adverse rulings on "certainty of hopelessness" and "past good faith effort." Indeed, in the Seventh Circuit's view, petitioner could have saved himself the time and effort of appealing: he was per se barred from a discharge by not making payment on the loans at issue. App., *infra*, 9a. In a "totality of the circumstances" jurisdiction, petitioner would not have faced automatic disqualification and could have put on evidence of "other relevant facts and circumstances surrounding [his] particular bankruptcy case" appealing to the "inherent discretion contained in Section 523(a)(8)." See *Long* v. *Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003). The fact that petitioner paid over $40,000 (an amount exceeding the principal) on a loan not at issue in the case, so he could obtain his diploma to aid in job-hunting, would undoubtedly be relevant. Accordingly, this case presents the Court with an opportunity to address this well-entrenched circuit conflict in circumstances where it matters.

2. Even if the Court were to conclude that the *Brunner* test should be the "uniform" law, U.S. Const. Art. I, § 8, Cl. 4, petitioner's case would offer the Court a chance to address the discrepancies among the circuits that do apply *Brunner*, many of which could be outcome determinative in their own right. See pp. 12-15, *supra*. The Seventh Circuit, from which this case arises, is among the most stringent *Brunner* jurisdictions on the two prongs decided adversely to petitioner. On the "future hardship" prong, the Seventh Circuit imposes the daunting "certainty of hopelessness" test, which has no grounding in the statutory text and im-

poses an improper evidentiary burden in violation of this Court's decision in *Grogan* v. *Garner*, 498 U.S. 279, 291 (1991). On the third "past good faith effort" prong, the Seventh Circuit has parted with the Tenth and Eleventh Circuits to impose an unforgiving rule denying discharge where the debtor has not made payments on the loans at issue in the case.

* * *

Congress has a rational interest in ensuring that the debt associated with student loans, for which the federal government is often a substantial creditor, is not easily discharged. But when Congress enacted Section 523(a)(8), it also intended that student loan debtors and their dependents should have the benefit of a "fresh start" upon a showing of "undue hardship." Petitioner and other debtors in the Seventh Circuit have been denied a "fresh start" under a rigid and restrictive standard of "undue hardship" that is based on a misreading of statutory language and purpose. This Court should grant certiorari to restore the availability of a discharge to debtors who are, in fact, experiencing "undue hardship."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-3702

MARK WARREN TETZLAFF,
PLAINTIFF-APPELLANT,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 14-cv-767 — **Lynn S. Adelman**, *Judge.*

ARGUED APRIL 22, 2015 — DECIDED JULY 22, 2015

Before FLAUM, MANION, and HAMILTON, *Circuit Judges.*

FLAUM, *Circuit Judge.* Mark Tetzlaff currently owes approximately $260,000 in student loan debt, which is guaranteed by Educational Credit Management Corporation. When Tetzlaff filed for Chapter 7 bankruptcy in 2012, he sought to have this debt discharged, claiming that repayment constituted an "undue hardship" under 11 U.S.C. § 523(a)(8). After a trial, the bankruptcy court held that Tetzlaff's student debt

could not be discharged. The United States District Court for the Eastern District of Wisconsin affirmed. We, in turn, affirm the district court.

I. Background

Mark Tetzlaff is fifty-six years old and lives in Waukesha, Wisconsin with his eighty-five-year-old mother; they both subsist on the income from her Social Security payments. Tetzlaff is divorced, has no children, and is currently unemployed. From the mid-1990s until 2005, Tetzlaff pursued a Masters in Business Administration from Marquette University, as well as a law degree from Florida Coastal School of Law ("Florida Coastal").[1] Most relevant to this appeal, Tetzlaff took out various federally guaranteed student loans to finance his graduate education.[2] In 2004, Tetzlaff consolidated his student loan debt, and Educational Credit Management Corporation ("Educational Credit") is now the guarantor for the outstanding loan amount.

Tetzlaff has been unsuccessful at passing a state bar exam to date (although he has made two attempts). Prior to attending graduate school, Tetzlaff worked as a financial advisor, an employee-benefits consultant, an insurance salesman, and a stock broker. Over the years, Tetzlaff has struggled with depression and alcohol

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[1] Tetzlaff also attended DePaul University College of Law, but was dismissed from the program without a degree.

[2] Tetzlaff financed his education at Florida Coastal directly with the school. Tetzlaff's Florida Coastal debt was not included in this discharge action. However, as we will explain later, Tetzlaff argues that payments made to Florida Coastal should influence our analysis of his good faith efforts to pay the student loan debt at issue in this action for discharge.

abuse; he has also been involved in domestic disputes. Tetzlaff has several misdemeanor convictions, including convictions for disorderly conduct and intimidating a victim. He claims that all of these factors combined make it very difficult for him to secure employment.

In February 2012, Tetzlaff filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Eastern District of Wisconsin. At the time, Tetzlaff owed approximately $260,000 in student loan debt, which was guaranteed by Educational Credit. In July 2012, Tetzlaff filed an adversary complaint seeking to discharge his student loan debt; the complaint named two financial institutions (who are not parties to this appeal) as defendants. Educational Credit subsequently filed a motion to substitute itself as a real party of interest, and the bankruptcy court granted this motion.

The bankruptcy court held a trial in May 2014 to determine whether Tetzlaff was eligible to discharge his student loans. The court determined that Tetzlaff failed to show that repaying his student loans would constitute an "undue hardship," and thus found that Tetzlaff could not discharge them. The United States District Court for the Eastern District of Wisconsin affirmed. Tetzlaff appealed.

II. Discussion

Student loans are generally not dischargeable in bankruptcy unless the debtor proves that excluding the loans from discharge "would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8). To determine which situations constitute an "undue hardship," we have adopted the *Brunner* test for student loan discharge proceedings, which requires a debtor to show that:

(1) [he] cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay [his] loans;

(2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and

(3) [he] made good faith efforts to repay the loans.

In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (citing *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). A debtor must satisfy each element of the *Brunner* test in order to have his loans discharged. *Id.* at 1135-36. In this case, the bankruptcy court found that Tetzlaff met the first element of the *Brunner* test, but that he failed to meet the second two. Educational Credit does not challenge the bankruptcy court's analysis of the first *Brunner* prong. Thus, we accept for purposes of our analysis that Tetzlaff meets the first *Brunner* requirement, and we proceed to examine the remaining elements: the "additional circumstances" prong and the "good faith" prong. The bankruptcy court found that neither element fell in Tetzlaff's favor.

We review the factual findings of the bankruptcy court for clear error. *Id.* at 1137. In *Krieger v. Educational Credit Management Corp.*, we held that the additional circumstances prong represents a "factual finding," and thus is only reversible if shown to be clearly erroneous. 713 F.3d 882, 884 (7th Cir. 2013). In analyzing the good faith prong, we held that this determination "combines a state of mind (a fact) with a legal characterization (a mixed question of law and fact)." *Id.* While we acknowledged in *Krieger* that there may be circumstances in which the "only real dispute is legal"

—in which case our review would be less deferential—we recognized that the good faith analysis is "a predominantly factual understanding" and that the "undue hardship" inquiry as a whole is "a case-specific, fact-dominated standard, which implies deferential appellate review." *Id.* With such deference in mind, we find that the bankruptcy court's conclusions on the additional circumstances prong and the good faith prong must both be affirmed.

A. Additional Circumstances

The second prong of the *Brunner* test contemplates whether "additional circumstances exist indicating that [the inability to pay] is likely to persist for a significant portion of the repayment period … ." *Roberson*, 999 F.2d at 1135. We have noted that "the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Id.* at 1136 (citing *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)). While in *Krieger* we noted that the "certainty of hopelessness" standard "sounds more restrictive than the statutory 'undue hardship' [standard]" we also noted that "a judge asked to apply a multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application." 713 F.3d at 885. Here, the bankruptcy court found that Tetzlaff's financial situation has the ability to improve given that "he has an MBA, is a good writer, is intelligent, and family issues are largely over." The court also concluded that "Tetzlaff is not mentally ill and is able to earn a living." On the topic of Tetzlaff's mental health, the court mentioned the testimony of Dr. Marc Ackerman—a forensic psychologist hired by Ed-

ucational Credit—and Dr. Amy Gurka—Tetzlaff's treating psychologist. The bankruptcy court noted that Dr. Gurka diagnosed Tetzlaff with Narcissistic Personality disorder, but that Tetzlaff's "anxiety and depression do not reach clinical levels." The court also noted that tests performed by Dr. Ackerman indicated that Tetzlaff "scored very high on several malingering scales," indicating that Tetzlaff was perhaps feigning his psychological symptoms.

On these facts, the bankruptcy court's analysis of the additional circumstances prong was not clearly erroneous. Given Tetzlaff's academic degrees, prior work experience, and age, we agree with the bankruptcy court that he is capable of earning a living. (In fact, Tetzlaff's capable pro se representation in this case is, in our opinion, an indicator of his marketable job skills.) While Tetzlaff references obstacles related to his mental health, testimony presented to the bankruptcy court indicates that he does not suffer from clinical levels of anxiety or depression, and further indicates that Tetzlaff may, in fact, be exaggerating his symptoms. As we stated in *Roberson*, "undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from factors beyond his reasonable control." 999 F.2d at 1136 (citation and internal quotation marks omitted).

On appeal, Tetzlaff notes that the bankruptcy court did not permit him to present the testimony of two experts that would have helped his case, particularly on the topic of his future ability to secure employment and earn a living. Prior to trial, the bankruptcy court excluded the proposed testimony of: (1) a forensic psy-

chologist who would have testified that Tetzlaff had memory problems that would likely prohibit him from ever passing a bar exam; and (2) a vocational counselor who would have testified that Tetzlaff was unlikely to find employment paying more than $31,000 to $37,000 per year. The bankruptcy court excluded this testimony due to Tetzlaff's late disclosure of the experts. The bankruptcy court previously granted three extensions of the court's pretrial deadline to disclose experts, such that Tetzlaff had until August 2, 2013 to do so. On April 10, 2014, Tetzlaff filed an emergency motion seeking permission to disclose the additional experts, and the bankruptcy court denied the motion. The district court affirmed, noting that under Federal Rule of Civil Procedure 16(b)(4), a pretrial scheduling deadline may only be modified for "good cause." Tetzlaff explained that it did not occur to him to seek testimony on memory loss until he failed two exams needed to work in the financial industry in November 2013 (several months after the expert disclosure deadline had passed). For the next six months, Tetzlaff apparently gathered the "memory evidence" that he wished to present at trial, and then filed the emergency motion with the bankruptcy court regarding the two additional experts. However, even assuming that Tetzlaff could not have recognized the need for "memory experts" prior to November 2013, Tetzlaff waited another six months to raise the issue with the bankruptcy court (and this was after the deadline for expert disclosure had been thrice extended). We therefore agree with the district court that Tetzlaff did not show good cause for the lateness of his expert disclosure, and thus we reject Tetzlaff's argument that the bankruptcy court erred in excluding his two proposed experts.

B. Good Faith

A debtor's good faith efforts to repay his student loans are measured by his ability to "obtain employment, maximize income, and minimize expenses." *Roberson*, 999 F.2d at 1136. Good faith is also assessed by the debtor's demonstrated efforts to pay off his existing loans. In *Krieger*, we recognized that the question of good faith under *Brunner* necessarily implicates the debtor's past efforts to pay down the debt at issue (rather than a resolve to pay the debt in the future, which directly conflicts with the very nature of a loan discharge proceeding). 713 F.3d at 884. The bankruptcy court noted that "[Tetzlaff] repaid much of the loan to Florida Coastal Law School, but nothing on the loan at issue in this adversary proceeding." Drawing on these facts, the bankruptcy court concluded that, as with the additional circumstances prong, Tetzlaff did not meet *Brunner*'s good faith requirement.

Tetzlaff argues that the bankruptcy court erred in refusing to consider his payments to Florida Coastal (which are not included in the instant discharge action) in concluding that he had not made a good faith effort to repay the debt held by Educational Credit. However, Tetzlaff's position is without legal support. Educational Credit points to *In re Roberta Spence*, 541 F.3d 538, 545 (4th Cir. 2008), in which a debtor also sought to discharge student loan debt (also held by Educational Credit) and argued that her attempt to pay Perkins Loans should qualify as a "good faith" effort to repay her Educational Credit debt. The Fourth Circuit noted that "[Spence's] choice to repay some of the Perkins Loans does not demonstrate a good faith effort to repay the student loans held by [Educational Credit]."

Id.; see also In re Cunningham, No. 04-2636, 2006 WL 1133923, at *4 (N.D. W.Va. Apr. 26, 2006) (holding that "there is no authority that suggests that a debtor who pays down one loan while neglecting another acts in good faith") Tetzlaff has not identified any competing authority. Additionally, Tetzlaff's argument conflicts with the very nature of the undue hardship analysis, which is an inquiry about the ability of a debtor to pay student loan debt *subject to a discharge action. See* 11 U.S.C. § 523(a)(8). The bankruptcy court was not required to consider Tetzlaff's payments to Florida Coastal as evidence of a good faith effort to repay Educational Credit, as his Florida Coastal debt was not included in the discharge action. Furthermore, as the bankruptcy court noted, it seems that Tetzlaff repaid his debt to Florida Coastal largely because he needed the school's cooperation in releasing his diploma and transcript. Thus, Tetzlaff was motivated by certain incentives to pay down his Florida Coastal debt that do not apply to the repayment of his debt held by Educational Credit. Therefore, we decline to hold that the bankruptcy court erred when it refused to consider the repayment of debt not included in the loan discharge proceeding before it in making a determination of good faith under the *Brunner* test. Further, we affirm the bankruptcy court's conclusion that Tetzlaff has not made a good faith effort to pay down his student loan debt.

III. Conclusion

Accordingly, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 14-C-0767

MARK W. TETZLAFF, APPELLANT,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION, APPELLEE,

OPINION

Mark Tetzlaff filed for bankruptcy under Chapter 7 in February 2012 and received a discharge in January 2013. His largest creditor is Educational Credit Management Corporation ("Educational Credit"), which holds his federally guaranteed student loan. At the time Tetzlaff filed for bankruptcy, the outstanding balance on the loan was approximately $260,000.

Tetzlaff borrowed the funds at issue in this case in the course of obtaining a Masters in Business Administration and a law degree. Tetzlaff pursued these degrees from the mid-1990s until December 2005, when he graduated from law school. Since then, Tetzlaff has not held steady employment in the legal field or any other field. He has not passed a bar exam and has only been able to find temporary, intermittent work in the legal field. Prior to attending law school, Tetzlaff worked in the employee-benefits industry, as a stock

broker, as an insurance salesman, and as a financial advisor. Since law school, Tetzlaff has tried to find work in some of these fields but has been unsuccessful.

Under the Bankruptcy Code, student loans are excepted from discharge unless the debtor proves that excepting the loans "would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8). On July 19, 2012, Tetzlaff commenced an adversary proceeding against Educational Credit in which he sought to prove that excepting his loans from discharge would impose an undue hardship. Following a trial held on May 1, 2014, the bankruptcy judge entered an order in which she concluded that Tetzlaff had not met his burden of proof. Tetzlaff appeals.

In the Seventh Circuit, a debtor must prove three elements in order to establish undue hardship:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] 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.

Krieger v. Educational Credit Management Corp., 713 F.3d 882, 883 (2013) (quoting In re Roberson, 999 F.2d 1132, 1135 (7th Cir.1993) (alterations in Roberson)). The bankruptcy court found that Tetzlaff proved the first element. Tetzlaff is 56 years old, is currently unemployed, and has not been steadily employed for many years. He lives with his mother, and it

appears that the only source of household income is his mother's Social Security benefits. However, the bankruptcy court concluded that Tetzlaff failed to prove the second and third elements of the undue-hardship test. Essentially, the bankruptcy court concluded that Tetzlaff is capable of finding employment that will enable him to repay his loans but that instead of making good-faith efforts to secure appropriate employment, Tetzlaff has been "making excuses for failure." R. 1234.

At trial, Tetzlaff presented evidence showing that he has been trying to obtain steady employment but has been unsuccessful. He introduced evidence showing that he is a recovering alcoholic, that he has been convicted of several misdemeanor offenses, and that these convictions have hindered his ability to find a job. Tetzlaff also presented evidence from his treating psychologist who testified that he has psychological issues, including narcissistic personality disorder, anxiety, and depression. Tetzlaff attempted to introduce testimony from a forensic psychologist who would have testified that Tetzlaff has memory problems that will likely prevent him from passing a bar exam. Tetzlaff also attempted to introduce testimony from a vocational counselor who would have testified that, given Tetzlaff's memory issues, he is unlikely to find employment paying, on average, more than $15.00 to $18.00 per hour (or $31,000 to $37,000 per year). The bankruptcy court excluded the testimony of Tetzlaff's forensic psychologist and his vocational counselor on the ground that he had failed to disclose these experts by the deadline in the court's pretrial order. This left Tetzlaff with only his treating psychologist, whose opinions the bankruptcy court did not assign much weight. Instead, the bankruptcy court credited the testimony of a fo-

rensic psychologist hired by Educational Credit. That witness administered tests to Tetzlaff that were designed to determine whether he was feigning his psychological symptoms and concluded that Tetzlaff was, in fact, feigning at least some of his symptoms. Based on this testimony, the court concluded that Tetzlaff "has not tried in good faith to work up to his ability and to pay his loans." R. 1234.

The first issue on appeal is whether the bankruptcy court erred when it excluded the testimony of the debtor's forensic psychologist and vocational counselor. The bankruptcy court excluded the testimony because Tetzlaff had failed to disclose these witnesses in accordance with Federal Rule of Civil Procedure 26(a)(3) by the deadline set in the court's pretrial order. The pretrial order originally set a deadline of April 12, 2013 for Tetzlaff to disclose his experts. The bankruptcy court granted Tetzlaff three extensions of this deadline, with the result that the Tetzlaff had until August 2, 2013 to disclose his experts.

According to Tetzlaff, in November 2013—after the deadline to disclose experts had passed—he failed two exams that he needed to pass in order to work in the financial industry, and this caused him to think that he might have memory problems. Tetzlaff had suspected, for two years prior to November 2013, that he might have memory problems, but he contends that failing the two exams caused him to bring up his suspicions with his physician. Tetzlaff's physician referred him to a psychologist, and this psychologist referred Tetzlaff to Robert Ver Wert, the forensic psychologist whose testimony the bankruptcy court would eventually exclude. On November 19, 2013, Ver Wert administered

one memory test to Tetzlaff, and on the basis of that test he concluded that Tetzlaff had some memory issues. R. 569-71. Ver Wert opined that, based on Tetzlaff's "weak memory problems," he would "most likely never be able to pass the Bar exam." R. 571. Der Wert then advised Tetzlaff that he should see a vocational counselor to assess what impact his test results would have on his ability to perform certain types of work. R. 501.

On December 2, 2013, Tetzlaff contacted the Wisconsin Department of Workforce Development's Division of Vocational Rehabilitation ("DVR"), to be evaluated by a vocational counselor. R. 501. DVR advised him that it might be a few months before he could be seen by a counselor. On February 28, 2014, Tetzlaff again contacted DVR, and DVR told him that it might be a few more months before he could be seen. At this point, Tetzlaff asked for referrals to private vocational counselors, and this lead him to Michael Ewens, the vocational counselor whose testimony the bankruptcy court would eventually exclude. Ewens evaluated Tetzlaff on March 27, 2014, and prepared a written report dated April 2, 2014. In that report, Ewens opined that, given the memory deficiencies identified by Ver Wert, Tetzlaff could not obtain skilled employment as an attorney or financial advisor. He further opined that Tetzlaff could only obtain employment in fields in which the average wages ranged from $15 to $18 per hour (or $31,000 to $37,000 per year). R. 580-83.

On April 10, 2014, Tetzlaff filed an "emergency" motion to allow him to disclose Ver Wert's and Ewens's reports despite the fact that the deadline to disclose experts had long passed. The court held a hearing on

the motion on April 16, 2014, and denied the motion on that date. The court ruled that Ver Wert and Ewens could not offer testimony at trial. R. 671-75.

The bankruptcy court's refusal to allow Tetzlaff's belated disclosure of Ver Wert and Ewens pursuant to Rule 26(a)(3) was based on Federal Rule of Civil Procedure 16(b)(4), which provides that a deadline in a pretrial scheduling order may be modified only for "good cause." Here, the bankruptcy court determined that Tetzlaff did not have good cause for failing to disclose Ver Wert and Ewens prior to April 10, 2014. I review this determination for abuse of discretion. See, e.g., Blue v. Hartford Life & Accident Ins. Co., 698 F.3d 587, 593 (7th Cir. 2012).[1]

In making a Rule 16(b) good-cause determination, the court's primary consideration is the diligence of the party seeking amendment. Alioto v. Town of Lisbon, 651 F.3d 715, 720 (7th Cir. 2011). And here, the bankruptcy judge found that Tetzlaff had not been diligent.

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[1]The court's ruling also implicates Federal Rule of Civil Procedure 37(c)(1), which provides that when a party fails to disclose a witness in accordance with Rule 26(a), the party may not use that witness to supply evidence at trial unless the failure was substantially justified or harmless. However, in this case there is no meaningful difference between the good-cause standard of Rule 16(b)(4) and the substantially justified standard of Rule 37(c)(1). Moreover, a decision under Rule 37(c)(1), like a decision under Rule 16(b)(4), is reviewed for abuse of discretion. See, e.g., Dynegy Mktg. & Trade v. Multiut Corp., 648 F.3d 506, 514 (7th Cir. 2011). As discussed in the text, Tetzlaff's untimely disclosusre of Ven Wert and Ewens was not harmless, as it would have required the court to reschedule the trial.

R. 673-74. She found that, at the latest, Tetzlaff learned of his memory issues in November 2013, when Ver Wert administered the memory test and opined that his memory issues would prevent him from passing the bar. And she found that Tetzlaff first contacted the DVR in search of a vocational counselor on December 2, 2013. R. 672-73. Yet Tetzlaff did not bring his newly discovered memory issues and his desire to hire a vocational counselor to the court's attention until April 10, 2014, which was the eve of trial, when granting Tetzlaff's motion would have required the court to adjourn the trial so that Education Credit could depose Tetzlaff's new expert witnesses and prepare a rebuttal. The judge noted that rescheduling the trial at that late date would prejudice the court, because the court could not use the time that it had set aside for the trial on other matters. R. 675. I cannot say that the bankruptcy judge abused her discretion when she concluded that Tetzlaff had not been diligent in seeking an amendment of the scheduling order or that Tetzlaff's lack of diligence had resulted in prejudice. See Perrian v. O'Grady, 958 F.2d 31, 195 (7th Cir. 1992) (holding that eleventh hour additions produce delays that burden not only the parties to the litigation but also the judicial system and other litigants).

Tetzlaff emphasizes that he is (and was in the bankruptcy court) proceeding pro se, and that pro se litigants are not always held to the same standards as lawyers. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972). However, "pro se litigants are not entitled to a general dispensation from the rules of procedure or court imposed deadlines." Jones v. Phipps, 39 F.3d 158, 163 (7th Cir. 1994). And in this case, the bankruptcy judge gave Tetzlaff an appropriate amount of leeway

before finally holding him to the deadline for disclosing expert witnesses. The judge had previously granted Tetzlaff three extensions of that deadline, and Tetzlaff's pro se status is not an excuse for his waiting until shortly before trial to request a fourth extension. Tetzlaff knew that he might want to present additional experts as early as November 2013 but did not alert the court to this fact until April 2014.

Having found that the bankruptcy court did not err in excluding Tetzlaff's additional expert witnesses, I turn to the question of whether the bankruptcy court erred when it found that Tetzlaff did not meet his burden to prove that excepting his student loans from discharge would cause an undue hardship. As noted, to prove undue hardship, Tetzlaff had to prove three elements: (1) that if he were forced to repay his loans he would be unable, based on current income and expenses, to maintain a "minimal" standard of living; (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. Krieger, 713 F.3d at 883. The bankruptcy judge found that Tetzlaff cannot maintain a minimal standard of living (element one), but that to the extent his inability to maintain a minimal standard of living is likely to persist for a significant portion of the repayment period (element two), it is because Tetzlaff "has not tried in good faith to work up to his ability and to pay his loans" (element three). R. 1234. The bankruptcy judge gave significant weight to the testimony of Education Credit's forensic psychologist, who opined that although Tetzlaff has some psychological issues, Tetzlaff is a malingerer, is feigning some psychological symp-

toms, and is trying to look as impaired as possible. Trial Tr. 66-69, 77-78. And the bankruptcy judge found, after hearing extensive testimony from Tetzlaff himself and observing his demeanor, 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—rather than securing appropriate employment." R. 1234. In short, after hearing Tetzlaff testify about his efforts to find work and weighing the credibility of the other witnesses, the bankruptcy judge found that Tetzlaff was not trying in good faith to maximize his income and pay his loans. See Roberson, 999 F.2d at 1136 (stating that debtor's good faith is measured by "his or her efforts to obtain employment, maximize income, and minimize expenses," and that "undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control'"). Tetzlaff has not shown that the judge's findings of fact on these matters are clearly erroneous.[1] Moreover, where as here the bankruptcy

[1]Tetzlaff points to evidence he presented at trial showing that he was trying hard to obtain employment, see Reply Br. at 14-15, but the bankruptcy court was not required to accept this evidence as proof of Tetzlaff's good faith. Rather, the bankruptcy court was entitled to credit the testimony of Education Credit's forensic psychologist, who opined that Tetzlaff was feigning psychological symptoms in an effort to avoid having to pass the bar exam and find employment. In other words, the bankruptcy court did not clearly err in accepting the psychologist's opinions and concluding that Tetzlaff's efforts to find work did not rise to the level of good faith.

court's ultimate finding as to undue hardship does not turn on a purely legal matter, I must review the court's finding deferentially, as I would a finding on a mixed question of law and fact. Krieger, 713 F.3d at 884. Here, I cannot upset the bankruptcy judge's finding of no undue hardship, which was reasonable given the evidence presented at trial concerning Tetzlaff's efforts to find employment. Accordingly, I must affirm the order of the bankruptcy court.

Tetzlaff argues that the bankruptcy court applied an incorrect legal standard when determining, under the second element of the undue-hardship test, that he had not shown that his inability to maintain a minimum standard of living was likely to persist for a significant portion of the repayment period. Tetzlaff argues that the bankruptcy court applied what he calls the "certainty of hopelessness" standard, a standard which he believes is unconstitutional. Tetzlaff claims that the appropriate question to ask with respect to the second element is whether it is reasonably certain that the debtor's circumstances are unlikely to improve, not whether it is absolutely certain that his circumstances will not improve. But the bankruptcy judge concluded that Tetzlaff had failed to meet even the lesser standard that he advocated for, see R. 1233-34, and thus the bankruptcy court did not, as Tetzlaff claims, apply the "certainty of hopelessness" test. In any event, it is clear from the record that the bankruptcy judge's undue-hardship decision turned on her reasonable conclusion that Tetzlaff was feigning psychological symptoms and not trying in good faith to work up to his abilities. Because the bankruptcy judge's resolution of the good-faith question must be affirmed, I could not reverse even if I thought the judge erred in applying the se-

cond element. See Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 777 (7th Cir. 2002) ("If the debtor fails to establish any one of the elements [of the undue-hardship test], the test has not been met and the court need not continue with the inquiry.").

Finally, Tetzlaff argues that the bankruptcy court erred when it determined that payments he had made to Florida Coastal School of Law did not constitute payments on a student loan. Tetzlaff raises this argument because he thinks that the bankruptcy judge based her good-faith determination on the fact that he had not made any payments at all on his student loans. Tetzlaff points out that he made late tuition payments directly to Florida Coastal in connection with his law-school education, and that these tuition payments should be characterized as payments on a student loan. But the appropriate characterization of his debt to Florida Coastal is irrelevant. The bankruptcy judge did not base her finding of lack of good faith on Tetzlaff's failure to make any payments at all on his student loans. She based her finding on the fact that Tetzlaff is a malingerer and has not tried to maximize his income. R. 1234. To be sure, the bankruptcy judge did mention during her discussion of the good-faith element that Tetzlaff had made payments to Florida Coastal but had not made payments towards the student loans at issue in this case. But it is clear from the entirety of her decision that the bankruptcy judge's finding on the good-faith element rested primarily on her conclusion that Tetzlaff was not making sufficient efforts to maximize his income. Put differently, it is clear that even if the bankruptcy judge had viewed the payments to Florida Coastal as payments on a student loan, she would have found that Tetzlaff had failed to prove good faith. And,

as discussed, that finding would have been reasonable in light of the evidence presented at trial and the bankruptcy judge's opportunity to observe the witnesses and make credibility determinations.

Accordingly, **IT IS ORDERED** that the decision of the bankruptcy court is AFFIRMED.

Dated at Milwaukee, Wisconsin this 3rd day of December, 2014.

s/ Lynn Adelman

LYNN ADELMAN
District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

COURT MINUTES

CHAPTER 7
DATE: May 1, 2014
JUDGE: Margaret Dee McGarity
CASE NO.: 12-21295-MDM
DEBTOR: Mark Tetzlaff
ADV. NO.: 12-2501
ADV.: Debtor v. Educational Credit Management Corporation

NATURE OF HEARING: (1) Plaintiff's motion to declare that the certainty of hopelessness requirement is not required under *Brunner v. New York State Higher Educ. Services Corp.;* (2) Plaintiff's motion to declare plaintiff's payments made on his open student account to Florida Coastal School of Law constitute a student loan under §523(a)(8); and (3) Trial.

APPEARANCES: Jeffrey W. Guettinger, Attorney for Defendant Mark Tetzlaff, Plaintiff/Pro Se Debtor Dr. Marc Ackerman, Witness Amy Gurka,

PHD/Witness
COURTROOM DEPUTY: Carolyn A. Belunas

TIME: 10:03 am - 12:33 pm and
1:33 – 5:04 pm

Plaintiff's motion to declare that the certainty of hopelessness requirement is not required under *Brunner v. New York State Higher Educ. Services Corp.* - The court denied the motion.

Plaintiff's motion to declare plaintiff's payments made on his open student account to Florida Coastal School of Law constitute a student loan under §523(a)(8) - The court denied the motion.

The digital recording of this court proceeding constitutes the record of the trial.

The court heard testimony from the following individuals:

Amy Gurka, Ph.D., Witness
Marc Ackerman, Ph.D., Witness
Mark Tetzlaff, Plaintiff/Pro Se Debtor

There were no objections to the following exhibits presented by the defendant: 101 - 106; There were no objections to the following exhibits presented by the plaintiff: Addendums A (pg. 16-17 only), C-F, and M. Therefore, the court admitted them.

Decision

This court has jurisdiction under 28 U.S.C. §1334; This is a core proceeding to determine dischargeability of a debt under §157(b)(2)(i). The plaintiff/debtor has the burden of proof by a preponderance of the evidence that the debt should be discharged under 11

U.S.C. § 523(a)(8). To meet his burden of proof, the debtor must show (1) he cannot meet a minimal standard of living; (2) there are additional circumstances causing an undue hardship that are likely to persist for a significant portion of the repayment period; and (3) the debtor has made a good faith effort to repay the loans. *In re Krieger*, 713 F.3d 882 (7th Cir. 2013) and *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993).

It is clear from Mr. Tetzlaff's income history that he meets the first *Brunner* test required by *Roberson;* that is, he cannot meet a minimal standard of living.

While the "certainty of hopelessness" standard for the second *Brunner* standard applied in *Roberson* was criticized in dicta in *Krieger*, it was not explicitly overruled. Some courts have emphasized that "undue hardship" simply means a hardship that is greater than that typically found in bankruptcy, not a certainty of hopelessness. However, even if the lesser standard were applicable to this case, Mr. Tetzlaff has not met this test. Dr. Gurka's testing, which was not current, showed that Mr. Tetzlaff has Narcissistic Personality Disorder, but his anxiety and depression do not reach clinical levels. Her testing was done for clinical reasons, not forensic, and some of the test questions implied how the taker could answer to look as impaired as possible ("face validity"). On the other hand, Dr. Ackerman's tests were designed not to imply such answers but instead were designed to show that the taker was faking symptoms. Such tests are important when money is at issue because the taker will be motivated to look as bad as possible. Mr. Tetzlaff scored very high on

several malingering scales. While he took and failed the Illinois bar exam twice, he said he walked out of the first. So the first time he stayed for the entire test, he came very close to passing. 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, provided that he continues to work on those challenges. 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.

Similarly, Mr. Tetzlaff did not meet the third *Brunner* standard, a good faith effort to increase his income to pay student loans. He repaid much of the loan to Florida Coastal Law School, but nothing on the loan at issue in this adversary proceeding, and this appears to be motivated by a desire to obtain its cooperation in his attempts to pass a bar exam, not to pay student loans in general. Most of his 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 - rather than securing appropriate employment. He has lied about his employment experience rather than honestly addressing gaps in employment. He has pursued jobs that are ill suited to his personality problems. Reducing expenses is not an issue, but the debtor has not tried in good faith to work up to his ability and to pay his loans.

The court held that the plaintiff did not meet his bur-

den of proof. Therefore, the debt owed by the plaintiff to the defendant is nondischargeable.

Mr. Guettinger will submit an order.