APPENDIX A

FILED
June 5, 2020

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40269

In the Matter of: THELMA G. MCCOY

Debtor

THELMA G. MCCOY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:18-CV-21

Before BARKSDALE, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:*

Thelma McCoy incurred a large amount of student loan debt (currently totaling over $345,000) in pursuit of advanced degrees, beginning when she was in her forties. She consolidated her loans and entered into an income-based repayment plan. When her degrees did not yield the well-paying jobs she hoped for, she filed for bankruptcy seeking relief from the consolidated student loan debt. At the time of her bankruptcy filing, and throughout this litigation, her repayment plan has required zero dollars per month due to her low income. If her income does not improve, McCoy will continue to have a zero-dollar repayment obligation. Under the structure of the repayment plan, her debt may be forgiven twenty-five years following her first payment under the plan. *See* 34 C.F.R. § 685.221(f)(1), (f)(3)(ii)(D) (2013). However, under current law, such forgiveness has tax implications unless McCoy were to qualify for an employment-based exception; any forgiven amount will be subject to whatever taxation laws are in effect at the time the debt is forgiven. 26 U.S.C. §§ 61(a)(11), 108(f)(1).

Student loan debt is usually not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(8). However, there is an exception, which McCoy asserted, for circumstances where failure to discharge would impose an "undue hardship" on the debtor. *Id*. The

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

bankruptcy court found no undue hardship, and the district court affirmed.[1] This timely appeal followed.[2]

Requirements for Student Loan Discharge. Although the bankruptcy code provides for student loan debt discharge for undue hardship, it does not define this term. *See id*. In the absence of a statutory definition, we have adopted a three-part test originally used by the Second Circuit. *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003) (adopting test from *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam)).

To prove that a debt imposes an "undue hardship," a debtor must show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist

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[1] The bankruptcy court had jurisdiction over this case under 28 U.S.C. § 1334, the district court had jurisdiction over the initial appeal under 28 U.S.C. § 158(a)(1), and our court has jurisdiction over McCoy's instant appeal under 28 U.S.C. § 158(d)(1).

[2] We "apply[] the same standards of review to the bankruptcy court's finding[s] of fact and conclusions of law as applied by the district court"; "[c]onsequently, the bankruptcy court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo." *In re Thomas*, 931 F.3d 449, 451-52 (5th Cir. 2019) (internal quotation marks and citations omitted). Thus, we review de novo any legal questions underlying whether the loans pose an undue hardship. *Id*. at 452.

> 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.

Brunner, 831 F.2d at 396.

Now 62 years old, McCoy describes the problems she has faced due to health issues and difficulty finding a job. Arguing for affirmance, the Government appears not to contest the basic premise that McCoy cannot afford to make higher payments on her loan at the present time. The impact of a zero-dollar monthly payment under an income-based repayment plan on the first prong of *Brunner* has not been decisively determined by our court previously,[3] and we conclude that we need not address it because McCoy has failed to establish that the bankruptcy court (as affirmed by the district court) erred in its findings on the second prong.

***Brunner* Second Prong**. Under our precedent, "[a]dditional circumstances encompass circumstances that impacted on the debtor's future earning potential but which were either not present when the debtor applied for the loans or have since

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[3] McCoy argues that the undue hardship comes from the tax liability she will face some twenty plus years from now. That argument is highly speculative and fails to account for the fact that tax laws can and do change and that, if she did not survive until the end of the twenty-five-year repayment period, the loan would be discharged without any further liability to her estate. *See* 34 C.F.R. § 682.402(b)(1).

been exacerbated." *Gerhardt*, 348 F.3d at 92 (cleaned up) (citation omitted). To meet the second prong's "demanding requirement," a "debtor must specifically prove a total incapacity in the future to pay [her] debts for reasons not within [her] control." *Id.* (internal alterations, quotation marks, and citations omitted). These circumstances "may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents." *In re Oyler*, 397 F.3d 382, 386 (6th Cir. 2005). We recently applied this standard to a debtor with a degenerative medical condition who had quit jobs where the employers "were unable to accommodate her need to remain sedentary for periods of time during her shifts" and determined that she could not meet the second prong because she was "capable of employment in sedentary work environments." *Thomas*, 931 F.3d at 452.

Here, McCoy argues that "at least two major additional circumstances" demonstrate that the state of affairs is likely to persist: "(1) she is elderly—at 62 she is less than three years away from the minimum retirement age; and (2) she suffers from severe mental and physical disabilities, which are not likely to recede or resolve."

The bankruptcy court determined that McCoy could not satisfy the second prong because, although her payments are set at zero dollars per month, she had not shown additional circumstances demonstrating her inability to pay a higher monthly amount would persist. Therefore, McCoy failed to meet her burden of proof.

In affirming the bankruptcy court's determination that McCoy failed to satisfy the second prong, the district court noted that bankruptcy courts have considered the timing of additional circumstances. *See*, *e.g.*, *In re Thoms*, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001) (stating that a pertinent additional circumstance would be one "which was either not present when the debtor applied for the loans or has since been exacerbated" because "[o]therwise, the debtor could have calculated that factor into its cost-benefit analysis at the time the debtor obtained the loan"). Because critical health issues (a car accident and a facial burning incident) occurred before McCoy took out the bulk of the loans and did not prevent her from obtaining her doctorate and various forms of employment, the district court determined that the bankruptcy court did not clearly err in its determination.

McCoy argues that the district court applied the wrong standard when it reviewed the bankruptcy court's decision for clear error rather than providing a de novo review. However, the question at issue—whether McCoy's evidence sufficiently demonstrated that additional circumstances show the state of affairs is likely to persist—rests upon factual determinations. *See In re Ostrom*, 283 F. App'x 283, 286 (5th Cir. 2008) (per curiam) (holding that the bankruptcy court did not clearly err when it found that a debtor did not fulfill the second prong because the debtor had not put any evidence, except for his own testimony, into the record demonstrating that his medical concerns would impact future earnings).

Thus, we conclude that the district court applied the correct standard.

Reviewing the evidence provided, we conclude that the district court correctly determined that the bankruptcy court did not clearly err in its determination about the second prong of the *Brunner* undue hardship test. Accordingly, we need not reach the third prong.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

THELMA G MCCOY	§	
	§	
Appellant	§	
VS.	§	CIVIL ACTION
	§	NO. 3:18-CV-21
	§	
UNITED STATES	§	
OF AMERICA	§	

MEMORANDUM OPINION AND ORDER

This is a bankruptcy appeal. The bankruptcy debtor/appellant, Thelma McCoy ("McCoy"), sought a judgment from the bankruptcy court discharging her student loan debt. After McCoy rested her case at trial, the bankruptcy court declared that McCoy's student loans were not discharged in bankruptcy and entered a final judgment to that effect. *See* Southern District of Texas Bankruptcy Case Number 16-8007 at Dkt. 77. The Court **AFFIRMS** the bankruptcy court's judgment.

I. BACKGROUND

After her youngest son entered college, McCoy went back to college herself in 2000 at the age of 43 (Dkt. 3-3 at pp. 12, 24; Dkt. 3-5 at p. 36). Over the next 14 years, McCoy obtained a bachelor's degree from Louisiana State University in general studies;

a master's degree from the University of Houston in social work; and a Ph.D. from the University of Texas in social work (Dkt. 3-4 at p. 543). In the course of earning her degrees, McCoy incurred approximately $350,000.00 in student loan debts; and she filed a Chapter 7 bankruptcy petition less than 18 months after getting her Ph.D. (Dkt. 3-3 at p. 20; Dkt. 3-4 at p. 543; Dkt. 3-5 at p. 1). McCoy then filed an adversary complaint in the bankruptcy proceeding in which she sought a judgment discharging her student loans;[1] the United States Department of Education ("the United States" or "the Department of Education") was the defendant in the adversary proceeding and is the appellee here (Dkt. 3-5 at p. 35). *See* 11 U.S.C. § 523(a)(8).

At the trial on McCoy's complaint requesting discharge of her student loans, McCoy's counsel rested after only calling McCoy (Dkt. 3-3 at p. 46). The bankruptcy court then granted the Department of Education's motion for judgment on partial findings under Federal Rule of Civil Procedure 52(c) (Dkt. 3-3 at p. 53). The bankruptcy judge issued his findings of fact and conclusions of law from the bench; and in them he explained that McCoy had not met her burden of proving that, if forced to repay her student loans, she would suffer an inability to maintain a minimal standard of living for herself

[1] The relevant bankruptcy court case numbers are 16-80108 (Chapter 7 petition) and 16-8007 (adversary proceeding). Both were filed in the United States Bankruptcy Court for the Southern District of Texas, Galveston Division.

that was likely to persist for a significant portion of the loans' repayment period:

> [McCoy] needs not only to demonstrate that she has a current hardship but that the hardship will in fact be maintained for the foreseeable future. In other words, that her inability to pay will persist.
>
> …
>
> She has not shown the situation will persist for an inability to pay[.]
>
> …
>
> For example, she's recently gotten some part-time employment.
>
> It's possible—we don't have any evidence at all—that over the next five years, she could get even better employment.
>
> …
>
> I find she's failed in her burden of proof. I'm granting the Government's motion. I'm granting judgment for the Government that the student loan is excepted from discharge. Dkt. 3-3 at pp. 53-55.

McCoy appealed to this Court.

II. BANKRUPTCY APPEALS AND STUDENT LOAN DEBT

Federal district courts have jurisdiction to hear appeals from the final judgments of bankruptcy judges. 28 U.S.C. § 158(a). An appeal to a district court from the bankruptcy court "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts[.]" 28 U.S.C. § 158(c)(2). This Court reviews the bankruptcy court's legal conclusions *de novo* but may only disregard a fact finding made by the bankruptcy court if that fact finding is clearly erroneous. *In re Perry*, 345 F.3d 303, 309 (5th Cir. 2003). "A factual finding is not clearly erroneous if it is plausible in the light of the record read as a whole." *In re Ramba, Inc.*, 416 F.3d 394, 402 (5th Cir. 2005). The Fifth Circuit has emphasized that, under the "clearly erroneous" standard, this Court "may [not] weigh the evidence anew" and may only set aside the bankruptcy court's fact findings if it is "left with the definite and firm conviction that a mistake has been committed." *In re Perry*, 345 F.3d at 309 (quotation marks omitted).

Generally, student loan debt like McCoy's is not dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(8); *see also Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (noting "the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt"). In order to obtain a discharge of her student loans, McCoy was required to prove to the bankruptcy court that excepting her student

loans from discharge "would impose an undue hardship on [her] and [her] dependents[.]" 11 U.S.C. § 523(a)(8). Since she had no dependents, in order to establish an undue hardship within the meaning of the statute, McCoy was required to prove the following three prongs: (1) that she cannot maintain, based on current income and expenses, a minimal standard of living for herself if forced to repay her student loans; (2) that additional circumstances exist indicating that the state of affairs described in prong one is likely to persist for a significant portion of the repayment period of the student loans; and (3) that she has made good faith efforts to repay the loans. *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003). The test is demanding, and "nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim that it would be an undue hardship to repay his student loans." *Id.* at 93.

Here, the bankruptcy court found that McCoy could not, on the evidence she proffered, fulfill the second prong of the *Gerhardt* test (Dkt. 3-3 at pp. 53-55);[2] the Court reviews that finding for clear error. *In re Ostrom*, 283 Fed. App'x 283, 286 (5th Cir. 2008).

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[2] The *Gerhardt* test is also frequently referred to as the "*Brunner* test," as the Fifth Circuit adopted the Second Circuit's *Brunner* test in the *Gerhardt* opinion. *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003) (citing *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)).

III. THE BANKRUPTCY COURT DID NOT CLEARLY ERR.

The bankruptcy court did not clearly err in finding that McCoy could not, on the evidence she proffered, fulfill the second prong of the *Gerhardt* test. The second prong of the *Gerhardt* test required McCoy to show the bankruptcy court at trial that additional circumstances exist indicating that her inability to maintain a minimal standard of living for herself if forced to repay her student loans is likely to persist for a significant period of time. *Gerhardt*, 348 F.3d at 92 (quotation marks and brackets omitted; bracketed phrase added). The Fifth Circuit has explained that:

> "[a]dditional circumstances" encompass circumstances that impacted on the debtor's future earning potential but which were either not present when the debtor applied for the loans or have since been exacerbated. This second aspect of the test is meant to be a demanding requirement. Thus, proving that the debtor is currently in financial straits is not enough. Instead, the debtor must specifically prove a total incapacity in the future to pay his debts for reasons not within his control.
>
> *Id*. (citations, ellipses, brackets, and some quotation marks omitted).

"An example of an additional circumstance impacting on the debtor's future earnings would be if the debtor experienced an illness, developed a disability, or became responsible for a large number

of dependents *after* receiving the loan." *In re Thoms*, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001) (emphasis added). The timing requirement exists so that courts can examine whether "the debtor could have calculated [a particular circumstance] into its cost-benefit analysis at the time the debtor obtained the loan." *In re Roach*, 288 B.R. 437, 445 (Bankr. E.D. La. 2003) (quoting *Thoms*).

In her brief, McCoy argues that she provided sufficient evidence to establish the second prong of the *Gerhardt* test in the bankruptcy court by entering evidence of her "lack of employability and a variety of serious illnesses" (Dkt. 14 at p. 15). In addressing McCoy's argument, the Court first notes that, as the United States points out, McCoy has not included a single citation to the record in her brief, "burden[ing] this [C]ourt with searching for and often guessing as to which parts of the record are relevant to [McCoy's] arguments." *In re Stotler and Co.*, 166 B.R. 114, 117 (N.D. Ill. 1994). This failure to include record citations is a clear violation of the bankruptcy rules' directive that an appellant's brief contain "citations to the … parts of the record on which the appellant relies[.]" Fed. R. Bankr. P. 8014(a)(8). Bankruptcy Rule 8014(a), which governs the presentation of appellants' briefs in bankruptcy appeals, "is not only a technical or aesthetic provision, but also has a substantive function—that of providing the other parties and the [C]ourt with some indication of which flaws in the appealed order or decision motivate the appeal." *In re Gulph Woods Corp.*, 189 B.R. 320, 323 (E.D. Pa. 1995). "For that reason alone, [McCoy's] appeal fails. The [C]ourt

continues to the substance of the appeal for the sake of completeness." *In re Stotler*, 166 B.R. at 117.

The Court has independently reviewed the record and concluded that it provides ample support for the bankruptcy judge's finding on *Gerhardt*'s second prong. McCoy's brief contends that her inability to maintain a minimal standard of living for herself if forced to repay her student loans is likely to persist for a significant period of time because she suffers from a variety of anxiety and stress disorders (including post-traumatic stress disorder), headaches, insomnia, and pain throughout her body (Dkt. 14 at pp. 7-8). The brief characterizes the bulk of McCoy's physical and psychological ailments as the aftereffects of a horrific car accident in 2007 and a "facial burning incident at a spa" in 2010 (Dkt. 14 at pp. 6-8). There is evidence in the record of these events: McCoy discussed the car accident at trial, though some of her testimony was correctly excluded by the bankruptcy judge on the basis that McCoy was not sufficiently qualified to offer medical causation opinions (Dkt. 3-3 at pp. 33-35); and, although McCoy did not mention the burning of her face at trial, she discussed that incident in her deposition (Dkt. 3-5 at pp. 114-16). However, the record also reflects that McCoy overcame those traumas to get her doctorate in 2014 and has diligently sought, and often obtained, employment as a professor, a teaching assistant, a research assistant, and a social worker since, at the latest, 2009 (Dkt. 3-4 at pp. 103-241, 543-48). Indeed, at the time of trial, McCoy was working part-time for two different universities and a mental health agency (Dkt. 3-3 at pp. 41-42). McCoy's

resume—despite limiting its scope to her college education and her research, counseling, and teaching jobs and excluding her prior work with the United States Postal Service—is six pages long and contains an impressive range of aptitudes and professional experience (Dkt. 3-4 at pp. 543-48; Dkt. 3-5 at p. 109). In short, the Court finds McCoy's circumstances materially identical to those of the debtor in the Fifth Circuit's *Ostrom* opinion, who similarly "presented no evidence, other than his own testimony, that any impairments to his earnings [we]re likely to persist into the future, … introduced no evidence that the effects of his [health] problems preclude[d] him from serving as a counselor, and … was able to obtain a master's degree and serve as a private counselor despite his [health] problems." *In re Ostrom*, 283 Fed. App'x at 286.

The Court further notes that, according to her own testimony, McCoy applied for the majority of her loans "after the first couple years" of her Ph.D. program (Dkt. 3-3 at p. 26). Since she earned her doctorate four years after the spa burning incident and seven years after her car accident, she necessarily must have applied for at least a significant portion of her loans after suffering the injuries that she now seeks to classify as "additional circumstances" within *Gerhardt*'s second prong. *Gerhardt*'s second prong requires the debtor to show that the "additional circumstances" indicating a persistent inability to pay either were not present when the debtor applied for the loans at issue or have since been exacerbated. *In re Gerhardt*, 348 F.3d at 92. The record does not contain any clear indication of what portion of McCoy's loans postdate

the injuries she now blames for her inability to pay her loans back, nor does it provide any clear picture of whether, when, or how any hinderances that predated her loan applications were later exacerbated.

The bankruptcy court did not clearly err in finding that McCoy had not fulfilled the second *Gerhardt* prong.

IV. CONCLUSION

The Court **AFFIRMS** the bankruptcy court's judgment. The debts owed by Thelma McCoy forming the basis of this appeal may not be discharged in bankruptcy under 11 U.S.C. § 523(a)(8).

The Court will issue a separate final judgment.

SIGNED at Galveston, Texas, this 7th day of March, 2019.

/s/ George C. Hanks Jr.
George C. Hanks Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

IN RE:	§	
	§	
THELMA G. MCCOY,	§	MAIN CASE
DEBTOR	§	NO. 16-80108
	§	CHAPTER 7
	§	
THELMA G. MCCOY,	§	ADV. CASE
PLAINTIFF,	§	NO. 16-08007
v.	§	
	§	GALVESTON,
	§	TEXAS
UNITED STATES	§	THURSDAY,
DEPARTMENT OF	§	DECEMBER 7,
EDUCATION	§	2017
(FedLoan Servicing), et al,	§	
DEFENDANTS.	§	8:59 A.M. TO
	§	10:17 A.M.
	§	

[RE: 16-08007]
TRIAL ON COMPLAINT

BEFORE THE HONORABLE MARVIN P. ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE PARTIES: SEE NEXT PAGE

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FOR THE DEBTOR/PLAINTIFF:
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***

[53]

THE COURT: I'm granting the motion for judgment on partial findings. Let me give my reasons why. Under the *Brunner* test and the *Gerhardt* test, Ms. McCoy is required to demonstrate not only that she is currently suffering a hardship in her ability to pay but that that hardship will—

MR. TOROK: I'm sorry.

THE COURT: She needs not only to demonstrate that she has a current hardship but that the hardship will in fact be maintained for the foreseeable future. In other words, that her inability to pay will persist.

She has qualified for zero repayment. Zero. The only thing that she has to do to maintain the zero repayment, according to Exhibits 8 and 9, is to submit annual statements that show that her income remains law, at which point the payments don't go up; they remain at zero for 25 years.

She is 60 years old. There is no forgiveness of debt currently, and there's no obligation to pay currently. She's been approved for zero. She has not shown an ability to submit annual statements.

MS. MCCOY: They know that's not true.

THE COURT: Stop. She has not shown an inability to submit—

MR. TOROK: Don't do that, Ms. McCoy.

[54]

MS. MCCOY: Their loan person knows that that's not true. I don't have that—

MR. TOROK: Ms. McCoy—

MS. MCCOY: But that's not true. They're lying.

MR. TOROK: (Conferring with client.)

THE COURT: She has not shown an inability to submit annual income statements or that the Government will not respect her annual income statements and maintain her payments at zero. She has not shown the situation will persist for an inability to pay, and she has no present inability to pay because the only amount she has to pay is zero.

The argument that there may someday be some debt forgiveness assumes that the recent events aren't replicable. For example, she's recently gotten some part-time employment.

It's possible—we don't have any evidence at all—that over the next five years, she could get even better employment. And, if so, she could be able to pay some back. If she's not able to get better employment, she remains at a zero level.

She's failed in her burden of proof. Having applied for the Income Based Repayment Program and been approved for it, she cannot meet her

burden of proof when the Government has established it at zero.

[55]

She does have a duty to supply annual statements. If she doesn't do that, her payment is going to go up. But she needs to provide those annual statements, and she hasn't shown any inability to provide the annual statements to keep her payment level.

I find she's failed in her burden of proof. I'm granting the Government's motion. I'm granting judgment for the Government that the student loan is excepted from discharge. We'll issue a judgment to that effect.

We are in adjournment.

THE CLERK: All rise.

(Proceedings adjourned at 10:17 a.m.)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40269

IN THE MATTER OF: THELMA G. MCCOY

Debtor,

THELMA G. MCCOY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion June 5, 2020, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, HAYNES, and WILLETT, *Circuit Judges*.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ *Catharina Haynes*
CATHARINA HAYNES
UNITED STATES
CIRCUIT JUDGE

[Dated: August 3, 2020]