No. 20-886

IN THE

Supreme Court of the United States

THELMA G. MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition presents this Court with an opportunity to resolve a clear circuit split on how to apply the "undue hardship" standard for student loan discharge in bankruptcy. As the petition explains (Pet. 9-13), most circuits apply the three-part *Brunner* test, but the Eighth Circuit (along with some courts in the First Circuit) applies a more flexible totality-of-the-circumstances approach. This circuit split has been widely acknowledged by courts and commentators. And the need to clarify the standard could not be more pressing, as the amount of outstanding student loan debt continues to skyrocket. *See* National Consumer Bankruptcy Rights Center Amicus Br. 3; Academics Amicus Br. 5-17; Center for Responsible Lending Amicus Br. 11-18.

The government does not disagree with these points. It acknowledges the circuit split, BIO 7, 13, and does not dispute that the question presented is recurring and important. Nor can the government bring itself to endorse *Brunner* as the best reading of the § 523(a)(8) "undue hardship" standard: The most it is willing to say is that *Brunner* is "not foreclosed" by § 523(a)(8) "nor inconsistent with the provision's history." BIO 13.

The government nonetheless maintains that this Court should deny review because this case is an "unsuitable vehicle." BIO 7. But its strained vehicle objections reflect, at most, alternative grounds for affirmance that the Fifth Circuit did not reach, which in no way impede this Court's review of the question presented. And although the government speculates

that the *Brunner* and totality approaches may not be all that different in practice, numerous courts applying these tests have expressly stated the contrary.

The disagreement among courts of appeals on the "undue hardship" standard is plainly worthy of the Court's review. This case is a sound vehicle for resolving the question. Given the entrenched nature of the split and the lack of resources of most debtors with an incentive to challenge it, there is no reason to think a better vehicle is in the offing. The Court should grant certiorari.

ARGUMENT

I. The Circuit Split Between The *Brunner* And Totality Approaches Merits This Court's Review.

Despite acknowledging the circuit split, the government opposes review because the split is "lopsided," and maintains that the "practical difference" between tests "appears to be limited." BIO 13. It also says the U.S. Department of Education is studying the issue and may revise its regulations or policies at some undefined future point. BIO 20. None of these arguments diminishes the urgent need for this Court's review.

A. First, while most Circuits follow *Brunner*, the Eighth Circuit has rejected that approach for decades, and that division will persist absent this Court's intervention. That the split is 8-1 or 8-2 (depending on how the First Circuit is counted) is not a reason to deny certiorari. This Court routinely reviews circuit

splits on recurring and important questions, even when one side of the split consists of a lone outlier Circuit. *See, e.g., United States v. Palomar-Santiago*, No. 20-437, 2021 WL 2044540, at *3 & n.1 (U.S. May 24, 2021). Review here is especially warranted given the constitutional directive for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4.

B. Although the government downplays the difference between the *Brunner* and totality approaches, the two plainly diverge in their inputs and outcomes. *Brunner* imposes a rigid, conjunctive, three-part test; by its nature, it instructs courts *not* to consider the totality of circumstances relevant to undue hardship. *See, e.g.*, *In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995) (forbidding consideration of "[e]quitable concerns or other extraneous factors not contemplated by the *Brunner* framework").

This Court need not take our word that the different approaches generate different outcomes. Several judges applying these tests have explained as much. *E.g.*, *In re Roth*, 490 B.R. 908, 920, 922-23 & n.17 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring); *In re Nightingale*, 543 B.R. 538, 544-45 (Bankr. M.D.N.C. 2016); *In re Wolfe*, 501 B.R. 426, 434 (Bankr. M.D. Fla. 2013). Indeed, bankruptcy courts have highlighted specific instances where the *Brunner* test precludes discharge but the totality test does not. *See* Pet. 14.

The government discounts these jurists' views by hypothesizing that certain bankruptcy court decisions "do not necessarily reflect the courts of appeals' understanding" of *Brunner*, and that different results

"may reflect different facts." BIO 19. That speculation does not respond to the critical point that bankruptcy judges believe the competing tests lead to different outcomes. Nor is there reason to think that these examples, which apply the *Brunner* test by its terms, are inconsistent with appellate understandings of the framework. *See, e.g.*, *In re Kelly*, 312 B.R. 200, 207 (B.A.P. 1st Cir. 2004) (restating *Brunner*'s third prong, under which "the Debtor's failure to make a good faith effort to repay the loans w[ill] result in a conclusion of nondischargeability"); *In re Denittis*, 362 B.R. 57, 63 (Bankr. D. Mass. 2007) (same).

Bankruptcy judges are not the only repeat players to note the significance of the differences between the *Brunner* and totality approaches. One leading student-loan guarantor has described the Eighth Circuit's totality standard as "different and significantly lower than the *Brunner* standard," such that "[s]ome debtors who are able to repay their student-loan debt may be discharged in the Eighth Circuit when similarly situated debtors elsewhere will not be." Cert. Pet., *Educ. Credit Mgmt. Corp. v. Reynolds*, No. 05-1361, 2006 WL 1126177, at *11, *15 (U.S. filed Apr. 26, 2006).[1] And the U.S. Department of Education

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[1] The government opposed certiorari in *Reynolds*, urging the Court to wait and see whether the Eighth Circuit's "holding conflicts with the approach followed by the circuits that adhere to the *Brunner* test," but it recognized that the legal question posed by any difference in those tests was "important." U.S. BIO, *Reynolds*, 2006 WL 2136239, at *9, *12 (U.S. filed July 28, 2006). Fifteen years have since elapsed. The ensuing percolation confirms that the circuit split is "meaningful" and "lead[s] to a materially different result in concrete cases," *id.* at *13, thus satisfying the

(DOE) has regarded the totality approach as a "more flexible alternative" to *Brunner*. U.S. Dep't of Educ., Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings, at 19 (July 7, 2015), https://tinyurl.com/drh9j5fb.

Academic research confirms that commonsense reality. *See* Pet. 15. The government ignores a recent study finding that, between 2005 and 2014, bankruptcy courts in the First Circuit, which primarily applies the totality test, were more than twice as likely to grant an undue-hardship discharge as bankruptcy courts in the Third Circuit, which applies *Brunner* and, like the Fifth Circuit, requires the debtor to make a "total incapacity" showing. *See* Aaron N. Taylor & Daniel J. Sheffner, *Oh, What A Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 Stan. L. & Pol'y Rev. 295, 315, 329 (2016).

C. Despite DOE's prior recognition that the approaches are different, the government says review is unwarranted because, in 2018, DOE issued a request for information regarding the factors loan holders should use in evaluating borrower claims of undue hardship. To be clear, this request for information informs the position that DOE instructs holders to take in response to borrower requests; it does not purport to change the law bankruptcy courts apply in adjudicating undue hardship under § 523(a)(8). Anyway, the government concedes that the agency, at most, "may" decide to issue guidance at some undefined "future"

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criteria for review that the government itself articulated in *Reynolds*.

time. BIO 20. The unremarkable fact that a government agency is purportedly "continu[ing] to study" an issue, BIO 20, provides no reason to defer or deny certiorari that is urgently needed on an important question.

II. The *Brunner* Test Impermissibly Constrains Discretion And Departs From The Statutory Text.

The government's defense of the *Brunner* test is halfhearted at best. Rather than endorsing *Brunner* as the best reading of statutory text, the government's lukewarm submission is that "the *Brunner* framework is neither foreclosed by the statutory 'undue hardship' standard, nor inconsistent with the provision's history." BIO 13. That parade of double negatives confirms that *Brunner* is indefensible. There is no getting around the palpable disconnect between the discretion-conferring statutory text and *Brunner*'s rigid, judicially created multiprong test. *See* Pet. 15-20.

A. The government has no meaningful response to this Court's instruction that when statutory text "is patently clear" and "imposes one and only one constraint on [lower] courts' discretion," a court of appeals may not "superimpose[] an inflexible framework" that curbs that discretion. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553, 555 (2014). In such cases, lower courts must be permitted to exercise their statutorily conferred discretion on a "case-by-case" basis, "considering the totality of the circumstances." *Id.* at 554; *accord Halo*

Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1931-33 (2016).

The government is wrong to suggest that the statutory standard in *Octane Fitness* was "far more 'open-ended'" than the one here. BIO 17. Like § 523(a)(8), the statute in *Octane Fitness* (§ 285 of the Patent Act) carved out an exception that applies "only in specific circumstances." BIO 17. Specifically, § 285 permits courts to award reasonable attorney's fees only when a case is "exceptional." *Octane Fitness*, 572 U.S. at 553. In both statutes, Congress used a clear but undefined term to ensure that a certain class of circumstances received special treatment, but provided no additional conditions restricting the term's application. *See Faish*, 72 F.3d at 302 (Bankruptcy Code's drafters "'did not define undue hardship,'" but "'said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor's circumstances'"). Because the discretion Congress left to the courts is comparable in these two settings, *Octane Fitness*—which struck down the court of appeals' rigid, multipronged test—applies here too.

B. The government barely addresses the most objectionable glosses that the Fifth Circuit and other courts of appeals have engrafted on *Brunner*'s already atextual requirements. *See* Pet. 11-12. For the second prong—the "heart of the *Brunner* test," *In re Frushour*, 433 F.3d 393, 401 (4th Cir. 2005)—these courts require debtors to show "'unique or extraordinary'" circumstances that create a "'total incapacity'" to pay the loans or a "'certainty of hopelessness'" should they try. *In re Brightful*, 267 F.3d 324, 328 (3d Cir. 2001) (equating these standards). These requirements

create a "climate" so severe that "'it seems no educational loan could ever be discharged.'" *Nightingale*, 543 B.R. at 545; *Wolfe*, 501 B.R. at 434.

The government's response, tucked in a footnote, is that the Fifth Circuit's "total incapacity" threshold "is not [an issue] presented in this case" because, while the court "referred to" that standard, it "did not rely on it." BIO 14-15 n.2. That is simply inaccurate: The Fifth Circuit squarely held that the district court "correctly" affirmed the bankruptcy court's decision that "McCoy could not satisfy [*Brunner*'s] second prong," Pet. App. 5a, 7a, and the district court, in turn, expressly cited the "total incapacity" standard, Pet. App. 13a. This case thus brings up features of the *Brunner* test that the government makes no effort to defend as consistent with the statutory text.

C. By contrast, the government concedes that courts applying *Brunner* (including the decision below) impose a rigid temporal limitation that prohibits bankruptcy courts from considering any "additional circumstances"—an illness, disability, advanced age, dependents, a bad job market, etc.—that may have existed when the debtor took out her loans. *See* Pet. App. 13a-14a (quoting *In re Thoms*, 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001)). This backwards-looking requirement, which eliminates from consideration otherwise vital facts about a debtor's prospective ability to repay, finds no support in the statutory text, and simply punishes debtors who "failed to correctly read the tea leaves of the future." *In re Erkson*, 582 B.R. 542, 556 (Bankr. D. Me. 2018).

D. The government also draws the wrong inferences from the statutory history of § 523(a)(8). That Congress has expanded the universe of loans subject to the undue hardship standard, BIO 16, hardly justifies the steps *Brunner* circuits have taken to make relief unavailable absent a "certainty of hopelessness." Given the acknowledged circuit split on the standard, there is no basis to suggest that Congress somehow ratified *Brunner* through its § 523(a)(8) amendments. *Cf. Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 351-52 (2005).

III. The Government's Vehicle Objections Are Meritless.

Having conceded the existence of a split and declined to endorse *Brunner* as the best reading of § 523(a)(8), the government's arguments against review turn almost entirely on the critique that this case is a poor vehicle. These vehicle objections are misguided and in no way inhibit the Court's ability to resolve the question presented.

A. The government maintains Ms. McCoy failed to show that the *Brunner* standard likely affected the outcome of her case, as the courts below found no evidence of undue hardship. BIO 11-12. But as the government itself stresses, *see* BIO 2, 5, 6, 9-10, the reason the lower courts so found is because the Fifth Circuit's "timing requirement," Pet. App. 14a, barred them from considering the abundant evidence of hardship Ms. McCoy actually presented (e.g., her advanced age, substantial psychological impairments, and extensive physical disabilities). Far from suggesting that Ms. McCoy would not fare better under the

totality test (which allows consideration of pre-borrowing circumstances), the government's argument only underscores that *Brunner*'s severe restrictions were, indeed, the reason she was denied a discharge.[2] And even if there were room for debate on this score, this Court routinely grants certiorari to clarify the legal standard, while remanding to the court of appeals to apply that standard to the facts in the first

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[2] The government also urges this court to ignore the grant of a discharge under comparable facts in *Grimes v. ECMC* (*In re Grimes*), No. BK06-81303, 2013 WL 5592913 (Bankr. D. Neb. Oct. 10, 2013). *See* Pet. 25. The government claims the facts of *Grimes* are "readily distinguishable" because the debtor's loans there were disbursed "before [her] health problems commenced," and she "had not enrolled in an income-based repayment program," which caps monthly payments at a percentage of the debtor's income. BIO 12. But it is far from clear whether those facts present meaningful distinctions: Grimes was *eligible* for income-based repayment, and while she had heart surgery after taking out loans, that surgery was related to preexisting chronic conditions. 2013 WL 5592913 at *1. And *Grimes* is just one example of a case with comparable facts that resulted in a discharge under the totality approach. *See, e.g.*, *In re Bronsdon*, 435 B.R. 791 (B.A.P. 1st Cir. 2010) (affirming discharge for 64-year-old debtor with no disabilities who received a bachelor's degree at age 50 and then a law degree, and was eligible for an income-based repayment plan); *Erkson*, 582 B.R. at 544 (granting discharge for 64-year-old debtor with hearing impairment who obtained a master's degree in counseling as an older adult and successfully found employment); *In re Monroe*, No. 2:13-BK-71026, 2015 WL 13035102 (Bankr. W.D. Ark. Sept. 23, 2015) (partial discharge for 57-year-old debtor with no serious disabilities who attended college and some graduate school as an older adult, worked many part-time jobs, expected to make $27,000 the year of discharge, and had qualified for zero-dollar income-based repayment plan).

instance. *See, e.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019).

B. The government attempts to cast doubt on whether Ms. McCoy "preserved" the question presented, maintaining that she did not challenge the *Brunner* framework in her appeal from the bankruptcy court to the district court. BIO 11.[3] It acknowledges (BIO 8), however, that applicable Fifth Circuit precedent squarely rejected the totality test. *See In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003). Ms. McCoy's first meaningful opportunity to urge reconsideration of that precedent was in the Fifth Circuit, where the government concedes (BIO 11) she directly and explicitly challenged it. C.A. Opening Br. 38-41; C.A. Reh'g Pet. 11-14. And the Fifth Circuit panel simply declined to address Ms. McCoy's challenge to the *Brunner* framework (which it, too, was powerless to change); it did not hint that she failed to preserve the argument.

The government cites no authority for the illogical proposition that to obtain certiorari review of an entrenched circuit split, a bankruptcy debtor must raise issues foreclosed by circuit precedent in her appeal to a district court that is compelled to follow that precedent. By raising the issue at the Fifth Circuit panel and en banc rehearing stages, Ms. McCoy "pressed

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[3] Although Ms. McCoy's district court appeal brief did not expressly ask the district court to jettison *Brunner* (which the district court was not authorized to do), it still relied on Eighth Circuit authority. ROA.842 n.8 (citing *In re Fern*, 553 B.R. 362, 369 (Bankr. N.D. Iowa 2016), *aff'd*, 563 B.R. 1 (B.A.P. 8th Cir. 2017)).

[it]" below, *United States v. Williams*, 504 U.S. 36, 41 (1992), and thereby preserved it for this Court's review.

C. Again grasping at straws, the government notes that Ms. McCoy's appeal brief in the district court (where she was represented by prior counsel) lacked record citations, in contravention of the Federal Rules of Bankruptcy Procedure. BIO 11. The government concedes that prior counsel's failure to include record citations presents at most an alternative ground for affirmance, as the Fifth Circuit expressly upheld the district court's decision on the merits, and in doing so expressly applied prior Fifth Circuit precedent adopting *Brunner*. *See* Pet. App. 3a-4a, 7a. That the respondent believes there may have been an alternative ground for affirmance is not a vehicle problem. An alternative basis for affirmance would not inhibit this Court's review of the question presented, and if the Court grants certiorari and reverses, the Fifth Circuit may consider any alternative grounds on remand. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021).

CONCLUSION

This Court should grant the petition.

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