No. 21-5290 ORIGINAL

SUPREME COURT OF THE UNITED STATES

Gordon Nitka,

Petitioner, pro se

vs.

United States Department of Education,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Friend of the Court

I. QUESTIONS PRESENTED

A. In analyzing the second prong of the *Brunner* test to determine "undue hardship," how should courts weigh speculation on the borrower's future income potential? And, if a borrower's loan defaults, becoming immediately due in full, was *Rosenberg* correct in holding that the repayment period has ended?

B. When a company submits testimony from an employee who did not play a personal role in the unfolding of the events and was merely supplied documentation in preparation of trial, under what circumstances would the employee's testimony constitute lay testimony?

II. PARTIES

All parties appear in the caption of the case on the cover page.

III. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner, Gordon Nitka, is an individual and is not affiliated with any corporation and does not own more than 10% of any publicly traded company.

IV. RELATED CASES

- *In re Nitka*, No. 18-16296-TBM (Bankr. D. Colo. 2018). Discharge ordered March 6, 2019.
- *Nitka v. Department of Education (In re Nitka)*, Adv. No. 18-01230-TBM (Bankr. D. Colo. 2018). Order granting Respondent's motion for summary judgement entered January 6, 2020.
- *Nitka v. Department of Education (In re Nitka)*, No. CO-20-002, (B.A.P. 10th Cir. 2020). Order affirming entered July 23, 2020.
- *Nitka v. Department of Education*, No. 20-1270 (10th Cir. 2021). Order affirming entered April 23, 2021. Motion for rehearing denied May 10, 2021.

V. TABLE OF CONTENTS

VI. INDEX OF APPENDICES

VII. TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

VIII. OPINIONS BELOW

- The opinion of the Bankruptcy Court for the District of Colorado appears at Appendix A to the petition and is unpublished.
- The opinion of the Bankruptcy Appellate Panel for the 10th Circuit Court of Appeals appears at Appendix B to the petition and is unpublished.
- The opinion of the 10th Circuit Court of Appeals appears at Appendix C to the petition and has not yet been published, but is reported as *Nitka v. Department of Education*, No. 20-1270 (10th Cir. 2021).

IX. JURISDICTION

The 10th Circuit Court of Appeals filed its order and judgement on April 23, 2021, a copy of which appears at Appendix C. A timely petition for rehearing was denied on May 10, 2021, a copy of the order appears at Appendix D. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

X. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(8)

(a) A discharge under section 727, 1141, 1192 [1] 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.

11 U.S.C. § 707(b)(2)

(b)

(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)

(A)

(i)In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I)25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

(II)$10,000.

XI. PETITION FOR WRIT OF CERTIORARI

Gordon Nitka, proceeding *pro se* and *in forma pauperis*, respectfully petitions this Court for a writ of certiorari to review the judgment of the 10th Circuit Court of Appeals. Proceeding pursuant Rule 39, this Petition has been prepared in accordance with Rule 33.2.

XII. STATEMENT

A discharge of student loan debt is permitted under 11 U.S.C. § 523(a)(8) if such debt would impose an undue hardship on the debtor. To qualify "undue hardship," most courts adopted the three-pronged test established in *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*[1] which held that a debtor may qualify for an undue hardship if,

1. 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. 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. the debtor has made good faith efforts to repay the loans.

[1] *New York State Higher Educ. Serv. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987).

A. Discharge of Student Loan Debt and the *Brunner* Test

1. How should courts weigh speculation on the borrower's future income potential when analyzing the second prong of the *Brunner* test?

In application, the *Brunner* test has deviated from the Bankruptcy Code's goal of providing a "fresh start" and instead imposes a nearly impossible burden on borrowers. The 10th Circuit remarked,

> Many ... courts employing the Brunner analysis, however, appear to have constrained the three Brunner requirements to deny discharge under even the most dire circumstances.[2] These applications show that an overly restrictive interpretation of the Brunner test fails to further the Bankruptcy Code's goal of providing a "fresh start" for the honest but unfortunate debtor ... and can cause harsh results for individuals seeking to discharge their student loans.[3]

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[2] *In re Polleys*, 356 F.3d 1302 (10th Cir 2004), citing to, *e.g.*, *Healey v. Mass. Higher Educ. (In re Healey)*, 161 B.R. 389, 395 (E.D.Mich.1993) (debtor failed first Brunner prong, because, although she was unable to maintain a "minimal" standard of living on her current income, she did not demonstrate that she was "making a strenuous effort to maximize her personal income within the practical limitations of her vocational profile"); *In re Walcott, 185 B.R. 721 (Bankr. E.D.N.C. 1995)* (debtor failed second Brunner prong because, since a $9.00 per hour position teaching literacy classes was "the highest hourly wage she has ever earned," "her current prospects appear brighter than at nearly any other time since her graduation"); *In re Roberson* 999 F.2d 1132 (7th Cir. 1993) at 1137 (debtor, who was divorced, unemployed, and living in a one-room apartment that did not have even a kitchen or toilet, failed second Brunner prong because he did not present a "certainty of hopelessness"); *In re Stebbins-Hopf,* 176 B.R. 784, 788 (Bankr.W.D.Tex. 1994) (debtor, who had nerve damage, bronchitis, and arthritis, and whose daughter had epilepsy, mother had cancer, and grandchildren had asthma, failed good faith prong because "[s]he intentionally chose to help her family financially").

[3] *Id.* at 1308.

In the recent case, *Rosenberg v. N.Y. State Higher Education Services Corp., et. al.*,[4] the court noted,

> *Brunner* has received a lot of criticism for creating too high of a burden for most bankruptcy petitioners to meet...The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*. Over the past 32 years, many cases have pinned on *Brunner* punitive standards that are not contained therein. Those retributive dicta were then applied and reapplied so frequently in the context of *Brunner* that they have subsumed the actual language of the *Brunner* test. They have become a quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.[5]

Much of the *Brunner* controversy resides with the second prong; that "additional circumstances exist indicating that [the borrower's] state of affairs is likely to persist for a significant portion of the repayment period." Some courts have interpreted this to such a draconian degree that they require a "certainty of hopelessness."[6] This standard forces borrowers to prove a negative; that even though unpredictable, the future will somehow not lead to improved circumstances for the borrower. A borrower with a hopeful outlook for the future therefore sabotages his own case, ironically disqualifying him from the help he needs.

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[4] *Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg)*, 610 B.R. 454 (Bankr. S.D.N.Y. 2020).

[5] *Rosenberg* at 5-6. (Internal quotes omitted).

[6] *See, e.g., In re Spence*, 541 F.3d 538, 544 (4th Cir. 2008).

The present matter is further proof of the confusion and misapplication of *Brunner*. From 2011 to 2013, Petitioner obtained student loans from Respondent totaling $136,086.00 to attend Phoenix School of Law (later renamed Arizona Summit Law School). As of October 8, 2019, Respondent reported Petitioner's outstanding student loan balance to be $209,033.28.[7]

Petitioner was unable to pass the state Bar examination and - according to reports by the Law School Admission Council and others[8] - is unlikely to do so in the future. Petitioner worked (often concurrently) as a law clerk, a roofing sales representative, a bar manager, a financial advisor, and a fitness coach. In spite of his employment, he struggled to maintain a minimal standard of living and, for a period of time, he was even homeless. After becoming unemployed in 2018, Petitioner applied for nearly a hundred jobs and often worked for free in hopes of earning a paid position, all the while, making his student loan payments. Eventually, due to repeated rejections and deepening debt, Petitioner resorted to performing

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[7] The NSLDS shows that Petitioner borrowed $136,186. Respondent claimed this sum to be $142,368.30 (in 2017) and later reported it as $188,816.86 (in 2018). Respondent has been unable to explain the discrepancy.

[8] Linda F. Wightman, Law School Admission Council, LSAC National, *Longitudinal Bar Passage Study* (1998), http://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf; Nicholas Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews* 7 (Robert H. McKinney Sch. of Law, Legal Studies Research Paper No. 2013-30, 2013); Deborah J. Merritt, *LSAT Scores and Eventual Bar Passage Rates*, FAC. LOUNGE (Dec. 15, 2015), http://www.thefacultylounge.org/2015/12/lsat-scores-and-eventual-bar-passagerates.html; Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam? Predicting Student Success Using LSAT Scores and Law School Performance*, 45 Hofstra L. Rev. 753 (2017).

manual labor on an independent basis - sometimes in exchange for food or other items - while he converted a school bus into a tiny home that he intended to rent out.

Following law school, Petitioner qualified for an Income Driven Repayment Plan (IDR Plan). Each year, he requalified for this program. Despite requalifying in March 2018 and receiving confirmations in the following months, Respondent suddenly and inexplicably raised Petitioner's monthly payments to $1,878.30 with the first payment due on June 1, 2018.[9] Respondent denied raising Petitioner's monthly payments, but provided records showing Respondent's attempted ACH transactions of $1,878.30 from Petitioner's bank account. Six weeks later, Petitioner filed for Chapter 7 bankruptcy and simultaneously filed this adversarial proceeding requesting discharge of his student loan debt.

Section 707(b)(1) of the Bankruptcy Code codifies the "means test" which determines a debtor's average monthly income which is the average income from all sources in the six-month period prior to commencement of the bankruptcy case.[10] According to the means test, Petitioner had a negative monthly net income and his annual income was $43,842 less than the median income for his state.[11]

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[9] Respondent denied raising Petitioner's monthly payments, but provided records showing Respondent's attempted ACH transactions of $1,878.30 from Petitioner's bank account.

[10] 11 U.S.C. § 101(10A).

[11] https://www.justice.gov/ust/eo/bapcpa/20180501/bci_data/median_income_table.htm.

Respondent filed for summary judgment which the bankruptcy court granted, finding that Petitioner satisfied the first and third prongs of the *Brunner* test, but failed to satisfy the second prong.[12] In affirming the lower court's ruling, the Tenth Circuit stated,

> When considering this factor, a court must take a realistic look...into [the] debtor's circumstances and...ability to provide for adequate shelter, nutrition, health care, and the like. A court should base [its] estimation of a debtor's prospects on specific articulable facts, not unfounded optimism, and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan.[13]

But, Respondent, in its original motion for summary judgment and subsequent filings, relied heavily on speculation of the Petitioner's future income potential. Because no tangible supporting evidence existed, the courts were left with mere speculation. And yet, the Tenth Circuit affirmed stating, *inter alia*,

> It is undisputed that [Petitioner] is relatively young, has no dependents, and is highly educated...has significant experience in numerous industries...has a strong potential for future employment should he choose to go back to work and has not shown his financial situation [is] unlikely to improve...[nor] shown his financial difficulties are likely to persist for a significant portion of the repayment period... He alleged he does not plan on remaining in [his]

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[12] **Appendix A** at 02a. The court claimed that Petitioner "failed to properly contravene any of the alleged undisputed facts advanced by the DOE. And, he provided no counter-facts or additional evidence at all." This was plain error. Petitioner's filings were more than sufficient to contextualize his circumstances and qualify him for a discharge of his student loan. If this Court deems it appropriate, Petitioner requests this Court direct the lower court(s) to rectify this plain error.

[13] **Appendix C** at 74a, citing *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1307, 1309 (10th Cir. 2004). (Internal quotation marks omitted).

> current desperate situation and fully anticipate[s] pulling [him]self out of these circumstances...That hardly bespeaks a state of affairs...likely to persist for a significant portion of the repayment period of the student loans. Accordingly, the court properly granted summary judgment for [the Respondent].[14]

This ruling weakens the Tenth Circuit's earlier claim that, "[a] debtor need not show 'a certainty of hopelessness.'"[15] This shows the inherent problem with the second prong of *Brunner* - it forces borrowers to prove a negative; that even though unpredictable, the future will somehow not lead to improved circumstances for the borrower. In other words, while a court may not explicitly require a borrower to show a "certainty of hopelessness," in practice that is exactly what is required.

2. If a borrower's loan defaults, becoming immediately due in full, was *Rosenberg* correct in holding that the repayment period ended?

During discovery, Petitioner objected to one of Respondent's interrogatories, noting,

> instead of asking whether Plaintiff's hardship is likely to persist for a "significant' portion of the repayment period," Defendant instead asks for speculation as to whether Plaintiff's hardship is likely to continue for a "substantial" portion of the repayment period. As there is no guidance as to what constitutes a "significant portion of the repayment period," Plaintiff contends that "significant" could either indicate an amount of time or the importance of the period of time. By substituting the word "substantial," Defendant improperly shifts the interpretation of the statute to mean a "majority" of the

[14] **Appendix C** at 75a. (Internal citations and quotation marks omitted).
[15] **Id.** citing *Polleys* at 1310.

> repayment period. No indication exists that the legislature intended for this to be the implied meaning behind the statutory wording.

The difference between "substantial" and "significant" is not negligible, and herein lies some of the ambiguity and confusion with the second prong of *Brunner*. What constitutes a "significant portion of the repayment period"? How can litigants contextualize - and how should the court weigh - the "significance" of a borrower's circumstances and speculative future income potential?

Given nearly identical facts to the present case, the *Rosenberg* Court provided the following analysis:

> It should be noted that the *Brunner* test does not require the Court to make a determination that the Petitioner's state of affairs are going to persist forever...Nor does the test require that the Court make a determination about whether the Petitioner's "state of affairs" was created by "choice"...
>
> The Court need only consider whether the Petitioner's present state of affairs is likely to persist "for a significant portion of the repayment period of the [current contractual] student loans."[16]
>
> Here, the repayment period has ended. Petitioner is in default and his loan was accelerated...Petitioner is responsible for the repayment of the full amount of $221,385.49. His circumstances will certainly exist for the remainder of the repayment period as the repayment period has ended and the loan is due and payable in the full

[16] Citing Robert M. Lawless, ABI Commission on Consumer Bankruptcy, *Final Report of the ABI Commission on Consumer Bankruptcy 2017-2019: Final Report and Recommendations* (2019) at 12 (recommending that "the court consider 'the debt' and not some different contract the debtor and the creditor might have made under different circumstances.").

amount. The second prong of the Brunner test is, therefore, satisfied.

Under section 435(l) of the Higher Education Act of 1965, as amended (HEA), a borrower who is 270 or more days past due in repaying a federal loan is considered to be in default.[17]

On December 1, 2011, Petitioner and Respondent executed a Master Promissory Note (MPN) stating that default occurred after 270 days of non-payment and that, upon default, the entire unpaid amount of the loan became accelerated (or immediately due in full).[18]

When Respondent raised Petitioner's monthly payments to $1,878.30, Petitioner was unemployed, had a negative net income, and could not make the payments. After 270 days of non-payment, Petitioner's loans went into default and became accelerated on February 26, 2019. According to the terms of the MPN, Respondent immediately required Petitioner to repay the entire unpaid amount of the loan which totaled $209,033.28.

Like in *Rosenberg*, Petitioner's repayment period had ended. This, in turn, provided context as to what a "significant portion of the repayment period" might be. Petitioner's circumstances would certainly exist for the remainder of the repayment period as the repayment period has ended.

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[17] 20 U.S.C. § 1085(l)

[18] **Appendix E** at 78a-79a.

Therefore, Petitioner contended that he satisfied the second prong of the *Brunner* test and, with the first and third prongs already satisfied, warranted a discharge of his student loans.

The lower courts, however, disagreed providing various half-explanations as to why Petitioner failed to satisfy the *Brunner* test.

B. EXPERT WITNESS QUALIFICATION

1. When a company submits testimony from an employee who did not play a personal role in the unfolding of the events and was merely supplied documentation in preparation of trial, under what circumstances would the employee's testimony constitute lay testimony?

On February 25, 2019, Respondent filed the parties' Joint Report which held the parties to one expert witness per side. On September 4, 2019, Respondent produced its expert witness, John Berg. Two months later, Respondent included a declaration of Department of Education employee, Christopher Bolander, in its motion for summary judgment.

Petitioner challenged Mr. Bolander's testimony citing the parties' joint report, FRBP 7026, and FRE 701 and 702. Bolander did not claim to have personal knowledge of the events and, as the court noted, "consulted with [Respondent's] records, and in his declaration he mainly testifies concerning the nature of the debtor-creditor relationship."[19]

[19] **Appendix F** at 81a.

Under the Federal Rules, an expert must be identified if his testimony does not come from his personal knowledge of the case[20] or if his knowledge was "acquired or developed in anticipation of litigation or for trial."[21]

FRE 701 requires lay witness testimony to be (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; *and* (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.[22] The Rule is conjunctive and requires that all three parts be true to qualify testimony as "lay testimony." Mr. Bolander did not have personal knowledge of the events as they unfolded and offered industry-specific insights, thereby disqualifying his testimony as lay testimony.

Petitioner objected[23] requesting summary judgement be denied or, alternatively, Mr. Bolander's declaration be stricken.[24]

Respondent relied upon *Gomez*[25] stating that FRE 702 "does not encompass a percipient witness who happens to be an expert." While true, it was irrelevant as Mr. Bolander did not have personal knowledge and was therefore not a percipient witness.

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[20] *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir.), cert. denied, 479 U.S. 918, 107 S.Ct. 324, 93 L.Ed.2d 296 (1986).
[21] *Grinnell Corp. v. Hackett*, 70 F.R.D. 326, 331 (D.R.I. 1976).
[22] Federal Rules of Evidence, Rule 701 (emphasis added).
[23] Pursuant Fed. R. Civ. P. 56(c)(2).
[24] Pursuant Fed. R. Civ. P. 12(f).
[25] *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 112 (1st Cir. 2003).

Furthermore, *Gomez* actually held that,

> a party need not identify a witness as an expert so long as the witness played a personal role in the unfolding of the events at issue and the anticipated questioning seeks only to elicit the witness's knowledge of those events.[26] *(emphasis added)*

This was not the case in the present matter, yet the court then stated,

> The Court also believes that [Petitioner's] argument confuses the expert witness part with what counsel for the [Respondent] referred to which is really the right section here, I think, which is Federal Rule of Evidence 602. And that requires witnesses, in order to be competent, to have personal knowledge. So to that extent, [Petitioner] is right, there doesn't need to be personal knowledge in order to be a fact witness.[27]

The court's last statement plain error,[28] and FRE 602 does not supersede FRE 701 or 702. Rather FRE 602 establishes the validity of witness testimony,[29] while FRE 701 and 702 qualify the nature of the testimony.

Adding to the confusion, the Bankruptcy Appellate Panel ruled that Mr. Bolander's testimony was appropriate because his "affidavit states facts instead of opinions"[30] and claimed the point was moot because the "limitation of experts

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[26] *Gomez* at 113-114, citing *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993); Fed. R. Civ. P. 26(a) advisory committee's note to the 1993 amendments. (Internal citations omitted).

[27] **Appendix F** at 82a.

[28] Petitioner made no such statement as a witness is obviously required to have personal knowledge to be a fact witness.

[29] "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703." Federal Rules of Evidence, Rule 602.

[30] **Appendix B** at 49a.

applies to an expert a party intends to 'use at *trial* to present evidence' in the form of an opinion."[31]

Mr. Bolander was listed on Respondent's list of trial witnesses clearly showing intent to call him at trial. Furthermore, experts are not limited to opinion testimony.

The Advisory Committee Notes state, "[m]ost of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded."[32] And, the American Bar Association has explained that "[e]xperts may testify 'in the form of an opinion *or otherwise*' - it is entirely appropriate for an expert to testify generally about principles, methods, or other information and leave the ultimate inference or 'opinion' to the finder of fact."[33]

Upon review of the present matter, the Tenth Circuit stated,

> [o]ur precedent suggests this testimony—if opinion testimony at all—was lay testimony under Fed. R. Evid. 701, not expert testimony under Fed. R. Evid. 702, see *Ryan Dev. Co., L.C. v. Ind. Lumbermens Mut. Ins. Co.*, 711 F.3d 1165, 1170-71 (10th Cir. 2013) (noting "[a] lay witness accountant may testify [under Fed. R. Evid. 701] on the basis of facts or data perceived in his role as an accountant based on his personal knowledge of the

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[31] **Id** at 49a-50a.
[32] Notes of Advisory Committee on Proposed Rules, Federal Rules of Evidence, Rule 702.
[33] Maria L. Kreiter, American Bar Association, *How To Distinguish Lay And Expert Witness Testimony* (2016). Text available at: https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/lay-v-expert-testimony/; Accessed: August 23, 2020.

company."[34]

Ryan Dev. Co., however, is not similar to the present matter. Whereas in *Ryan Dev. Co.*, the company's accountant testified about his personal knowledge *of the company* (about which he would have personal knowledge), in the present matter Mr. Bolander did not play a personal role in the unfolding of the events at issue[35] - the events at issue being Petitioner's 2011-2018 interactions with Respondent.

In its review, the Tenth Circuit cited to *Kearn*[36] claim "testimony providing 'facts, not opinions,' is not subject to Fed. R. Evid. 701 *or* 702."[37] The citation is improper because the *Kearn* court did not come to that conclusion. The *Kearn* opinion indicates that the statement is from "R., Vol. 2 at 566" suggesting that it is an excerpt from the respondent's documentation that is being reviewed by the *Kearn* court. *Kearn* did not support the court's argument.

XIII. REASONS FOR GRANTING THE PETITION

A. DISCHARGE OF STUDENT LOAN DEBT AND THE *BRUNNER* TEST

As of September 30, 2020, outstanding student loan debt exceeded $1.6 trillion for 42.9 million borrowers.[38] A 2019 CRS report found that students

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[34] **Appendix C** at 70a.
[35] *Gomez*.
[36] *United States v. Kearn*, 863 F.3d 1299, 1307 n.3 (10th Cir. 2017).
[37] **Appendix C** at 70a.
[38] *See* Alexandria Hegji, U.S. Congressional Research Service, *Federal Student Loan Debt Relief in the Context of COVID-19* (R46314 Feb. 8, 2021). Text at: Congressional Research Digital

pursuing professional degrees owed, on average, more than $175,000 upon graduation.[39] The findings of CRS were corroborated in the ABA's 2020 Law Student Loan Debt Report,[40] which found that, of those admitted to the bar before 2014 and who have been working for several years, 45.4 percent have seen their debt increase since graduation.[41] These educated, hard-working professionals are crawling deeper into debt despite years of gainful employment. The problem has become so dire that the President of the American Bar Association recently wrote to the head of the Office of Federal Student Aid (FSA) advocating for loan forgiveness.[42]

This issue affects millions of Americans. The need for a thorough inquiry into the student loan debt crisis is crucial. And courts need guidance on how to adequately adjudicate these issues fairly. Despite courts rejecting the "certainty of hopelessness" standard, most still require it in practice.

The *Rosenberg* Court emphasized that "[i]t is important not to allow judicial

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Collection; https://crsreports.congress.gov/product/pdf/R/R46314; Accessed: June 22, 2021.

[39] *See* David P. Smole, U.S. Congressional Research Service, *A Snapshot of Federal Student Loan Debt* (IF10158 Feb. 4, 2019). Text at: Congressional Research Digital Collection; https://crsreports.congress.gov/product/pdf/IF/IF10158; Accessed: June 22, 2021.

[40] *See* American Bar Association, Young Lawyers Division, *2020 Law Student Loan Debt Report* (2020). Text at: https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2020-student-loan-survey.pdf; Accessed: June 22, 2021.

[41] *Id.* at 10.

[42] *See* Letter from Patricia Lee Refo to Richard Cordray (June 8, 2021). Text from: https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/yld-fsa-cordray-student-debt-relief.pdf; Accessed: June 22, 2021.

glosses . . .to supersede the statute itself."[43] And yet, the inconsistent interpretation of *Brunner* results in a misapplication of justice depending on the day or the court.

In the present matter, the underlying facts are nearly identical to *Rosenberg*. But, while the court in *Rosenberg* was disciplined - analyzing the facts in accordance with the original intent of *Brunner* - the present matter has muddied the issue even further.

This case presents this Court with the necessary opportunity to clarify the many inconsistences surrounding the *Brunner* test and provide guidance necessary to ensure equal application of the law.

B. EXPERT WITNESS QUALIFICATION

This issue warrants this Court's review as it involves a basic component of law; the qualification of testimony. Eroding the text of FRE 701 diminishes the limits placed on expert testimony, and the present matter is proof that clarification is needed. When a district court judge rules that "there doesn't need to be personal knowledge in order to be a fact witness,"[44] it is indicative of a significant problem. The Rules are worthless if courts are unclear as to their meaning and application.

This case presents this Court with an opportunity to clarify the distinction between FRE 701 and 702.

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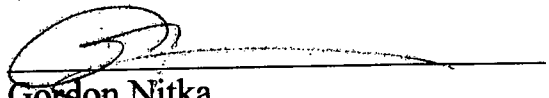
[43] Citing *Krieger v. Educs. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).
[44] **Appendix R** at 12.

XIV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted this July 26, 2021. **GORDON NITKA**



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