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

BRIEF OF *AMICI CURIAE* CONSUMER BANKRUPTCY AND STUDENT LOAN ACADEMICS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The *amici curiae* are academics with expertise in student debt and consumer bankruptcy. They have a professional interest in the correct application of the undue-hardship standard applicable to bankruptcy discharge of most student loans. *Amici* join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in Appendix A.

SUMMARY OF ARGUMENT

To interpret the open-ended phrase "undue hardship," courts must look not just to the goals of the nondischargeability provision in isolation, but also to the broader purposes of Title IV of the Higher Education Act (HEA), the statutory scheme governing federal student loans. Over 90 percent of outstanding student loans were made under Title IV programs, nondischargeability was originally adopted as an amendment to the HEA, and the *Brunner* test itself purports to be based on the "purposes of the guaranteed student loan program." *In re Brunner,* 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

Overly stingy application of the undue-hardship provision undermines the expressly articulated

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

overarching goals of the federal student loan programs. Fear of debt and student debt itself deter students, particularly low-income students, from starting and completing higher education. Unmanageable debt discourages borrowers from using their education for the economic benefit of society because their earnings simply go to creditors. Fear of financial distress distorts students' career choices. Many student loans are harmful to borrowers, who would have been better off never borrowing for higher education. By denying borrowers escape from debts they cannot repay, nondischargeability exacerbates all these effects, each of which undermines a goal of Title IV.

The *Brunner* decision imagines a harsh "quid pro quo" in which the federal government "exacts" a price of near-total nondischargeability in exchange for making student loans. *Brunner*, 46 B.R. at 756. Although the *Brunner* opinion asserts that this arrangement advances the purposes of the student loan programs, it cites no evidence of the programs' aims and ignores their true goals. The same is true of the Fifth Circuit's decisions adopting and applying *Brunner*. These decisions are thus fundamentally flawed.

To be sure, Congress did limit the dischargeability of student loans, despite the tension between nondischargeability and the goals of the student loan programs. It thought doing so would combat abuse and enhance repayment. But the limit on dischargeability contains an "undue hardship" exception of uncertain scope. In applying that exception, courts should act not just to fight abuse and

recover money but also to advance the education-promoting goals of the overall statutory scheme.

ARGUMENT

I. "Undue Hardship" Should Be Interpreted in Light of the Purposes of the Federal Student Loan Program

The provision requiring "undue hardship" as a prerequisite for bankruptcy discharge of student loans is "open-ended." *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 759 (7th Cir. 2015). Thus, reference to legislative purpose is critical. *See* Stephen Breyer, *Making Our Democracy Work: A Judge's View* 81 (2010) ("[J]udges faced with open-ended language and a difficult interpretive question … rely heavily on purposes and related consequences."); John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 173 (2011) ("Certainly … when an interpreter makes sense of an open-ended statute, it is appropriate if not necessary to read such a statute in light of the broad purposes that inspired its enactment."). "Undue hardship" therefore should be interpreted in light of the overall purposes of the relevant statutory scheme. As this Court held in an opinion interpreting the Bankruptcy Act together with a related statute:

> [T]he court … will take in connection with [the specific clause at issue] the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a

> construction as will carry into execution the will of the Legislature.

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 193 (1857)).

The "undue hardship" exception in Section 523(a)(8) of the Bankruptcy Code is inextricably bound up with the student loan provisions of the Higher Education Act (HEA). Federal student loan programs under Title IV of the HEA account for approximately 90 percent of the outstanding balance of student loans in the United States.[2] As discussed in more detail in Part III, the *Brunner* test itself is based on the perceived purposes of the federal student loan programs. Indeed, the nondischargeability provision first appeared not in the Bankruptcy Code, but in the 1976 amendments to the HEA. *See* Education Amendments of 1976,

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[2] As of the third quarter of 2020, the Department of Education reported an outstanding balance of $1,544.8 billion under the three major Title IV programs: the Federal Direct Loan Program, the Federal Family Education Loan Program, and the Perkins Loan Program. U.S. Dep't of Educ., *Federal Student Aid Portfolio Summary*, https://studentaid.gov/data-center/student/portfolio (last visited Dec. 30, 2020). Also as of the third quarter of 2020, the Federal Reserve reported a total outstanding balance of "student loans originated under the Federal Family Education Loan Program and the Direct Loan Program; Perkins loans; and private student loans without government guarantees" of $1,704.9 billion. Board of Governors of the Fed. Res. Sys., *Consumer Credit – Release G.19*, https://www.federalreserve.gov/releases/g19/current/default.htm (last visited Dec. 30, 2020). Dividing $1,544.8 billion by $1,704.9 billion yields 90.61 percent.

Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (adding § 439A to Higher Education Act of 1965) (repealed 1978). The undue-hardship provision of the Bankruptcy Code cannot be properly understood in isolation from the goals of Title IV of the HEA.

II. An Unduly Demanding Interpretation of "Undue Hardship" Undermines the Purposes of the Federal Student Loan Programs

Making bankruptcy discharge of educational loans too difficult undermines the major purposes of the student loan programs. Those purposes include promoting equality of access to higher education, educating the population for the benefit of the country, fostering freedom of career choice, and benefiting students. The argument in Part II is developed more fully in John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. Rev. 725 (2019).

A. Equality of Access to Higher Education

Higher education access regardless of economic circumstance is a primary goal of the student loan programs, as scholars have often noted. *See*, *e.g.*, Jonathan D. Glater, *The Narrative and Rhetoric of Student Loan Debt*, 2018 Utah L. Rev. 885, 891; Matthew Adam Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, 106 Ky. L.J. 223, 249 (2018). In introducing the proposals that became the HEA, President Johnson emphasized that "full educational opportunity" was "our first national goal." Recorded Remarks on the Message on Education, 1 Pub. Papers

33 (Jan. 12, 1965) [hereinafter Message on Education]. The legislative history of the HEA is full of references to the goal of equality of educational opportunity; members mentioned this goal at least 16 times in the floor debates on the bill. *See* Hunt, *Tempering*, *supra*, at 732-34.

Equality of access remained important as Congress modified the student loan programs over the decades. For example, in support of the College Cost Reduction and Access Act of 2007 (CCRAA), Senator Mike Enzi stated, "Higher education is the onramp to success in the global economy, and it is our responsibility to make sure everyone can access that opportunity and reach their goals." 153 Cong. Rec. 19,961 (2007). Courts have recognized that the HEA was adopted "to keep the college door open to all students of ability, regardless of background." *E.g.*, *Chae v. SLM Corp.*, 593 F.3d 936, 938 (9th Cir. 2010); *Pelfrey v. Educ. Credit Mgmt. Corp.*, 71 F. Supp. 2d 1161, 1162-63 (N.D. Ala. 1999).

The fear of student debt disproportionately deters students from lower-income families from pursuing higher education. The American Medical Association, for example, has stated that the high debt burden of medical school "may dissuade students from attending medical school altogether, especially students from diverse ethnic and socioeconomic backgrounds." Am. Med. Ass'n, *Reducing Medical Student Debt Strengthens the Physician Workforce* (2015).

Research bears out the contention that fear of debt is especially likely to deter low-income students. "Debt aversion," defined as unwillingness to take out student loans even when doing so would probably be a good idea given the benefits of higher education, has been found to affect 20 to 50 percent of student borrowers and to be particularly likely to affect low-income students. Hunt, *Tempering*, *supra*, at 743-44. Researchers have also found that debt-averse students, particularly those from families of lower socioeconomic status, are less likely to plan on higher education. *See* Claire Callender & Geoff Mason, *Does Student Loan Debt Deter Higher Education Participation? New Evidence from England*, 671 Annals Am. Acad. Pol. & Soc. Sci. 20, 36, 41, 46 n.16 (2017); Claire Callender & Jonathan Jackson, *Does the Fear of Debt Deter Students from Higher Education?*, 34 J. Soc. Pol'y 509, 509, 524 (2005).

Researchers have found direct links between high debt and failure to complete an educational program. Debt loads of more than $10,000 have been found to be linked to lower graduation rates for students at public universities, especially for students from families in the bottom 75 percent of the income distribution. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 Soc. Forces 1133, 1146 fig.2, 1149 fig.3 (2012). Another study found that students who dropped out of a large public university in the Midwest "had taken out … $2,000-$3,000 more in student loans during their first two years of college" than students who had not dropped out. Sonya L. Britt et al., *Student Loans,*

Financial Stress, and College Student Retention, 47 J. Student Fin. Aid 25, 32 (2017).

Although researchers have not studied the effects of student loan nondischargeability as extensively as they have studied student debt in general, nondischargeability makes high debt balances more fearsome by denying the borrower the recourse of bankruptcy. Because unmanageable student debts and the fear of unmanageable student debts disproportionately affect lower-income students, nondischargeability tends to undermine the HEA's goal of equal access to higher education.

B. Educating the Population for the Benefit of Society

A second critical goal of the student loan programs is educating the population for the benefit of society. The earliest broad-based federal student loan program was authorized in the 1958 National Defense Education Act, which opened with the finding that "the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women." National Defense Education Act, Pub. L. No. 85-864, § 101, 72 Stat. 1580, 1581 (1958). When he proposed the HEA, with its expansion of federal student loan programs, President Johnson emphasized that the educational benefits the new law would bring about were not just for the individual's sake but "for the country's sake." Message on Education, *supra*, at 33. The legislative record of the HEA likewise reflects the importance of this goal. *See*, *e.g.*, S. Rep. No. 89-673 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 4027, 4053

(citing the "continuing shortage of trained, educated persons in many areas" and the "present and future shortage of competent well-trained professional and technical personnel" as reasons for Title IV); *see also* Hunt, *Tempering*, *supra*, at 737 (citing additional examples). Like the goal of equality of access, the purpose of promoting education for the benefit of the country remained important over the years. For example, in 2007, Representative George Miller described the CCRAA as an "investment" in "the young people that will take their talents and provide the next generation of discovery, … innovation, … jobs , [and] economic activity." 153 Cong. Rec. 18,522 (2007).

The research cited in Part II.A indicates that the fear of unmanageable debt, and the presence of high debt levels, are associated with not entering and not completing educational programs. Because nondischargeability exacerbates the harm of unmanageable debt, it undermines the goal of educating the population, as well as the goal of equal access to higher education.

Nondischargeability also interferes, through "debt overhang," with student debtors' use of their education to contribute to society. The idea of debt overhang is simple: If the rewards of the debtor's activity go to creditors rather than the debtor, the debtor may simply give up in despair on economic activity and/or social participation. *See, e.g.*, Dalié Jiménez, *Ending Perpetual Debts*, 55 Hous. L. Rev. 609, 639 (2018); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 Cornell L. Rev.

1399, 1435 (2012); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393, 1420-24 (1985).

As this Court has recognized, solving the debt-overhang problem is a major goal of American bankruptcy law, which has, as a "primary purpose[]," "reliev[ing] the honest debtor from the weight of oppressive indebtedness, and permit[ting] him to start afresh" with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). After all, "there is little difference between not earning at all and earning wholly for a creditor." *Id.* at 245. Although *Hunt* was decided under the 1898 Bankruptcy Act, the 1978 Bankruptcy Code and subsequent bankruptcy laws reflect the same principle, *see* Hunt, *Tempering*, *supra*, at 754-55, and this Court has cited the above-quoted passage of *Hunt* in interpreting those laws, *see Grogan v. Garner*, 498 U.S. 279, 286 (1991).

Research in the analogous field of tax indicates that labor output goes down when tax rates go up. *See* Congressional Budget Office., *How the Supply of Labor Responds to Changes in Fiscal Policy* 4 tbl. 1 (2012) (reporting that a middle-of-the-road estimate is that a tax increase of 10 percent of after-tax income would reduce labor output by approximately three percent). Turning over income to creditors presumably affects behavior similarly to turning income over to the government. Thus, the CBO research suggests that taking even 10 percent of

marginal income for debt service, as required under the most generous income-driven repayment (IDR) programs, renders debtors less willing to work.

Thus, nondischargeability of student loan debt does not just directly reduce the amount of education students or prospective students acquire, as argued in Part II.A. It also interferes, through the debt-overhang effect, with debtors' use of their education to strengthen the nation's economy and thus undermines a second key goal of the federal student loan programs.

C. Minimizing the Effect of Loans on Career Choice

A third goal of the student loan programs is to minimize the effect of repayment obligations on students' career choice. This goal has shown up most clearly in Congress's authorization of income-driven repayment plans (IDR) and employment-based loan forgiveness. For example, the committee report on the House bill that led to enactment of the first large-scale IDR plan identified one of the purposes of the student loan reform as "provid[ing] [borrowers] a variety of repayment plans, including [a]n income-contingent repayment [plan] … so that … [repayment] obligations do not foreclose community service-oriented career choices." H.R. Rep. No. 103-111, at 119 (1993). In 2007, when Congress made income-driven repayment more generous and enacted forgiveness based on public-service employment, both the House and Senate debates reflected a purpose to make it easier for students to choose lower-paying but valuable careers. *See Paying for a College Education:*

Barriers and Solutions for Students and Families: Hearing before the Subcomm. on Higher Educ., Lifelong Learning, and Competitiveness of the H. Comm. on Educ. and Labor, 110th Cong. 41 (2007) (statement of Rep. Petri) ("[IDR] would also give people the opportunity to do low-income work to prepare for maybe more lucrative careers later."); 153 Cong. Rec. 23,873 (2007) (statement of Sen. Murray) (a "problem with high student loan debt" is that it "limits the career choices of college graduates").

Nondischargeability's constraining effect on career choice shows up directly in judicial decisions. Frequently, student borrowers who have found rewarding but low-paying work in fields for which they were trained are denied bankruptcy relief on the ground that they should abandon their jobs for more lucrative employment elsewhere. For example, in *In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003), the debtor was a professional cellist who was unable to maintain a minimal standard of living on his cellist's salary. The court upheld denial of discharge, writing, "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 it would be an undue hardship to repay his student loans." *Id.* at 93. Other decisions are similar. *See, e.g.*, *In re Oyler*, 397 F.3d 382, 386 (6th Cir. 2003) (trained minister who was pastor of start-up church denied discharge; debtor was "obliged to seek work that would allow debt repayment before he can claim undue hardship"); *In re Matthews-Hamad*, 377 B.R. 415, 422 (Bankr. M.D. Fla. 2007) (Salvation Army counselor denied discharge; "the fact that a debtor has

a low-paying job without much upside earning potential is not enough"); *In re Mallinckrodt*, 274 B.R. 560, 568 (Bankr. S.D. Fla. 2002) (mental health counselor who earned less than $6,000 per year denied discharge; "no evidence" that he had "made efforts to generate income outside his chosen profession").

More generally, the effect of student debt on career choice is well-documented. Researchers who studied a private college's change in financial aid policies to replace loans with grants found that "debt causes graduates to choose substantially higher-salary jobs and reduces the probability the students choose low-paid 'public interest' jobs." Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. Pub. Econ. 149, 149 (2011).

A study at the New York University School of Law found that even calling assistance a "loan" affects career choice. Two groups of students received substantively identical financial aid offers that provided that the student would not have to repay the aid if the student worked in public interest law for a period of time, but otherwise would have to repay. One group's offers were structured as loans and the other group's as conditional tuition subsidies. The students who received tuition subsidies had a significantly higher rate of placement in lower-paying public interest jobs. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 2009

Am. Econ. J. 1, 1 (2006). A study of medical students found that students with more debt were more likely to switch in medical school from primary care to high-paying non-primary-care specialties. Martha S. Grayson et al., *Payback Time: The Associations of Debt and Income with Medical Student Career Choice*, 46 Med. Educ. 983, 983 (2012).

Nondischargeability of student loan debt makes it riskier to take on lower-paying employment, as bankruptcy provides no escape if the student borrower enters financial distress. Indeed, when debtors do enter low-paying fields and encounter distress, courts in effect tell them to abandon work for which their education has prepared them so that they can pay more on their student loans. Nondischargeability thus exacerbates the effect of debt on career selection.

D. Benefiting Students

Finally, student loan programs are supposed to benefit students. *See* Hunt, *Tempering*, *supra*, at 740-42. For example, Secretary Celebrezze of the Department of Health, Education, and Welfare testified that Title IV of the HEA was designed "to make the benefits of higher education available" more broadly. *Higher Education Act of 1965: Hearings on H.R. 3220 and Similar Bills Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Lab*or, 89th Cong. 29 (1965). In 1993, Senator Paul Simon predicted that direct lending would "help[]" hundreds of thousands of students. 139 Cong. Rec. 9423 (1993). Senator Enzi's 2007 description of higher education as "the onramp to success in the

global economy," 153 Cong. Rec. 23,864 (2007), and Senator Mikulski's reference in 2010 to "the freedom to achieve" through higher education, 156 Cong. Rec. 4858 (2010), likewise painted rosy pictures of student loans.

But some students are harmed, not helped, by borrowing for higher education. Being indebted is harmful. A meta-analysis of 65 studies with a pooled sample size of almost 34,000 found that there is "a statistically significant relationship between debt and presence of a mental disorder, depression, suicide completion or attempt, problem drinking, drug dependence, neurotic disorders … and psychotic disorders." Thomas Richardson et al., *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis*, 33 Clinical Psychol. Rev. 1148, 1153 (2013). Researchers have also linked negative effects to student loans specifically. Student loans have been found to be associated with lower post-graduation income (among students with bachelor's degrees, the population studied); lower self-reported mental health; lower future net worth (with net worth calculated excluding the student loans) and satisfaction with personal finances; lower probability of owning a house or car and of getting married; and a higher risk of material hardship, health-care hardship, and other financial difficulties. *See* Hunt, *Tempering*, *supra*, at 759-60 (collecting studies).

The risk of harm from educational debt appears to be distributed along racial lines. Black students are more likely than White ones "to borrow,

to borrow larger amounts, to take out student loans to attend for-profit schools with worse career outcomes, and to default . . . ." Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 Harv. C.R.-C.L. L. Rev. 131, 132-33 (2020). The median Black borrower who started school in 2003-04 owed more in 2015 than was originally borrowed, while the median White borrower owed less. *See* Hunt, *Tempering*, *supra*, at 761. Moreover, higher education appears to provide less security against financial distress for Black people than for White ones: bankrupt Black debtors are as likely as non-bankrupt ones to have a college degree, and the same is not true for White debtors. *See* Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 Mich. J. Race & L. 1, 11-12 (2010). With more negative effects and fewer positive effects from debt-funded education, it seems likely that Black people are more likely to suffer harm from student borrowing.

Of course, student loans may have positive effects as well as negative ones because they may make higher education possible. But higher education is a risky investment, even if it is on average a good one. Studies have found that the positive mental-health effect of having a four-year degree does not shield borrowers from the negative mental-health effects of student loans, *see* Katrina M. Walsemann et al., *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 Soc. Sci. & Med. 85, 89-90 (2015), and that student debt has a net positive association with financial distress, even taking into

account education's positive effects on financial well-being. *See* Jesse Bricker & Jeffrey Thompson, *Does Education Loan Debt Influence Household Financial Distress? An Assessment Using the 2007–2009 Survey of Consumer Finances Panel*, 34 Contemp. Econ. Pol'y 660, 661 (2016). Students whose investment in higher education has a relatively poor economic outcome are often harmed and not helped by borrowing for school, and nondischargeability perpetuates the harm.

III. The *Brunner* Test Misapplies "Undue Hardship" Because It Is Based on an Unsupported, Incorrect, and Incomplete View of Statutory Purpose

The *Brunner* test originated in a district-court opinion of the Southern District of New York; the Court of Appeals for the Second Circuit adopted the test "[f]or the reasons set forth in the district court's order." *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The district court's opinion therefore is the place to look to understand the origins of the *Brunner* test.

The court did not, and could not, ground its test primarily in the text or structure of the statute. Indeed, the only textual claim it made is wrong. The court stated that "[t]he existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient . . . ." *In re Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985). As dictionaries from the time of enactment and re-enactment of the undue-hardship provision in 1976 and 1978 confirm, the most important relevant meaning of "undue" is

"excessive," or "unjustifiably great," not "unusually great." *See* John Patrick Hunt, *Bankruptcy as Consumer Protection: The Case of Student Loans*, 52 Ariz. St. L.J. (forthcoming 2021) (manuscript at 10-11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656532. In other words, the issue is whether the debtor's hardship is too great as a normative matter, not whether the hardship is greater than that of the average bankrupt debtor. Courts are thus free to determine that the average bankrupt debtor's suffering is unjustifiably great. Amici have found no contemporary dictionary definition that supports the contention that the use of "undue" necessarily implies that the debtor's suffering must be greater than average or must exceed "garden variety hardship." *See id.*

The *Brunner* court's "draconian" decision to "strip[]" student debtors "of the refuge of bankruptcy in all but extreme circumstances" rests largely on the court's own speculation about the "purposes" of the federal student loan programs. *Brunner*, 46 B.R. at 756. Specifically, the court found that radically restricting bankruptcy relief is a "quid pro quo" the government "exacts" in return for making loans available without regard to borrowers' credit risk. *Id.*

Despite relying on the supposed purposes of the student loan programs, *Brunner* cites no evidence supporting its view of those purposes. Its failure to do so cannot be chalked up to skepticism of legislative history, as the decision relies extensively on the legislative history of the nondischargeability

provision. *Id*. at 753-56 ("The statutory history has provided the lodestone for most interpretations.").

The Fifth Circuit likewise has ignored all evidence of the goals of the student loan programs in its decisions adopting and applying *Brunner*. *See In re McCoy*, 810 Fed. Appx. 315 (5th Cir. 2020); *In re Thomas*, 931 F.3d 449 (5th Cir. 2019); *In re Ostrom*, 283 Fed. Appx. 283 (5th Cir. 2008); *In re Hough*, 128 Fed. Appx. 369 (5th Cir. 2005); *In re Gerhardt*, 348 F.3d 89 (5th Cir. 2003). In its application of *Brunner*, the Fifth Circuit has created perhaps the harshest student loan bankruptcy regime in the country. Its requirement that the debtor "specifically prove a total incapacity in the future to pay her debts for reasons not within her control," *McCoy*, 810 Fed. Appx. at 317 (quoting *Gerhardt*, 348 F.3d at 92), is so demanding that a bankruptcy judge in the circuit recently observed that he had not discharged a single student loan over a creditor's objection in 15 years on the bench. *See In re Thomas*, 581 B.R. 482, 482 (Bankr. N.D. Tex. 2017).

The harsh quid pro quo that *Brunner* envisioned, and that the Fifth Circuit has put into effect, does not in fact serve the student loan programs' goals. Instead, as shown in Part II, overly stingy bankruptcy relief discourages the pursuit of higher education (particularly for people from lower-income groups), distorts career choices, discourages workers, and makes many student loans harmful rather than helpful. All these effects undermine the true aims of the student loan programs.

To be sure, Congress did restrict the dischargeability of student loans in spite of nondischargeability's drawbacks. Members believed that limiting dischargeability would combat bankruptcy abuse and increase loan repayment. *See* John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 Geo. L.J. 1287, 1300-12 (2018). But Congress restricted dischargeability by enacting an open-ended standard, one that necessarily entails the exercise of judicial discretion as to its scope. In exercising that discretion, courts must balance the narrow, discharge-disfavoring goals of the nondischargeability provision taken in isolation against the discharge-favoring purposes of the rest of the statutory scheme.

CONCLUSION

For the reasons stated above, the Court should grant certiorari in this action so that it may, after full briefing on the issue, resolve the split in the circuits

and settle for the entire nation what "undue hardship" means.

Respectfully submitted,

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