No. 20-886

In the Supreme Court of the United States

THELMA G. MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under the Bankruptcy Code, certain student loans cannot be discharged "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8).

The question presented is whether the court of appeals applied an incorrect standard in upholding the lower courts' determination that petitioner failed to demonstrate that requiring repayment of her student loans would impose an undue hardship on her.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Armstrong, *In re*, No. 10-82092, 2011 WL 6779326 (Bankr. C.D. Ill. 2011) 19
Bronsdon v. *Educational Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791 (B.A.P. 1st Cir. 2010) 19
Brunner v. *New York State Higher Educ. Services Corp.*, 831 F.2d 396 (2d Cir. 1987) 3, 4, 6, 8, 14
Denittis, *In re,* 362 B.R. 57 (Bankr. D. Mass. 2007) 19
Educational Credit Mgmt. Corp. v. *Frushour* (*In re Frushour*), 433 F.3d 393 (4th Cir. 2005) 8
Educational Credit Mgmt. Corp. v. *Jesperson*, 571 F.3d 775 (8th Cir. 2009) 13, 18, 19
Educational Credit Mgmt. Corp. v. *Kelly* (*In re Kelly*), 312 B.R. 200 (B.A.P. 1st Cir. 2004) 20
Educational Credit Mgmt. Corp. v. *Polleys*, 356 F.3d 1302 (10th Cir. 2004) 9, 15, 19
Grimes v. *ECMC*, No. BK06-81303, 2013 WL 5592913 (Bankr. D. Neb. Oct. 10, 2013) 12
Grogan v. *Garner*, 498 U.S. 279 (1991) 2
Halo Electronics, Inc. v. *Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016) 17

Cases—Continued: Page

Hemar Ins. Corp. of Am. v. *Cox* (*In re Cox*), 338 F.3d 1238 (11th Cir. 2003), cert. denied, 541 U.S. 991 (2004) 9
Long v. *Educational Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549 (8th Cir. 2003) 10, 17, 18
Lorenz v. *American Educ. Servs.* (*In re Lorenz*), 337 B.R. 423 (B.A.P. 1st Cir. 2006) 19
Nash v. *Connecticut Student Loan Found.* (*In re Nash*), 446 F.3d 188 (1st Cir. 2006) 10, 18
Nielson v. *ACS, Inc.* (*In re Nielson*), 473 B.R. 755 (B.A.P. 8th Cir. 2012) 12
Octane Fitness, LLC v. *ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) 17
Oyler v. *Educational Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382 (6th Cir. 2005) 9
Pelkowski, *In re*, 990 F.2d 737 (3d Cir. 1993) 15
Pennsylvania Higher Educ. Assistance Agency v. *Faish* (*In re Faish*), 72 F.3d 298 (3d Cir. 1995), cert. denied, 518 U.S. 1047 (1996) 8
Peterson v. *Akrabawi* (*In re Stotler & Co.*), 166 B.R. 114 (N.D. Ill. 1994) 5
Piccinino v. *U.S. Dep't of Educ.* (*In re Piccinino*), 577 B.R. 560 (B.A.P. 8th Cir. 2017) 12
Roberson, *In re*, 999 F.2d 1132 (7th Cir. 1993) 9
Sandifer v. *United States Steel Corp.*, 571 U.S. 220 (2014) 13
Stellwagen v. *Clum*, 245 U.S. 605 (1918) 2
Thoms v. *Educational Credit Mgmt. Corp.* (*In re Thoms*), 257 B.R. 144 (Bankr. S.D.N.Y. 2001) 6, 9
United States Dep't of Educ. v. *Gerhardt* (*In re Gerhardt*), 348 F.3d 89 (5th Cir. 2003) 4, 6, 9
United Student Aid Funds, Inc. v. *Pena* (*In re Pena*), 155 F.3d 1108 (9th Cir. 1998) 9, 14

Statutes, regulations, and rule: Page

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 59 16
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 523(a)(8) ..... *passim*
Ch. 7, 11 U.S.C. 701 *et seq.* 2
Ch. 11, 11 U.S.C. 1101 *et seq.* 2
Ch. 12, 11 U.S.C. 1201 *et seq.* 2
Ch. 13, 11 U.S.C. 1301 *et seq.* 2
Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, Tit. XXXVI, § 3621, 104 Stat. 4964 16
Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 16
Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, Tit. III, § 3007, 104 Stat. 1388-28 16
35 U.S.C. 284 17
35 U.S.C. 285 17
34 C.F.R.:
Section 674.49(c) 20
Section 682.402(i)(1) 20
Section 685.212(c) 20
Section 685.221(a)(5) 3
Section 685.221(b)(1) 3
Section 685.221(b)(2)(iii) 3
Section 685.221(e)(9) 3
Section 685.221(f)(2) 3
Fed. R. Bankr. P. 8014(a)(8) 5, 11

Miscellaneous: Page

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 98th Cong., 1st Sess. Pt. II (1973) 15
Request for Information on Evaluating Undue Hardship Claims, 83 Fed. Reg. 7460 (Feb. 21, 2018)..... 20
The American Heritage Dictionary of the English Language (3d ed. 1996) 13, 14
18 *The Oxford English Dictionary* (2d ed. 1989)..... 13, 14
Webster's Third New International Dictionary (1968)..... 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 315. The opinion of the district court (Pet. App. 8a-17a) is not published in the Federal Supplement but is available at 2019 WL 1084211. The oral decision of the bankruptcy court (Pet. App. 18a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2020. A petition for rehearing was denied on August 3, 2020 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on December 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal bankruptcy system is intended to give the "honest but unfortunate debtor" a "fresh start" while ensuring the maximum possible equitable distribution to creditors. *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991) (citation omitted); see, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918). In balancing these sometimes competing goals, Congress has enacted various provisions that prevent or limit the discharge of certain debts. See *Grogan*, 498 U.S. at 287.

This case concerns Section 523(a)(8) of the Bankruptcy Code. Under that provision, a discharge of debts in a Chapter 7, 11, 12, or 13 bankruptcy proceeding "does not discharge an individual debtor from any debt" for certain educational loans "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8). The Bankruptcy Code does not define the phrase "undue hardship" for purposes of Section 523(a)(8).

2. a. Petitioner "incurred a large amount of student loan debt * * * in pursuit of advanced degrees, beginning when she was in her forties." Pet. App. 2a. Between 2000 and 2014, petitioner obtained a bachelor's degree in general studies, a master's degree in social work, and a Ph.D. in social work. *Id.* at 8a-9a. While pursuing her studies, petitioner suffered injuries from a car accident in 2007 and a "'facial burning incident at a spa' in 2010." *Id.* at 15a (citation omitted). Petitioner obtained the bulk of her loans in the final years of her Ph.D. program, after suffering those injuries. *Id.* at 16a.

Following graduation, petitioner consolidated her student loans and enrolled in the income-based repayment plan, which is a specific type of what are known as income-driven repayment plans. Pet. App. 2a. The income-based repayment plan is available to borrowers experiencing "a partial financial hardship." 34 C.F.R. 685.221(b)(1); see 34 C.F.R. 685.221(a)(5) (defining "[p]artial financial hardship") (emphasis omitted). Under the income-based repayment plan, a borrower's monthly payment is capped at 15% of the amount by which her adjusted gross income exceeds 150% of the federal poverty line for the borrower's family size and state of residence. *Ibid.* The monthly payment obligation may be as low as $0.00. See 34 C.F.R. 685.221(b)(2)(iii) and (e)(9)(i). Under the version of the plan applicable to petitioner, once a borrower has been enrolled for 25 years and made any required payments, her remaining principal and interest are cancelled. 34 C.F.R. 685.221(f)(2).

Although petitioner worked at several part-time jobs, her income remained low. Pet. App. 10a; see *id.* at 15a-16a. Accordingly, petitioner's monthly repayment obligation under the income-based repayment plan was $0.00. *Id.* at 2a, 5a.

b. Less than 18 months after obtaining her Ph.D., petitioner filed a Chapter 7 bankruptcy petition. Pet. App. 9a. Petitioner then filed an adversary complaint in the bankruptcy proceeding, seeking a judgment discharging her student loans. *Ibid.*

Following a trial, the bankruptcy court entered judgment against petitioner. Pet. App. 18a-22a (entering judgment from the bench). Consistent with governing circuit precedent, the bankruptcy court applied a three-part test, first articulated in *Brunner* v. *New York State*

Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987) (per curiam), to determine whether "excepting" petitioner's student debt "from discharge * * * would impose an undue hardship" under Section 523(a)(8). 11 U.S.C. 523(a)(8); see *United States Dep't of Educ.* v. *Gerhardt* (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003) (adopting the *Brunner* framework). The *Brunner* framework requires a debtor seeking an exception from the general nondischargeability of certain kinds of student-loan debts to show, by a preponderance of the evidence,

> (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 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.

831 F.2d at 396.

The bankruptcy court focused on the second prong of that framework. Pet. App. 20a-22a. The court determined that petitioner had failed to introduce any evidence indicating that she would be unable to maintain a minimal standard of living while repaying her loans in the future. *Id.* at 21a. The court observed that petitioner's payments were currently set at $0.00, and that if petitioner failed to secure a higher-paying job, she would not be required to make payments in the future. *Ibid.* If, by contrast, petitioner obtained better employment, her monthly payment might increase, but so too would her capacity to repay her loans. *Ibid.*

3. The district court affirmed the bankruptcy court's judgment. Pet. App. 8a-17a.

The district court first observed that petitioner's opening brief did not "include[] a single citation to the record," in "clear violation" of Bankruptcy Rule 8014(a)(8). Pet. App. 14a. The court determined, "[f]or that reason alone," that petitioner's "appeal fail[ed]." *Ibid.* (quoting *Peterson* v. *Akrabawi*, (*In re Stotler & Co.*), 166 B.R. 114, 116 (N.D. Ill. 1994)).

The district court nevertheless proceeded to address the merits of petitioner's appeal "for the sake of completeness." Pet. App. 15a (citation omitted). Petitioner did not challenge the *Brunner* framework in the district court, but contended instead that the bankruptcy court abused its discretion by declining to discharge her loans. D. Ct. Doc. 14, at 7-12 (Mar. 26, 2018). After "independently review[ing] the record," the district court rejected that contention, determining that the bankruptcy court's decision was "ampl[y] support[ed]" by the evidence. Pet. App. 15a. In particular, the district court rejected petitioner's argument that her medical conditions—the "bulk" of which petitioner had characterized as resulting from the 2007 and 2010 accidents, see p. 2, *supra*—would prevent her from maintaining a minimal standard of living while repaying her loans. Pet. App. 15a. The court determined that petitioner "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." *Ibid.* In addition, the court observed that petitioner's testimony indicated that she applied for "at least a significant portion of her loans after suffering the injuries." *Id.* at 16a. The court declined to allow petitioner to rely on those circumstances as proof of undue hardship because she had already known about them at the

time of borrowing and the record contained no evidence that they had since been "exacerbated." *Id.* at 16a-17a.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-7a. Like the bankruptcy and district courts, the court of appeals focused on the second prong of the *Brunner* framework, *i.e.*, whether petitioner had demonstrated that "additional circumstances exist indicating that" she would be unable to maintain a "minimal" standard of living if required to repay her loans. *Id.* at 3a-4a (quoting *Brunner*, 831 F.2d at 396). The court explained that such "additional 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." *Id.* at 4a-5a (quoting *In re Gerhardt*, 348 F.3d at 92) (brackets omitted). The court observed that, when debtors invoke additional circumstances, bankruptcy courts consider when they arose to prevent debtors from relying on circumstances that they "could have calculated" into their "cost-benefit analysis" when deciding whether to obtain their loans in the first place. *Id.* at 6a (quoting *Thoms* v. *Educational Credit Mgmt. Corp.* (*In re Thoms*), 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001)).

The court of appeals agreed with the district court that, because petitioner's "critical health issues * * * occurred before [she] took out the bulk of the loans and did not prevent her from obtaining her doctorate and various forms of employment," the bankruptcy court did not "clearly err" in concluding that petitioner had failed to satisfy the second prong of the *Brunner* framework and therefore to carry her burden of demonstrating undue hardship. Pet. App. 6a-7a.

Because the court of appeals affirmed on that basis, it did not reach the government's other arguments in favor of affirmance, including that petitioner had failed to challenge the governing standard in the district court; that the district court had correctly determined that petitioner waived her evidentiary arguments by failing to cite the record; and that, under the third *Brunner* prong, petitioner failed to demonstrate that she had made "good faith efforts" to repay her student loans. Gov't C.A. Br. 20; see *id.* at 12-13, 23-24.

ARGUMENT

Petitioner contends (Pet. 9-26) that the court of appeals applied the wrong standard to determine whether "excepting" her student loan debt "from discharge * * * would impose an undue hardship" on her. 11 U.S.C. 523(a)(8). This case would be an unsuitable vehicle for considering the question presented because petitioner did not preserve her objection to the framework applied by the court of appeals; the district court's determination that petitioner forfeited her arguments by failing to include citations to the record provides an alternative basis for affirmance; and petitioner has not demonstrated that she would be entitled to discharge her student loan debt in bankruptcy under her preferred approach to "undue hardship." In addition, the court of appeals applied the same framework that is used by the overwhelming majority of the courts of appeals. While the Eighth Circuit applies a somewhat different test, that difference in approach does not warrant this Court's review at this time, especially since the Department of Education is currently studying whether to revise its regulations governing how student loan holders should evaluate undue hardship and has expressly

called for information about whether the use of different tests for undue hardship has created inequities among borrowers. The petition for a writ of certiorari should be denied.

1. Under Section 523(a)(8) of the Bankruptcy Code, the general discharge of debts in a bankruptcy proceeding under Chapter 7, 11, 12, or 13 "does not discharge an individual debtor from any debt" for certain educational loans unless "excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8). Section 523(a)(8) does not define the phrase "undue hardship." *Ibid.* As petitioner observes (Pet. 9), however, the overwhelming majority of the courts of appeals, including the Fifth Circuit in the decision below, apply a three-part framework first articulated by the Second Circuit in *Brunner* v. *New York State Higher Education Services Corp.*, 831 F.2d 395 (1987) (per curiam). The *Brunner* framework requires a debtor who seeks to discharge student-loan debt to show, by a preponderance of the evidence, the following three things:

> (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 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.

831 F.2d at 396; accord *Pennsylvania Higher Educ. Assistance Agency* v. *Faish* (*In re Faish*), 72 F.3d 298, 306 (3d Cir. 1995), cert. denied, 518 U.S. 1009 (1996); *Educationalal Credit Mgmt. Corp.* v. *Frushour* (*In re Frushour*), 433 F.3d 393, 400 (4th Cir. 2005); *United*

States Dep't of Educ. v. *Gerhardt* (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003); *Oyler* v. *Educational Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 385 (6th Cir. 2005); *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *United Student Aid Funds, Inc.* v. *Pena* (*In re Pena*), 155 F.3d 1108, 1114 (9th Cir. 1998); *Educational Credit Mgmt. Corp.* v. *Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *Hemar Ins. Corp. of Am.* v. *Cox* (*In re Cox*), 338 F.3d 1238, 1240 (11th Cir. 2003) (per curiam), cert. denied, 541 U.S. 991 (2004).

Petitioner does not dispute that if the *Brunner* framework applies, the court of appeals correctly applied it to the facts of this case. Like the bankruptcy court and the district court, the court of appeals focused on *Brunner*'s second prong, which requires the debtor to demonstrate that her future earning potential is limited by "additional circumstances * * * which were either not present when the debtor applied for the loans or have since been exacerbated." Pet. App. 4a-5a (quoting *Gerhardt*, 348 F.3d at 92) (brackets omitted). As the court of appeals observed, "the timing of additional circumstances" is relevant because the debtor "could have calculated" into her "cost-benefit analysis" any circumstances that already existed when she sought the loans. *Id.* at 6a (quoting *Thoms* v. *Educational Credit Mgmt. Corp.* (*In re Thoms*), 257 B.R. 144, 149 (Bankr. S.D.N.Y. 2001)).

Here, petitioner claimed that two "additional circumstances" were relevant: her proximity to the "minimum retirement age" and her "mental and physical disabilities." Pet. App. 5a. But petitioner "incurred a large amount of student loan debt * * * beginning when she was in her forties," and "applied for the majority of her

loans 'after the first couple years' of her Ph.D. program," when she was in her fifties; it would have been clear to her at that time that at least some of that debt might still be outstanding as she approached the age of 65. *Id.* at 2a, 15a-16a. And the "critical health issues" on which petitioner relied in claiming undue hardship had already "occurred before [she] took out the bulk of the loans." *Id.* at 6a. Furthermore, those events "did not prevent her from obtaining her doctorate and various forms of employment," thus suggesting that she might be able to repay her loans while maintaining a minimal standard of living in the future. *Ibid.*

2. Petitioner nonetheless contends (Pet. 15-18) that the court of appeals should have applied a "totality of the circumstances" approach to determine whether exempting her loans from discharge would cause her "undue hardship" under Section 523(a)(8). Pet. 17-18 (citations and emphasis omitted). The vast majority of circuits use the *Brunner* framework applied by the court of appeals in this case.[1] See pp. 8-9, *supra*. Although the Eighth Circuit applies a totality of the circumstances approach, see, *e.g.*, *Long* v. *Educational Credit Mgmt. Corp.* (*In re Long*), 322 F.3d 549 (2003), this case presents an unsuitable vehicle for reviewing any disagreement among the courts of appeals, for three reasons.

First, although petitioner asserts (Pet. 24) that she "fully preserved for this Court's review" the question of which framework should be used to assess undue hardship, it is not clear that the court of appeals agreed that

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[1] As petitioner acknowledges, the First Circuit has "not formally committed to either approach." Pet. 10; see *Nash* v. *Connecticut Student Loan Found.* (*In re Nash*), 446 F.3d 188, 190 (1st Cir. 2006).

the issue was preserved. Petitioner pressed her challenge to the *Brunner* framework in the court of appeals, but she had forfeited that argument by failing to raise it in her first-level appeal from the bankruptcy court to the district court. See Gov't C.A. Br. 23 (pointing out the forfeiture). The court of appeals applied the *Brunner* framework without addressing petitioner's contention that the totality of the circumstances approach should instead apply. See Pet. App. 1a-7a.

Second, the judgment of the court of appeals may be affirmed on a distinct ground. The district court determined that petitioner's appeal "fail[ed]" because she did not include any citations to the record, in "clear violation" of Bankruptcy Rule 8014(a)(8). Pet. App. 14a (citation omitted); see p. 5, *supra*. Although the district court "continue[d] to the substance of the appeal for the sake of completeness," Pet. App. 15a (citation omitted), the court's determination provides an alternative ground for affirming the decision below.

Third, petitioner has not demonstrated that she would have likely succeeded in obtaining an undue-hardship discharge of her student-loan debt under the totality of the circumstances approach for which she advocates. As discussed below, see pp. 18-20, *infra*, it is far from clear that the choice between the two approaches results in different outcomes in a significant number of cases. Here, petitioner suggests (Pet. 24-25) that a court applying the totality approach would consider her claimed medical and financial impediments to repayment. But three courts below considered those issues under the *Brunner* framework, and each one determined that petitioner's discharge request failed because petitioner had failed to adduce "any evidence at all" that repayment would inflict undue hardship upon

her. Pet. App. 21a (bankruptcy court); see *id.* at 5a-7a (court of appeals); *id.* at 15a-16a (district court).

Petitioner cites (Pet. 25) *Grimes* v. *ECMC* (*In re Grimes*), No. BK06-81303, 2013 WL 5592913 (Bankr. D. Neb. Oct. 10, 2013), to suggest that application of the totality approach might have changed the result in her case. But even if the facts of *Grimes* were comparable, a conflict between the court of appeals decision below and an unpublished and unreviewed bankruptcy court decision would not warrant this Court's review. And the facts of *Grimes* are readily distinguishable from petitioner's case. As the court there explained, the loans at issue were disbursed more than a decade before the debtor's health problems commenced, *id.* at *1, whereas the courts here emphasized that petitioner did not apply for "the bulk" of her loans until after her health issues arose, Pet. App. 6a; see *id.* at 16a-17a. Moreover, the debtor in *Grimes* had not enrolled in an income-based repayment program, see 2013 WL 5592913, at *2, whereas petitioner has enrolled in such a program and has, as a result, monthly payments of $0.00, see Pet. App. 20a. Although the court of appeals here did not rely on the payment plan, see *id.* at 4a, courts applying the Eighth Circuit's totality of the circumstances approach have relied on the low level of payments under such plans to support the *denial* of undue-hardship discharge requests. *E.g.*, *Piccinino* v. *U.S. Dep't of Educ.* (*In re Piccinino*), 577 B.R. 560, 567 (B.A.P. 8th Cir. 2017) (finding that the bankruptcy court did not clearly err in concluding that the debtor "has sufficient funds to make" payments of $0.00 under a repayment plan); *Nielson* v. *ACS, Inc.* (*In re Nielson*), 473 B.R. 755, 761-762 (B.A.P. 8th Cir. 2012) (noting that "the ability to make" a payment under such a plan "is, at a minimum,

an important factor in the analysis" and that the debtor's payments "would be zero"); see generally *Educational Credit Mgmt. Corp.* v. *Jesperson*, 571 F.3d 775, 783 (8th Cir. 2009) (observing that, because repayment plans adjust for future declines in income, they "in most cases will avoid undue hardship"). Petitioner therefore has not demonstrated that she would have been likely to receive a discharge of her student-loan debt under a totality of the circumstances approach.

3. More generally, the lopsided disagreement about how to characterize the standard for evaluating undue hardship does not presently warrant this Court's review. The *Brunner* framework is not foreclosed by the text or history of Section 523(a)(8), as petitioner contends. And the practical difference between *Brunner* and petitioner's preferred approach appears to be limited. In addition, because the Department of Education is currently considering this issue, review would be premature.

a. Contrary to petitioner's contentions (Pet. 15-20), the *Brunner* framework is neither foreclosed by the statutory "undue hardship" standard, nor inconsistent with the provision's history.

i. Because Section 523(a)(8) does not define the word "undue," courts give the term its "ordinary, contemporary, common meaning." *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). "Undue" means "excessive" or "[e]xceeding what is appropriate or normal." *The American Heritage Dictionary of the English Language* 1949 (3d ed. 1996); see 18 *The Oxford English Dictionary* 1010 (2d ed. 1989) ("Going beyond what is appropriate, warranted, or natural; excessive"); *Webster's Third New*

International Dictionary 2492 (1968) ("exceeding or violating propriety or fitness: excessive, immoderate, unwarranted") (capitalization and emphasis omitted); see also, *e.g.*, *In re Pena*, 155 F.3d at 1111 ("The existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans.") (citation omitted). It also connotes some degree of unfairness—that something is "[n]ot in accordance with what is just and right." *Oxford English Dictionary* 1010; see also *American Heritage Dictionary* 1949 ("Not just, proper, or legal.").

The *Brunner* framework reflects most courts' interpretation of the phrase "undue hardship." The first prong of the framework limits discharge to those debtors who would be unable to maintain a "minimal" standard of living if required to repay their loans, while the second prong requires a debtor to show that this state of affairs will persist for the foreseeable future. *Brunner*, 831 F.2d at 396. Those conditions implement Section 523(a)(8)'s restriction on the discharge of student-loan debt to the circumstances in which repayment would inflict excessive hardship. The third prong requires a debtor to have made a good-faith effort at repaying her student-loan obligations before seeking to discharge them. That condition implements Section 523(a)(8)'s requirement that discharge be limited to circumstances in which requiring repayment would be unfair, which would not be true of a debtor who seeks to discharge her obligations without first making good-faith efforts to meet them.[2]

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[2] Petitioner contends that some courts of appeals have required a debtor to prove hardship using a standard more rigorous than that of *Brunner* itself, *e.g.*, by requiring the debtor to show a "total incapacity in the future to pay [her] debts for reasons not within [her]

ii. Courts have also explained that the *Brunner* standard is consistent with the history of Section 523(a)(8). Congress enacted that provision in 1978 to implement the recommendations of a congressionally chartered advisory commission. *Polleys*, 356 F.3d at 1306. The commission concluded that there had been a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts." *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. 137, 93d Cong., 1st Sess., Pt. II, at 140 n.14 (1973). In response, the commission urged that student loans be nondischargeable unless a debtor can demonstrate that "he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." *Id.* at 140 n.15; see *In re Pelkowski*, 990 F.2d 737, 742-743 (3d Cir. 1993) (discussing legislative history).

Petitioner suggests (Pet. 19) that the *Brunner* framework is inconsistent with congressional intent because, when Congress adopted the "undue hardship" standard in 1978, it intended to create only "a narrow window of nondischargeability." But as petitioner acknowledges, *ibid.*, over the next several decades,

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control." Pet. 17-18 (citation omitted; brackets in original). That issue, however, is not presented in this case. Although the court of appeals referred to the "total incapacity" standard, Pet. App. 5a (citation omitted), the court's reasoning did not rely on it. Instead, the court held that petitioner had failed to meet the second *Brunner* factor because petitioner had known about her ailments before taking out the "bulk" of her loans, and those ailments were unlikely to impair petitioner's ability to repay her loans because they "did not prevent her from obtaining her doctorate and various forms of employment." *Id.* at 6a. The court did not address whether petitioner had demonstrated a "total incapacity" to repay her loans in the future. *Id.* at 5a (citation omitted); see *id.* at 5a-7a.

Congress expanded the scope of its general rule that certain student loans are not dischargeable in bankruptcy, extending both the timeframe and the scope of loans covered without altering the requirement that, to qualify for an exception, a debtor must demonstrate "undue hardship." Indeed, following the Second Circuit's 1987 decision in *Brunner*, and as "the *Brunner* test spread through multiple circuits," Pet. 20, Congress expanded application of the "undue hardship" requirement on four separate occasions.[3] At a minimum, petitioner has not demonstrated that Section 523(a)(8)'s history forecloses the *Brunner* framework, though Congress could, of course, easily address that question through another amendment to Section 523(a)(8).

b. Petitioner nonetheless contends (*e.g.*, Pet. 16) that the court of appeals erred in applying the *Brunner* framework rather than the totality of the circumstances approach. Under the latter approach—which only the Eighth Circuit has adopted, see pp. 8-9, 10 n.1, *supra*—the court "consider[s]: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reason-

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[3] See Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, Tit. III, § 3007, 104 Stat. 1388-28 (expanding the undue-hardship requirement by making it an exception to discharge in Chapter 13 bankruptcies); Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, Tit. XXXVI, § 3621, 104 Stat. 4964 (increasing the applicable time limit from five to seven years); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (eliminating time limit entirely); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 59 (excluding from discharge any debt meeting the Internal Revenue Code's definition of a "qualified education loan").

able necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *In re Long*, 322 F.3d at 554.

Petitioner's principal argument in favor of the totality test is that, in her view, "§ 523(a)(8) confers 'discretion.'" Pet. 16 (quoting *In re Long*, 322 F.3d at 554). But as discussed above, the phrase "undue hardship" permits courts to discharge certain student-loan debt only in specific circumstances. In particular, Section 523(a)(8) permits courts to discharge certain student-loan obligations where the debtor would suffer an "undue" or excessive degree of hardship, and the debtor has made good-faith efforts to repay her loans. See pp. 13-14, *supra*.

For similar reasons, petitioner errs in suggesting (Pet. 17-18) that the totality approach is required by this Court's decisions in *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), and *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016). Those cases involved far more "open-ended statutory standards," Pet. 17, than Section 523(a)(8)'s "undue hardship" standard. In *Octane Fitness*, the Court considered Section 285 of the Patent Act, which "provides, in its entirety, that '[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.'" 572 U.S. at 548 (quoting 35 U.S.C. 285). And in *Halo Electronics*, the Court considered Section 284 of the Patent Act, which provides that in cases of infringement, "courts 'may increase the damages up to three times the amount found or assessed.'" 136 S. Ct. at 1928 (quoting 35 U.S.C. 284). Section 523(a)(8)'s undue-hardship standard provides greater guidance to courts than do those other statutes. See pp. 13-14, *supra*.

c. In any event, it is far from clear that, in practice, the totality approach differs from *Brunner* in a manner sufficient to warrant this Court's review at this time. Although the Eighth Circuit has described the totality approach as "less restrictive" than the *Brunner* framework, *In re Long*, 322 F.3d. at 554, it has also observed that the burden it imposes on debtors is a "rigorous" one, and it has recognized that the distinction between the standards "may not be that significant," *Jesperson*, 571 F.3d at 779 & n.1. Cf. Pet. 21 (noting that "[l]ike *Brunner*, the totality approach erects a high barrier to discharging student loans"). Like the *Brunner* framework, the totality approach focuses on factors relevant to the debtor's economic situation. As the Eighth Circuit explained:

> Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimum standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor's financial position.

In re Long, 322 F.3d at 554-555. And the totality approach incorporates *Brunner*'s third factor, by considering "evidence of a less than good faith effort to repay * * * student loan debts." *Jesperson*, 571 F.3d at 782; see *id.* at 784 (Smith, J., concurring).

Other courts have likewise acknowledged that while the totality approach is "facially" different from the *Brunner* framework, *In re Nash*, 446 F.3d at 190, "the distinctions between the two tests are modest, with

many overlapping considerations," and the two "'tests take converging tacks,'" *Bronsdon* v. *Educational Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 798-799 (B.A.P. 1st Cir. 2010) (quoting *Lorenz* v. *American Educ. Servs.* (*In re Lorenz*), 337 B.R. 423, 431 (B.A.P. 1st Cir. 2006)). Put differently, the *Brunner* framework does not necessarily "rule out consideration of all the facts and circumstances," and "[a]s a practical matter * * * the two tests will often consider similar information," including "the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment." *Polleys*, 356 F.3d at 1309; see *ibid.* (explaining that courts should consider "all relevant factors, including the health of the debtor" under the first and second *Brunner* factors); *Jesperson*, 571 F.3d at 779 (observing that under the totality of the circumstances approach, a debtor must still demonstrate that her "reasonable future financial resources will [not] sufficiently cover payment of the student loan debt") (citation omitted).

Petitioner relies (Pet. 14-15) on three cases to suggest that the standards "diverge dramatically" in practice. Pet. 13. But differences in results may reflect different facts rather than the approach nominally applied by each court. And two of the cases on which petitioner relies (*ibid.*) are unreviewed Bankruptcy Court decisions (one unpublished), which do not necessarily reflect the courts of appeals' understanding of the proper application of the *Brunner* framework. See *In re Armstrong*, No. 10-82092, 2011 WL 6779326 (Bankr. C.D. Ill. 2011); *In re Denittis*, 362 B.R. 57 (Bankr. D. Mass. 2007). The third case, decided by a Bankruptcy Appellate Panel in the First Circuit, states only that "[u]nder

Brunner, the Debtor's failure to make a good faith effort to repay the loans would result in a conclusion of nondischargeability," whereas under the totality approach, "a debtor's failure to make a good faith repayment effort is an additional factor to be weighed, but not necessarily a determinative factor." *Educational Credit Mgmt. Corp.* v. *Kelly* (*In re Kelly*), 312 B.R. 200, 207 (2004). The First Circuit has not adopted either test, see p. 10 n.1, *supra*, and that panel's characterization of the two approaches does not warrant review in this case.

d. Finally, review is also unwarranted because the U.S. Department of Education, which has issued regulations requiring loan holders to evaluate undue-hardship claims and concede an undue hardship in certain circumstances, see 34 C.F.R. 674.49(c), 682.402(i)(1), 685.212(c), is currently considering the appropriate factors to be taken into account in making that determination. In 2018, the Department of Education issued a request for information on this issue, including on whether "the use of two tests results in inequities among borrowers." *Request for Information on Evaluating Undue Hardship Claims*, 83 Fed. Reg. 7460, 7461 (Feb. 21, 2018). Because the Department of Education continues to study this issue, and may revise its regulations and related policies in the future, this Court's review is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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